

JUDGE PAULEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

11 CV 2186

ESPN, INC.,

Plaintiff,

vs.

CONFERENCE USA,

Defendant.



Plaintiff ESPN, Inc. ("ESPN"), by and through its undersigned attorneys, for its Complaint against defendant Conference USA ("C-USA" or "Conference") alleges, upon knowledge with respect to its acts and upon information and belief as to other matters, as follows:

Nature of the Action

1. C-USA entered into an agreement with ESPN in 2005 granting ESPN the exclusive worldwide rights to distribute and otherwise provide coverage for certain C-USA sporting events for a period of five years (the "Rights Agreement", a true and correct copy of which is attached hereto as Exhibit A). In the spring of 2010, ESPN and C-USA entered into an extension of the Rights Agreement (the "Extension Agreement"). Upon information and belief, C-USA subsequently entered into an agreement granting FOX Sports Media Group ("FOX"), an entity affiliated with FOX Broadcasting Company, distribution rights to sporting events covered by the Rights and Extension Agreements (the "FOX Agreement").

2. ESPN brings this action seeking specific performance of C-USA's contractual obligations under the Rights Agreement and/or Extension Agreement or, in the alternative, monetary damages resulting from C-USA's breaches of those obligations.

3. The Rights Agreement contains a First Negotiation/First Refusal ("FNFR") provision, which, among other things, obligates C-USA to make an offer conforming to specific requirements before it begins negotiating with third parties regarding the acquisition of rights covered by the Rights Agreement. C-USA has breached the Rights Agreement by negotiating with FOX and by entering into the FOX Agreement without fulfilling its obligations under the FNFR.

4. The Extension Agreement is either a complete, finalized agreement requiring C-USA to license the distribution rights to certain sporting events exclusively to ESPN or, in the alternative, a binding preliminary commitment requiring C-USA to negotiate a final agreement with ESPN in good faith. C-USA has breached the Extension Agreement by granting distribution rights to FOX that it exclusively licensed to ESPN and by failing to negotiate in good faith with ESPN.

Parties

5. ESPN is a Delaware Corporation with its principal place of business located in Bristol, Connecticut.

6. Upon information and belief, C-USA is an Illinois Corporation with its principal place of business located in Irving, Texas.

Jurisdiction and Venue

7. Pursuant to 28 U.S.C. § 1332, this Court has jurisdiction over this action because the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and there is complete diversity of citizenship between the parties.

8. Pursuant to 28 U.S.C. § 1391, venue properly lies in this Court because the parties agreed in their Rights Agreement to submit to the exclusive jurisdiction of and venue in the federal and state courts of New York for the resolution of any dispute arising from that Agreement.

Relevant Facts

ESPN

9. ESPN is a multimedia sports entertainment company featuring a large portfolio of multimedia sports assets. Among its other businesses, the company owns and operates eight domestic television networks (ESPN, ESPN2, ESPN Classic, ESPNEWS, ESPN Deportes, ESPNU, ESPN Today and ESPN 3D) and several internet services including ESPN.com and ESPN3.com (formerly, ESPN360.com).

C-USA

10. C-USA is a college athletic conference with member schools—such as The University of Memphis, The University of Southern Mississippi and Marshall University—located across the Southern United States. The conference participates in the National Collegiate Athletic Association's Division I in an array of sports, including football and basketball.

The Rights Agreement

11. On January 7, 2005, ESPN and C-USA executed a Rights Agreement wherein the C-USA granted to ESPN the exclusive worldwide rights to distribute and otherwise provide

coverage for certain C-USA football and basketball games for a period of five years. In addition to providing other benefits, ESPN paid C-USA a total of \$21,900,000 over the five year period in consideration for those rights. ESPN has performed all of its contractual obligations under the Rights Agreement.

12. Importantly, the Rights Agreement includes an FNFR provision. (Rights Agreement § 9.) ESPN regarded, and continues to regard, this provision as an important component of the consideration it received under the Rights Agreement. Indeed, ESPN seeks to have similar provisions included in most of its major distribution agreements.

13. The FNFR provision provides an exclusive thirty-day negotiating period between ESPN and C-USA to discuss an extension of the Rights Agreement (the "Negotiating Period"). More specifically, under the FNFR, C-USA agreed that

Conference shall negotiate exclusively with ESPN for a period of 30 days (the "Negotiating Period") commencing on a date selected by ESPN (but not later than April 1, 2010) with respect to the acquisition by ESPN for one or more years of rights to the package of [sporting events licensed under the Rights Agreement]. It is of the essence of this Agreement that Conference offer ESPN the same package of rights set forth in this Agreement, and, should the parties not reach agreement, that the Conference make the exact same package of rights available to third parties.

(*Id.* § 9(a).)

14. If, at the conclusion of the Negotiating Period, the parties do not otherwise reach an agreement, C-USA is then required under the FNFR to make an offer to ESPN conforming to specific requirements (the "Offer"). That provision provides, in relevant part,

If ESPN and Conference have not reached an agreement by the end of the Negotiating Period, Conference shall make a written offer (the "Offer") within three days thereafter to ESPN of the monetary consideration on which it is willing to license such rights to ESPN. With the exception of monetary consideration, the Offer shall not contain any terms or conditions which are different from those contained in this Agreement

("Nonconforming Terms") other than as permitted by section (d) [sic], below.

(*Id.* § 9(b)).)

The crucial aspect of this provision from ESPN's perspective is that it requires C-USA to make an "Offer" to ESPN without shopping the package of rights covered by the Rights Agreement in the open market.

15. The reference to 9(d) in the FNFR was intended to be a reference to 9(c)(iv).

16. Additionally, the FNFR contains several other requirements. In particular,

C-USA agreed

(l) Conference shall not discuss the rights contemplated under this section with any third party prior to the commencement of or during the Negotiating Period, and any discussion between Conference and third parties following the end of the Negotiating Period shall be held in accordance with the terms of this section;

. . .

(iii) The parties shall act at all times in complete good faith consistent with the intent and spirit of this entire agreement.

(*Id.* § 9(c)(i) and (iii).)

17. If, after 14 days, ESPN does not accept the "Offer", "Conference may then enter into an agreement with a third party with respect to the same package of events" described in the Rights Agreement. (*Id.* § 9(b).) However, if the agreement with the third party is for less monetary consideration than that contained in the "Offer", C-USA must first offer to ESPN the same monetary terms offered to the third party. (*Id.*)

18. In addition, the Rights Agreement includes an attorneys' fees provision providing that "the prevailing party will be entitled to recover from the other party its reasonable attorneys' fees and other costs of suit" in the event of legal disputes arising under the Rights Agreement.

(*Id.* § 13(e).)

ESPN and C-USA Negotiate an Extension to the Rights Agreement

19. ESPN representative Burke Magnus and C-USA Commissioner Britton Banowsky began discussions in late February 2010 about an extension of the Rights Agreement.
20. On April 1, 2010, ESPN and C-USA's exclusive Negotiating Period commenced.
21. Shortly thereafter, ESPN provided a deal memo outlining proposed renewal terms for an extension of the Rights Agreement.
22. On April 30, 2010, Magnus and Banowsky agreed via email to extend the Negotiating Period to May 15, 2010.
23. On May 7, 2010, Banowsky provided a marked-up copy of the proposed renewal terms to Magnus.
24. On May 14, 2010, Magnus emailed Banowsky a list of ten points of contention (the "Ten Deal Points") in response to C-USA's mark-up of the proposed renewal terms.
25. On the same day, Magnus and Banowsky agreed via email to extend the Negotiating Period to May 26, 2010.
26. On May 22, 2010, Banowsky reached out to Magnus via email to express his view that the relationship between C-USA and ESPN had been mutually beneficial. In that email, Banowsky asked for ESPN's "continued cooperation on the remaining items" and requested "a reconsideration of our fee structure".
27. On May 28, 2010, after further negotiations, Banowsky sent an email to Magnus indicating whether the parties had reached agreement on each of the Ten Deal Points, providing C-USA's responses to any unsettled Deal Points and requesting a \$500,000 increase in consideration for the rights granted under the extension. The email states, in relevant part,

As we discussed, we offer the following responses using the same numbering we have been working from:

1. Agreed, and confirming ESPN limited to re-airs.
2. Agreed. ESPN3 for up to six football games annually following CBS selections.
3. Agreed.
4. Agreed.
5. Agreed.
6. Agreed. (August 1 works for basketball selections)
7. Agreed. (Pending final copyright language)
8. Agreed.
9. Open. We reiterate [sic] request and ask for time period exclusivity relief on Saturdays and Thursdays in football, in addition to the basketball [sic] already given.
10. Agreed.

Rights Fee: Agree to annual payout proposed, would request increase in one-time payment from 1 million you have offered to 1.5 million.

Bringing [sic] total to 22.5 over the five year term.

28. Banowsky concluded his May 28, 2010 email, "Seems like we have clicked almost all of the open issues off of the list. If you can help us with #9 and the additional 500k we have a deal subject to long form execution, and I will present the deal and recommend it to our Board of Directors on June 7".

29. Although Banowsky sent this email within three days following the last day to which ESPN and C-USA formally extended the conclusion of the Negotiating Period, upon information and belief, C-USA did not intend for this email to constitute an "Offer" under the FNFR. Moreover, the email does not satisfy the requirements necessary to constitute such an "Offer". Among other things, the email contains "Nonconforming Terms"—including item "9", which is a request for a revision to the substantive terms of the Rights Agreement—prohibited by

the FNFR. Further, C-USA has waived its right to assert and is estopped from arguing that it satisfied its “Offer” obligations under the FNFR by failing to identify any of its communications to ESPN as an “Offer” and by continuing to negotiate the proposed renewal terms.

30. In contrast to C-USA’s failure to provide an “Offer”, ESPN performed all of its obligations under the FNFR, including “act[ing] at all times in complete good faith consistent with the letter and spirit of [the] entire agreement”.

31. In an email exchange on June 2, 2010, after Magnus indicated that he did not expect ESPN to “have any movement” on the two open issues, Banowsky wrote, “With respect to [those open] issues (money and window exclusivity) given your belief that there will not be movement and in an effort to wrap this up, we will withdraw the requests”. Banowsky then asked whether negotiations were “done, provided we get this in long form”.

32. Magnus responded in a signed email on June 2, 2010, “based on your note below, yes we are done pending execution of the long-form agreement”.

33. Shortly thereafter, Banowsky responded in a signed email, “I am pleased we are done pending long form”.

34. Following this email exchange, on June 4, 2010, Banowsky sent Magnus a signed email with an updated version of the renewal terms memorializing the terms—including the Ten Deal Points—agreed upon in the foregoing negotiations (the “Renewal Terms”).

35. The Renewal Terms grant ESPN the right to distribute and otherwise provide coverage for certain C-USA basketball and football games for a five-year period extending from the start of the college football season in the fall of 2011 to the end of the college basketball season in the spring of 2016. In consideration for these rights, ESPN agreed to pay fees totaling \$22,000,000 on a specific pay schedule. In addition, the Renewal Terms, among other things:

- provide that ESPN will have first priority to select ten C-USA regular season football games each year to telecast on ABC, ESPN or ESPN2;
- provide that ESPN will have the right to telecast C-USA's football conference championship game each year on ABC, ESPN or ESPN2;
- provide that, upon selection of the remaining games by C-USA's secondary distributor (CBS), ESPN will have the right to select up to six Saturday football games to telecast on its internet service, ESPN360.com;
- provide that ESPN will have the right to replay any football game originally telecast on ABC, ESPN or ESPN2 on ESPN2;
- provide that ESPN will have first priority to select a minimum of six regular season C-USA men's basketball games to telecast on ABC, ESPN or ESPN2;
- provide that ESPN will have the right to telecast the men's basketball championship game of C-USA's conference tournament each year on ESPN or ESPN2;
- provide that ESPN may sublicense the rights to the men's basketball championship game of C-USA's conference tournament each year to a third party broadcaster;
- require ESPN to indicate the events it will select by specific dates and dictate specific time frames within which ESPN may schedule certain games;
- provide that C-USA will own the copyright to the events selected for telecast by ESPN;
- provide that ESPN will have exclusive universal rights through all languages to distribute the live programs of the events selected by ESPN and their constituent elements;
- provide that upon completion of ESPN's telecast of events, C-USA and ESPN will both have the non-exclusive right to utilize this content;
- provide that C-USA will have the right to distribute non-ESPN games on a third party network or on C-USA's official website or participating conference institution websites, provided that ESPN will have window exclusivity for all C-USA football games scheduled on any ESPN network; and
- provide that ESPN will have an exclusive FNFR period beginning on or before April 1, 2015 for future rights.

36. Through the signed emails of Banowsky and Magnus, ESPN and C-USA entered into an extension to the Rights Agreement that incorporated the Renewal Terms. The Extension Agreement includes all material terms for a fully formed contract; indeed, the Extension Agreement was based off of and included the same level of detail as C-USA's May 28, 2010 email, which C-USA has characterized as an offer capable of acceptance.

Delays in the Execution of the Long Form of the Extension Agreement

37. In Banowsky's June 2, 2010 email indicating that the deal was "done", Banowsky included "a couple of thoughts":

1. I have a draft of the terms that I have developed (based on your original documents) that I can send you. Hopefully, it reflects and incorporates all these discussions. Just let me know if you want me to forward it along.
2. I plan on presenting these terms to our Board on Monday, and hopefully getting their support and authority to complete the extension.

38. On June 7, 2010, Banowsky informed Magnus via email that he had presented the extension terms to the C-USA Board, that the Board was "supportive" of the terms, and that he had discussed a time frame of one month with the Board for "finalizing the agreement".

39. Because the material terms of the extension were settled, on or about June 8, 2010, Magnus and Banowsky handed off primary responsibility for completing the long form of the Extension Agreement to other members of their respective teams.

40. From June through December, C-USA and ESPN exchanged drafts and mark-ups of the long form of the Extension Agreement. During this period, C-USA insisted on conditions that deviated from the previously agreed-upon Renewal Terms. For example, on August 20, 2010, C-USA sent a mark-up of a draft of the long form that rejected at least seven previously agreed upon terms.

41. Despite C-USA's attempts to deviate from the Renewal Terms, C-USA did not give any indication that the extension was anything but a done deal and the parties continued to work toward finalizing the long form of the Extension Agreement.

42. Then, on December 20, 2010, C-USA sent ESPN an edited version of the long form of the Extension Agreement containing terms not previously discussed, including a request relating to the scheduling of mid-week football games after the 2011 season.

43. Several days later, on December 23, 2010, C-USA suggested that its Board, which C-USA had previously indicated was "supportive" of the extension, might not approve the agreement because of "certain issues, most notably mid-week scheduling". Upon information and belief, C-USA used the scheduling of mid-week football games, which C-USA included in a draft of the long form of the Extension Agreement on December 20, 2010—well after C-USA and ESPN mutually agreed that negotiations were "done"—as a pretext to abandon negotiations with ESPN and execute the FOX Agreement.

44. On January 4, 2011, C-USA informed ESPN that it did not intend to execute an extension of the Rights Agreement that it had already fully negotiated and agreed to.

45. The exclusive distribution rights to these C-USA sporting events, individually and as a whole, are unique products with wide-ranging value for ESPN's business.

C-USA Executes an Agreement with FOX

46. Upon information and belief, on or about January 5, 2011, C-USA executed an agreement with FOX.

47. Upon information and belief, the FOX Agreement grants FOX distribution rights to sporting events that are covered by the Extension Agreement and would be covered by a conforming "Offer" under the FNFR.

48. Upon information and belief, FOX agreed to pay \$43,000,000 for these rights, or roughly twice the amount that ESPN agreed to pay under the Renewal Terms.

49. While reserving its legal rights under the FNFR and the Extension Agreement, ESPN has attempted to negotiate a deal with C-USA to share distribution rights with FOX. Although C-USA initially indicated that such a deal was possible, these efforts have proved unsuccessful and negotiations have recently broken off. ESPN has not entered into any other commitments that would preclude it from distributing these sporting events.

COUNT I

BREACH OF THE RIGHTS AGREEMENT

50. ESPN repeats and realleges as though fully set forth herein the allegations of Paragraphs 1 through 49 of the Complaint.

51. The Rights Agreement is an enforceable agreement that imposes upon ESPN and C-USA certain contractual obligations.

52. ESPN has fully performed all of its obligations under the Rights Agreement.

53. C-USA has breached that agreement by, among other things, (1) failing to make an "Offer" to ESPN in accordance with its obligations under the FNFR and (2) by negotiating, and ultimately executing, the FOX Agreement without satisfying its obligations under the FNFR.

54. Upon information and belief, C-USA is able to perform its obligation to provide an "Offer" in accordance with its obligations under the FNFR.

55. ESPN has no adequate remedy at law for C-USA's breaches of the Rights Agreement.

COUNT II

BREACH OF THE EXTENSION AGREEMENT
(COMPLETE, FINAL AGREEMENT)

56. ESPN repeats and realleges as though fully set forth herein the allegations of Paragraphs 1 through 49 of the Complaint.

57. Through signed emails sent by Magnus and Banowsky from May 28, 2010 to June 4, 2010, ESPN and C-USA entered into an enforceable extension to the Rights Agreement that incorporated the Renewal Terms.

58. ESPN is willing and able to perform its obligations under the Extension Agreement, including paying consideration totaling \$22,000,000.

59. C-USA has breached the Extension Agreement by granting distribution rights to FOX that it licensed exclusively to ESPN.

60. Upon information and belief, C-USA is able to perform its obligation to license its distribution rights to ESPN in accordance with the Renewal Terms.

61. ESPN has no adequate remedy at law for C-USA's breaches of the Extension Agreement.

COUNT III

BREACH OF THE EXTENSION AGREEMENT (BINDING PRELIMINARY COMMITMENT TO NEGOTIATE IN GOOD FAITH)

62. ESPN repeats and realleges as though fully set forth herein the allegations of Paragraphs 1 through 49 of the Complaint.

63. In the alternative to Count II, through the same signed emails sent by Magnus and Banowsky from May 28, 2010 to June 4, 2010, ESPN and C-USA entered into a binding preliminary commitment that required C-USA to negotiate in good faith in an effort to reach final agreement within the framework settled in the preliminary agreement.

64. ESPN has substantially performed its obligations under this agreement by negotiating in good faith and is willing and able to continue to perform its obligation to negotiate in good faith.

65. C-USA has breached its duty to negotiate in good faith by, among other things, (1) insisting on conditions that do not conform to the terms agreed upon in the Renewal Terms; (2) abandoning negotiations with ESPN on the basis of pretexts; and (3) negotiating the FOX Agreement in violation of its obligation to negotiate exclusively with ESPN.

66. Upon information and belief, C-USA is able to perform its obligation to negotiate in good faith with ESPN.

67. ESPN has no adequate remedy at law for C-USA's breaches of the Extension Agreement.

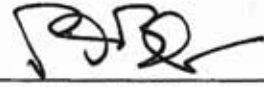
Prayer for Relief

WHEREFORE, plaintiff demands judgment against defendant as follows:

- A. Ordering specific performance by C-USA of its FNFR obligations under the Rights Agreement and/or specific performance by C-USA of its obligations under the Extension Agreement.
- B. Alternatively, awarding ESPN damages against C-USA of no less than \$21,000,000;
- C. Awarding ESPN attorneys' fees, costs and disbursements incurred as a result of this action; and
- D. Granting ESPN such other and further relief as may be just and proper.

March 30, 2011

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by  _____

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