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13 *Plaintiffs' Counsel*

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 EDWARD C. O'BANNON, JR. on behalf
19 of himself and all others similarly situated,

20 Plaintiffs,

21 v.

22 NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION (NCAA); ELECTRONIC
23 ARTS, INC.; and COLLEGIATE
LICENSING COMPANY,

24 Defendants.
25
26
27
28

Case No. 4:09-cv-3329 CW

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO ADMIT EXHIBITS**

Judge: The Honorable Claudia Wilken
Courtroom: 2, 4th Floor
Trial: June 9, 2014

1 **PLEASE TAKE NOTICE** that Plaintiffs hereby move to admit the following trial
2 exhibits:

3 PX 2628 (attached hereto as Exhibit A): PX 2628 is the University of Illinois student-
4 athlete release. Dr. Stiroh relied on this document, bates stamped ILLINOIS000035, in her
5 March 14, 2013 Class Certification Report as support for her statement that “student-athletes at
6 the University of Illinois, for example, grant rights to the university and/or the Big Ten
7 Conference to use their NILs in broadcasts and other media.” Stiroh Class Certification Report, ¶
8 43 & n.53. PX 2628 is admissible as consistent with the Court’s ruling on the motion *in limine*
9 permitting Plaintiffs to introduce student-athlete releases so long as there is some evidence of a
10 nexus between the forms and the NCAA. Order Resolving Motions *in Limine* at 10, Dkt. No. 166
11 (May 30, 2014). PX 2628 states that all uses of the athlete’s NILs “shall be consistent with all
12 applicable NCAA . . . rules and regulations.” PX 2628, a legally binding release, is also
13 admissible as non-hearsay. *United States v. Karr*, 928 F.2d 1138 (9th Cir. 1991) (“Facts of
14 independent legal significance constituting a contract which is at issue are not hearsay.”)
15 (quoting *United States v. Rubier*, 651 F.2d 628, 630 (9th Cir. 1981), *cert. denied*, 454 U.S. 875
16 (1981)). Finally, PX 2628 is admissible not for the truth but rather to show that Dr. Stiroh viewed
17 and relied upon evidence which contradicts her testimony that student-athlete releases apply only
18 to promotional uses of their NILs. *See* Tr. 2907:14-20.

19 PX 2623 (attached hereto as Exhibit B): PX 2623 is a summary exhibit of voluminous
20 data and is admissible under FRE 1006. It is entitled “Distribution of In-Season and
21 Rebroadcasted Football and Basketball Games” and represents a true and accurate summary of
22 voluminous Who’s Watching TV (“WWTV”) and Nielsen television data from the 2005-06 to
23 2012-13 seasons regarding the number of NCAA Division I men’s basketball and FBS football
24 games telecasted on television. These data are business records of their respective organizations.
25 Pursuant to the parties’ stipulation, Plaintiffs disclosed this summary exhibit “no less than 48
26 hours before to its anticipated use at trial.” Stipulation Regarding Exchange of Pretrial Materials,
27 Case No. 4:09-cv-1967-CW (Dkt. No. 1038) at 3. As required by the stipulation and by FRE
28 1006, Plaintiffs also made available to the NCAA the data underlying PX 2623.

1 On June 27, 2014, after the last witness finished his trial testimony, counsel for the NCAA
2 represented to the Court that the NCAA would not require Plaintiffs to call the lay witness who
3 prepared this exhibit. By agreeing that Plaintiffs did not have to call the witness, the NCAA
4 waived its opportunity cross examine the witness regarding the accuracy of the chart. Thus, the
5 NCAA has no basis to contest the accuracy of this exhibit.

6 The NCAA's main objection to PX 2623 appears to be that it is "expert" evidence, but it
7 is in fact, not. Rather, it is merely a summary of data regarding the number of broadcasts and
8 rebroadcasts of NCAA FBS football and Division I basketball games. No expert opinion based
9 on the summary of the data is offered in conjunction with the exhibit, and no expert opinion or
10 testimony is required under the Rule. *See United States v. Pree*, 408 F.3d 855, 869 (7th Cir.
11 2005) ("When a summary witness simply testifies as to what the . . . evidence shows, he does not
12 testify as an expert witness."); *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 666 (N.D.
13 Ill. 2006) ("Expert testimony is not necessary to summarize voluminous documents or records—
14 Rule 1006 provides such a mechanism without the use of expert testimony.").

15 PX 2623 shows that, of all Division I men's basketball and FBS football games telecasted
16 during from July 1, 2005 to June 30, 2013, 80.6% of them were in-season live or rebroadcast
17 games, 10.7% of them were games originally telecasted live during each game's respective
18 season between 2005-06 and 2012-13 and were also rebroadcast in a subsequent season, and
19 8.7% of them constitute games originally telecasted prior to the 2005-06 season but were
20 rebroadcasted between 2005-06 and 2012-13. The rebroadcasts that PX 2623 depicts demonstrate
21 that the games held in the NCAA archives have a significant future value. *See* PX 298 (NCAA
22 executive stating in an email that "archive rights are 10% of our TV rights (the \$6 Billion deal) . .
23 . .").

24 That the information summarized in PX 2623 is "gigabytes" of data, as counsel for the
25 NCAA argued, is beside the point. *See Intel Corp. v. Am. Guar. & Liab. Ins. Co.*, 5:09-CV-
26 00299-JR/PVT, 2010 WL 5176088, at *2 n.5 (N.D. Cal. Dec. 7, 2010) (admitting summary of
27 17,000 pages of attorney invoices). The fact of large volume of the data is precisely the issue that
28

1 Rule 1006 addresses. *See* Fed. R. Evid. 1006 (permitting a party to introduce summary evidence
2 to “prove the content of voluminous writings”).

3 PX 2021 (attached hereto as Exhibit C): PX 2021 is a February-March 2007 email chain
4 among NCAA executives, including Greg Weitekamp, David Knopp, and Peter Davis, with co-
5 defendant Electronic Arts’ executives Joel Linzner and Jordan Edelstein, among others. PX 2021
6 is admissible in its entirety as statements of party-opponents under FRE 801(d)(2)(C) and/or (D).
7 EA remains a co-defendant in this case. Furthermore, PX 2021 is admissible as statements of co-
8 conspirators in furtherance of the conspiracy. *See* Pls.’ June 8, 2014 Bench Mem. (Case No.
9 4:09-cv-3329, Dkt. No. 197) at 8-9.

10 PX 2645 (attached hereto as Exhibit D): PX 2645 is the first page of the National
11 Association of Intercollegiate Athletics’ (“NAIA”) IRS Form 990 for 2011-12. PX 2645 is
12 admissible as a business record under FRE 803(6).

13 PX 2661 (attached hereto as Exhibit E): PX 2661 is an excerpt from Dr. Rubinfeld’s
14 September 25, 2013 merits expert report. PX 2661 is admissible as Dr. Rubinfeld’s expert
15 testimony and directly supplements Dr. Rubinfeld’s testimony on June 27, 2014 regarding the
16 NCAA’s and Knight Commission’s views and/or recommendations regarding commercialism in
17 college athletics. *See* June 27, 2014 Trial Tr. 3106:1-3110:24.

18 PX 2662 (attached hereto as Exhibit F): PX 2662 is a compilation of the graduation rates
19 of Conference USA member institutions. During the cross-examination of Britton Banowsky, the
20 Conference USA commissioner, counsel for Plaintiffs represented that he would try to reach
21 agreement with the NCAA on admission of this graduation data. June 23, 2014 Trial Tr.
22 2382:13-29. The parties were unable to reach a stipulation. The graduation rate reports are
23 publicly available data, filed by the NCAA on its own website. This data is highly relevant to the
24 NCAA’s procompetitive justification regarding the success of the restraint in promoting
25 integration. In fact, many other graduation rate reports from other NCAA member institutions
26 have already been admitted, without NCAA objection.

27 For the foregoing reasons, Plaintiffs respectfully request that the Court admit the
28 preceding exhibits into evidence.

1 Dated: June 29, 2014

Respectfully submitted,

2 By: /s/ Swathi Bojedla

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25 *Plaintiffs' Class Counsel*

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 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.

/s/ Swathi Bojedla
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