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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 IN RE NCAA STUDENT-ATHLETE NAME
12 AND LIKENESS LICENSING
13 LITIGATION

Case No. 09-cv-01967 CW (NC)

**ORDER GRANTING IN PART
ANTITRUST PLAINTIFFS'
MOTION TO SEAL**

Re: Dkt. No. 598

16 Antitrust Plaintiffs moved to seal their motion for class certification, their expert
17 reports, and the exhibits offered in support of those reports. These documents had been
18 designated confidential in accordance with a stipulated protective order. Antitrust Plaintiffs
19 were required to file a motion to seal under Local Rule 75-9(d), but it is defendants
20 Electronic Arts, Inc. ("EA"), College Licensing Company ("CLC"), and the NCAA, along
21 with nonparties, T3Media ("T3M"), XOS Digital ("XOS"), and the NBA, that seek to keep
22 under seal documents designated confidential. The issues are (1) whether EA, CLC, the
23 NCAA, T3M, XOS, and the NBA have made a sufficient showing of good cause to
24 overcome the presumption of public access and warrant filing the Noll report, its exhibits,
25 and appendices under seal; (2) whether there is good cause to seal the Gerbrandt report; and
26 (3) whether the NCAA's proposed redactions of Exhibits 51 and 76 are limited to
27 competitively sensitive information. Because the parties have met their burden of good
28 cause as to certain documents, the Court GRANTS IN PART the motion to seal.

Case No. 09-cv-01967 CW (NC)
ORDER GRANTING IN PART
MOTION TO SEAL

I. BACKGROUND

A. The Noll Report

In support of their motion for class certification, Antitrust Plaintiffs submit the expert report of Professor Roger Noll. The Noll report and its appendices were filed provisionally under seal on August 31, 2012, however, the exhibits to the report were not filed. In accordance with this Court's minute order after the October 3, 2012 case management conference, Antitrust Plaintiffs submitted to chambers unredacted and redacted versions of the report, its appendices, and exhibits for consideration of the motion to seal. In their administrative motion to seal, Dkt. No. 598, Antitrust Plaintiffs identified the following parts of the Noll report as containing material designated confidential by defendants or third parties:

- pages 41, 64-68, 91-92, 99-100, 102-103, and 106;
- footnotes 20-21, 23, 38, 41, 48-49, 89, 94;
- appendices C-A1, C-A5 through C-A12, C-A14, C-A19 through C-A22, C-B1, C-B5 through C-B12, C-B14, C-B19 through C-B22, D-A1, D-A5 through D-A12, D-A17 through D-A18, D-A20 through D-A21, D-B1 through D-B2, D-B5 through D-B9, D-B11, D-B17 through D-B18, and D-B20 through D-B21; and
- exhibits 5, 6, 12A, 12B, 13A, 13B, 14A, 14B, 15A, and 15B.

In response, defendant EA submitted declarations in support of the motion and in support of Antitrust Plaintiffs' proposed redactions. Dkt. Nos. 579, 608. Defendant CLC submitted declarations and proposed its own redactions. Dkt. Nos. 580, 609. Defendant the NCAA also filed a declaration in support of the motion and proposed its own redactions. Dkt. No. 605. Nonparty T3M filed a declaration in support of the motion and agreed with the redactions proposed by the NCAA. Dkt. No. 604. Nonparty XOS filed a declaration in support of the motion and in support of Antitrust Plaintiffs' redactions of the material XOS sought to protect. Dkt. No. 606. Nonparty the NBA submitted a letter and a formal declaration in support of the motion to seal, along with proposed redactions. Dkt. Nos. 588, 610. Although defendants and nonparties do not seek to seal the same portions

of the Noll report, they all assert the same good cause for so doing: to protect competitively sensitive business information that will disadvantage them in future negotiations.

B. The Gerbrandt Report

Antitrust Plaintiffs also submit the report of Larry Gerbrandt in support of their motion for class certification. Like the Noll report, Antitrust Plaintiffs filed the Gerbrandt report provisionally under seal. In accordance with this Court’s minute order from the October 3 case management conference, Antitrust Plaintiffs submitted a copy of the report to chambers, but requested the Gerbrandt report be made public in its entirety. Dkt. No. 598 at 3. Antitrust Plaintiffs allege that the Gerbrandt report does not contain confidential information. *Id.* at 3-4. The Court has not received any declarations that indicated good cause for sealing the Gerbrandt report.

C. Exhibits 51 and 76 to the Gosselin Declaration

In its September 28 order, the Court considered whether the NCAA established good cause to seal Exhibits 9, 51, 66, and 76-78 to the Gosselin declaration, which Antitrust Plaintiffs filed provisionally under seal in support of their motion for class certification. The Court denied the NCAA’s request to seal, but ordered the NCAA to submit redacted copies of Exhibits 51 and 76. The Court found that Exhibits 51 and 76 contain terms, including fee arrangements, content packages, and advertising requirements, that could be beneficial to parties that wish to participate in future negotiations for the licensing and distribution of NCAA content, and that such terms might be particularly useful to the competitors of Turner and CBS, neither of whom is a party to this litigation.

II. STANDARD OF REVIEW

There is a presumption of public access to judicial records and documents. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). Accordingly, a party seeking to file a motion to seal in connection with a nondispositive motion must show “good cause” under Federal Rule of Civil Procedure 26(c). *In re Midland Nat’l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th Cir. 2012); *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (“In light of the weaker public interest in nondispositive

1 materials, we apply the ‘good cause’ standard when parties wish to keep them under seal.”).
2 “[T]he party seeking protection bears the burden of showing specific prejudice or harm will
3 result,” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th
4 Cir. 2002), and must make a “particularized showing of good cause with respect to any
5 individual document,” *San Jose Mercury News, Inc. v. U.S. Dist. Court, N. Dist. (San Jose)*,
6 187 F.3d 1096, 1103 (9th Cir. 1999). “Broad allegations of harm, unsubstantiated by
7 specific examples or articulated reasoning” are insufficient. *Beckman Indus., Inc. v. Int'l*
8 *Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

9 III. DISCUSSION

10 A. The Noll Report

11 Defendants EA, CLC, and the NCAA, as well as nonparties XOS, T3M, and the
12 NBA assert that the information contained in the Noll report, its appendices, and exhibits
13 includes:

- 14 • “non-public financial information and negotiated royalty terms,” along with the
15 identity and distribution rights of licensees, (Dkt. No. 606 ¶ 12);
- 16 • “video game royalty data,” payments “to colleges and universities for the licensing
17 of their trademarks,” (Dkt. No. 580-2 ¶ 13);
- 18 • “confidential revenue data,” “royalty rates, and guaranteed payment terms,” (Dkt.
19 No. 579 ¶ 10);
- 20 • “confidential financial terms of licenses EA negotiated with the National Football
21 League (NFL) and the NFL Players Association,” (Dkt. No. 579 ¶ 14);
- 22 • “revenue data broken down by videogame,” which could provide “competitors with
23 detailed information regarding the market for that game and the capacity for that
24 market to support competitive consumer offerings” (Dkt. No. 579 ¶ 15);
- 25 • “confidential financial data,” and “quarterly revenue” figures that are “not publicly
26 disclosed,” (NCAA Dkt. No. 604 ¶6).

27 Defendants and nonparties assert that if this information is made public, it will give
28 competitors sensitive information about the defendants and nonparties, the terms of

licensing agreements for NCAA content, and the markets for NCAA content, and thereby disadvantage them in future negotiations. As this Court has previously noted, “sources of business information that might harm a litigant’s competitive standing”—such as fee arrangements and terms that could be beneficial to parties that wish to participate in future negotiations—often warrant protection under seal. *Nixon Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). Defendants and nonparties have submitted proposed redactions that aim to limit the scope of the sealed information. The Court finds that defendants and nonparties have articulated good cause for redacting the Noll report, and have limited their redactions to competitively sensitive details. Accordingly, the following portions of the Noll report will be redacted:

Portion Identified as Containing Confidential Information	Portion to be Redacted or Sealed
Appendix C-A1	Columns [b]*, [c], [d], [f]
Appendix C-A5	Columns [d], [e], [f], [i], [j]
Appendix C-A6	as Antitrust Plaintiffs proposed
Appendix C-A7	as Antitrust Plaintiffs proposed
Appendix C-A8	as Antitrust Plaintiffs proposed
Appendix C-A9	as Antitrust Plaintiffs proposed
Appendix C-A10	as Antitrust Plaintiffs proposed
Appendix C-A11	Columns [a], [e], [f], [i], [j]
Appendix C-A12	as Antitrust Plaintiffs proposed
Appendix C-A14	Columns [c], [d], [f]
Appendix C-A19	as Antitrust Plaintiffs proposed
Appendix C-A20	as Antitrust Plaintiffs proposed
Appendix C-A22	as Antitrust Plaintiffs proposed
Appendix C-B1	Columns [b]*, [c], [d], [f]
Appendix C-B5	as Antitrust Plaintiffs proposed
Appendix C-B6	as Antitrust Plaintiffs proposed
Appendix C-B7	as Antitrust Plaintiffs proposed
Appendix C-B8	as Antitrust Plaintiffs proposed
Appendix C-B9	as Antitrust Plaintiffs proposed

Portion Identified as Containing Confidential Information (cont.)	Portion to be Redacted or Sealed (cont.)
Appendix C-B10	as Antitrust Plaintiffs proposed
Appendix C-B11	Columns [a], [e], [f], [i], [j]
Appendix C-B12	as Antitrust Plaintiffs proposed
Appendix C-B14	Columns [c], [d], [f]
Appendix C-B19	as Antitrust Plaintiffs proposed
Appendix C-B20	as Antitrust Plaintiffs proposed
Appendix C-B22	as Antitrust Plaintiffs proposed
Appendix D-A1	Columns [b]*, [c], [d], [f]
Appendix D-A5	as Antitrust Plaintiffs proposed
Appendix D-A6	Columns [a], [e], [f], [i], [j]
Appendix D-A7	as Antitrust Plaintiffs proposed
Appendix D-A8	as Antitrust Plaintiffs proposed
Appendix D-A9	as Antitrust Plaintiffs proposed
Appendix D-A11	Columns [c], [d], [f]
Appendix D-A17	as Antitrust Plaintiffs proposed
Appendix D-A18	as Antitrust Plaintiffs proposed
Appendix D-A20	as Antitrust Plaintiffs proposed
Appendix D-A21	as Antitrust Plaintiffs proposed
Appendix D-B1	Columns [b]*, [c], [d], [f]
Appendix D-B5	as Antitrust Plaintiffs proposed
Appendix D-B6	Columns [a], [e], [f], [i], [j]
Appendix D-B7	as Antitrust Plaintiffs proposed
Appendix D-B8	as Antitrust Plaintiffs proposed
Appendix D-B9	as Antitrust Plaintiffs proposed
Appendix D-B11	Columns [c], [d], [f]
Appendix D-B17	as Antitrust Plaintiffs proposed
Appendix D-B18	as Antitrust Plaintiffs proposed
Appendix D-B20	as Antitrust Plaintiffs proposed
Appendix D-B21	as Antitrust Plaintiffs proposed
Exhibit 5	as the NBA proposed in Dkt. No. 610-1 Ex.B
Exhibit 6	as Antitrust Plaintiffs proposed

Portion Identified as Containing Confidential Information (cont.)	Portion to be Redacted or Sealed (cont.)
Exhibit 11	Sealed in its entirety
Exhibit 12A	Columns [e], [h], [i], Subtotal, Total
Exhibit 12B	Columns [e], [h], [i], Subtotal, Total
Exhibit 13A	Columns [e], [h], [i], Subtotal, Total
Exhibit 13B	Columns [e], [h], [i], Subtotal, Total
Exhibit 14A	Columns [b], [c], [e], [f], [g], [h], [i]
Exhibit 14B	Columns [b], [c], [e], [f], [g], [h], [i]
Exhibit 15A	Columns [b], [c], [e], [f], [g], [h], [i]
Exhibit 15B	Columns [b], [c], [e], [f], [g], [h], [i]
Footnote 23	as Antitrust Plaintiffs proposed
Footnote 94	as Antitrust Plaintiffs proposed
Page 99	as Antitrust Plaintiffs proposed
Page 100	as Antitrust Plaintiffs proposed
Page 102	as Antitrust Plaintiffs proposed
Page 103	as Antitrust Plaintiffs proposed
Page 106	as Antitrust Plaintiffs proposed

* In Appendices C-A1, C-B1, D-A1, and D-B1 what should be labeled [b] is mistakenly labeled [c].

Antitrust Plaintiffs must redact the portions of the Noll report, its appendices, and exhibits in accordance with the table above and then file the redacted version in the public record by October 22, 2012 at 5:00 p.m.

B. The Gerbrandt Report

Antitrust Plaintiffs acknowledge that the Gerbrandt report refers to the deposition testimony of NCAA executive Weitekamp at page 28 and in footnote 18. Dkt. No. 598 at 3. They further aver that this testimony is not designated confidential. *Id.* at 4. Antitrust Plaintiffs seek to file the entirety of the Gerbrandt report in the public record. Because no party has shown good cause to overcome the presumption of public access, Antitrust Plaintiffs must file the report in the public record by October 22, 2012 at 5:00 p.m.

1 **C. The NCAA's Redaction of Exhibit 51 and 76.**

2 The Court ordered NCAA to redact the competitively sensitive portions of Exhibits
3 51 and 76 in order to balance the public interest in access to judicial records against the
4 interest of the NCAA and nonparties Turner and CBS in protecting their competitive
5 standing. Redactions, as opposed to filing entire documents under seal, "have the virtue of
6 being limited and clear." *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1183
7 (9th Cir. 2006). The redaction of Exhibit 76 is limited, and the Court accepts the NCAA's
8 proposed redactions of that Exhibit. The proposed redactions to Exhibit 51, however, are
9 far from limited in scope. In fact, if accepted by the Court, the proposed redactions would
10 render nearly the entirety of Exhibit 51 under seal. That the NCAA and Turner have been
11 less than discriminate in choosing which portions of Exhibit 51 to redact is indicated by the
12 fact that one redacted paragraph contains such competitively sensitive information as the
13 number of interns to hire. The NCAA must resubmit by October 24, 2012 proposed
14 redactions to Exhibit 51 that are limited to the terms necessary to protect the competitive
15 standing of the NCAA and Turner.

16 //

1 **IV. CONCLUSION**

2 Defendants EA, CLC, and the NCAA and nonparties XOS, T3M, and the NBA have
3 demonstrated that certain parts of the Noll report, its exhibits, and appendices contain
4 commercially valuable information that could competitively disadvantage defendants and
5 the nonparties. Therefore, the portions of the Noll report indicated in this order must be
6 redacted to protect those interests. After redacting the portions indicated, Antitrust
7 Plaintiffs must file it in the public record by October 22, 2012. Because no party as shown
8 good cause to seal the Gerbrandt report, Antitrust Plaintiffs will file it in the public record
9 also by October 22. The NCAA must submit to this Court by October 24, 2012 proposed
10 redactions to Exhibit 51 that are limited to competitively sensitive terms. The Court will
11 issue a further ruling after receiving the NCAA's proposed redactions.

12 IT IS SO ORDERED.

13 Date: October 17, 2012

14 
Nathanael M. Cousins
United States Magistrate Judge