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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

On June 29, 2014, Plaintiffs filed a Motion to Admit Exhibits. Dkt. No. 256. The NCAA respectfully requests that the Court deny admission of the following trial exhibits.

PX 2628: The NCAA objects to the admission of this exhibit, which is a University of Illinois student-athlete release, on relevance and hearsay grounds. Plaintiffs have presented no evidence regarding the nexus between the NCAA and the University of Illinois form, as required to establish relevance pursuant to this Court's ruling on NCAA's Motion in Limine No. 9. *See* Dkt. No. 166 at 11 (May 30, 2014). Moreover, PX 2628 is inadmissible hearsay. Plaintiffs contend that Dr. Stiroh testified regarding this exhibit at trial, but that does not render the underlying exhibit admissible as substantive evidence. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261 (9th Cir. 1984) (explaining that experts are permitted under Federal Rule of Evidence 703 to rely on hearsay or other inadmissible evidence for the limited purpose of explaining the basis of an expert opinion, but that expert reliance material is not admissible for its truth). Finally, PX 2628 was not an executed contract and thus is not being introduced for the nonhearsay purpose of establishing the fact of utterance or facts of independent legal significance. *See N.L.R.B. v. H. Koch & Sons*, 578 F.2d 1287, 1291 (9th Cir. 1978).

PX 2623: The NCAA has not disputed that Plaintiffs could provide a witness to testify that PX 2623 accurately reflects the underlying data. Rather, the NCAA's objection is that the data on which PX 2623 is based are inadmissible and unexplained, and thus PX 2623 is not an admissible summary exhibit under FRE 1006.

An exhibit is admissible under FRE 1006 only if the underlying data is itself admissible, and here the underlying data—Watching TV (WWTV) and Nielsen television data—are inadmissible hearsay. *See Amarel v. Connell*, 102 F.3d 1494, 1516 (9th Cir. 1996) ("A proponent of a summary exhibit must establish a foundation that . . . the underlying materials on which the summary exhibit is based are *admissible in evidence*"); *United States v. Shirley*, 884 F.2d 1130, 1133 (9th Cir. 1989) (same). Plaintiffs have made no effort to satisfy the foundational requirements for the business records exception. *See United States v. Catabran*, 836 F.2d 453, 457 (9th Cir. 1988). The Court should reject Plaintiffs' attempt to circumvent the rules against hearsay by turning their hearsay into a "summary." While hearsay data compilations may be

properly relied upon by an expert, Plaintiffs have conceded here that "[n]o expert opinion based on the summary of the data is offered in conjunction with [PX 2623]." Dkt. No. 256-3.

Separately, Plaintiffs proffered no witness to provide context or explain the relevance of PX 2623. This runs counter to the very purpose of FRE 1006, which is to enable a witness when presenting his or her testimony to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." FRE 1006. Because neither PX 2623 nor the underlying data were discussed with any witness, the exhibit serves no summarizing purpose, lacks foundation and relevance, and is likely to mislead. Plaintiffs claim that the data show certain statistics about the prevalence of rebroadcasts, but they have no admissible testimony on that point. Although an expert could explain the underlying dataset and what it represents or means for this case, Plaintiffs have proffered no such evidence.

PX 2021: The NCAA objects to this exhibit, an email written by Electronic Arts' executives Joel Linzner and Jordan Edelstein, as inadmissible hearsay. Plaintiffs contend that this document is admissible as statements of party-opponents because EA remains a co-defendant in this case. That might make the document admissible against EA, 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). This Court has previously excluded documents authored by co-defendant CLC on similar grounds. *See* Dkt. No. 264 at 3:10-15. Nor is PX 2021 admissible as statements of co-conspirators in furtherance of a conspiracy because Plaintiffs have not established by *independent evidence*, as they must for the co-conspirator exception to the hearsay rule to apply, "that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'" *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Not only have Plaintiffs failed to prove a vertical conspiracy involving EA and NCAA, but they have proffered no evidence showing how PX 2021 at all relates to, and much less was made in furtherance of, any alleged conspiracy.

PX 2645: The NCAA does not object to this exhibit.

PX 2661: PX 2661, an excerpt from Dr. Rubinfeld's September 25, 2013 merits report discussing the Knight Commission Report, is inadmissible hearsay within hearsay. This Court has previously denied Plaintiffs' attempt to move the Knight Commission report into evidence, *see* Dkt. No. 264 at 1:22-2:4, and Plaintiffs' attempt to end-run this ruling by introducing the same Knight Commission report through a second layer of hearsay—Rubinfeld's expert report—should likewise be rejected. Plaintiffs fully questioned Dr. Rubinfeld about this excerpt at trial, *see* Trial Tr. at 3106:1-3110:24, and present no basis for why the underlying exhibit should be admitted.

PX 2662: The NCAA objects to the admission of this exhibit, which was not used with any witness at trial. While Commissioner Britton Banowsky testified to aggregate Conference USA graduation rates during trial, PX 2662 contains only school graduation rates. Plaintiffs should not be able to dump scores of graduation data into the record without giving the NCAA and the Court the opportunity to examine a witness on their contents. Again, this is material that would require testimony to explain its meaning and relevance to the Court. Raw data should not be admitted into the record if those data serve no function other than supporting lawyer argument.

DATED: July 1, 2014

Respectfully submitted,

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