ROBERTA L. STEELE, SBN 188198 (CA)
MARCIA L. MITCHELL, SBN 18122 (WA)
AMI SANGHVI, SBN 4407672 (NY)
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
San Francisco District Office
450 Golden Gate Ave., 5th Floor West
P.O. Box 36025
San Francisco, CA 94102
Telephone No. (415) 522-3071o
Fax No. (415) 522-3425
ami.sanghvi@eeoc.gov

DAMIEN A. LEE, SBN 430135 (WASH. D.C.)
Seattle Field Office
909 First Ave., Ste. 400
Seattle, WA 98104
Telephone No. (206) 220-6915
Fax No. (206) 220-6911
damien.lee@eeoc.gov

Attorneys for Plaintiff EEOC

DAVID MAREK, SBN
THE MAREK LAW FIRM, INC.
228 Hamilton Avenue
Palo Alto, CA 94301
Telephone No. (917) 721-5042
david@marekfirm.com

Attorney for Plaintiff-Intervenor Duane

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

ADRIAN SCOTT DUANE,

Plaintiff Intervenor,

vs.

IXL Learning, Inc.,

Defendant.

Case No.: 3:17-cv-02979-VC

PLAINTIFF EEOC'S MOTION *IN LIMINE* NO. 1 RE: EXCLUSION OF GOVERNMENTAL PROCEEDINGS

Pretrial Date: October 15, 2018
Time: 10:00 am
Courtroom: 4, 17th Floor
Judge: Hon. Vince Chhabria

Trial Date: October 22, 2018

Plaintiffs, EEOC and Adrian Scott Duane move *in limine* for an order precluding Defendant IXL Learning, Inc. (IXL) from introducing any evidence, offering any exhibits, making any statements or arguments, or eliciting any testimony, except prior sworn testimony for the limited purpose of impeachment, related to the following government agency actions: (1) National Labor Relations Board (NLRB) proceedings and the subsequent ALJ decision; (2) the EEOC investigation and findings, except to explain why the EEOC is a party; and (3) Duane's application and IXL's opposition to unemployment insurance benefits from the California Employment Development Department (EDD). All three proceedings occurred after IXL fired Duane and were completed before Plaintiffs filed suit. The existence of these proceedings, as well as exhibits relied upon and administrative findings are irrelevant, hearsay, cumulative, confusing and and/or unduly prejudicial to Plaintiffs.

I. RELEVANT FACTS

Plaintiffs allege that IXL fired Duane in retaliation for a Glassdoor post publicly airing discrimination complaints against IXL. After his termination, Duane filed a charge with the NLRB. [ECF No. 69-06.] The NLRB Regional Director issued a complaint and notice of hearing alleging that IXL fired Duane because of his concerted activities and to discourage other employees from engaging in concerted activities in violation of the National Labor Relations Act § 8(a)(1). The ALJ issued a decision concluding that Duane did not engage in concerted protected activity as defined by the NLRA, and recommending dismissal of the Complaint. [ECF No. 71-16. (NLRB decision)] The Board adopted the ALJ's recommended order. [ECF No. 69-07.]

Duane also filed EEOC and DFEH charges alleging transgender discrimination, failure to accommodate his disability, and retaliation. [ECF No. 69-01.] The EEOC investigated and determined that there was reasonable cause to believe that IXL retaliated against Duane. [ECF No. 69-05.] The EEOC found insufficient evidence to conclude that IXL failed to provide a reasonable accommodation or discriminated against Duane because he is transgender. [Id.]

Duane also sought unemployment benefits. IXL opposed Duane's application, arguing: "Scott Duane was discharged for misconduct. He showed extremely poor judgment and ethical values by deliberately defaming IXL Learning in a public space." [Declaration of Ami Sanghvi

(Sanghvi Decl.), Exh 1 (EDD Notice of Wages).] The California Employment Development Department (EDD) awarded benefits because Duane had not engaged in disqualifying misconduct. [Sanghvi Decl., Exh. 2 (EDD Notice of Determination/Ruling).]

II. ARGUMENT

Governmental agency proceedings, decisions and orders are inadmissible in federal employment discrimination litigation when: they are irrelevant; constitute inadmissible hearsay, implicate different legal standards which will confuse the issues and mislead the jury, and are more prejudicial than probative. Fed. R. Evid. 401, 402, 403, 801. Here, all three governmental proceedings have one or more of these disqualifying characteristics. The NLRB, EEOC, and EDD proceedings and decisions are irrelevant because they have no bearing on the determination of the issues in controversy in this *de novo* trial. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973); Fed. R. Evid. 401, 402. Each of these proceedings involved different burdens of proof from those at issue here. The NLRB ALJ evaluated whether Duane's Glassdoor post constituted protected concerted activity under the NLRA. In fact, the judge limited evidence to only NLRA issues and prohibited, as irrelevant, discovery into or introduction of evidence related to Duane's discrimination claims and charges of discrimination. [*See e.g.*, ECF No. 69-08 at Request No 8 (limiting IXL's overbroad subpoena to only those documents Duane contends support the [NLRB] complaint allegations), and Request No. 16 (finding documents to the EEOC "not reasonably relevant" and an "unwarranted fishing expedition").] The NLRB ALJ relied on different evidence than the jury will hear in this case. For example, under Title VII and the ADA, Duane may refute IXL's justifications for termination by showing pretext while in NLRB actions, an employer's subjective motivation for its conduct is irrelevant to whether its actions violate NLRA Section 8(a)(1). *See EEOC v. Zellerbach Corp.*, 720 F.2d 1008, 1016 (9th Cir. 1983) (questioning the parity between the opposition clause of Title VII and the standard under the NLRA.). Similarly, the EDD assessed whether Duane engaged in misconduct connected to his work justifying the denial of unemployment benefits. Cal. Unemp. Ins. Code § 1256 (Deering 2018). It did not consider IXL's motivation and conduct, as permitted in a Title VII and ADA analysis.

The jury will be confused by governmental decisions or findings founded on standards inapplicable to and inconsistent with Title VII and the ADA. A limiting instruction will not cure the problem: there is a significant risk that the jury will place undue weight on the administrative findings in lieu of making its own determinations and thus apply the wrong standard. Further, admitting the evidence will require Plaintiffs to explain the differences between the proceedings and the legal standards, resulting in a sideshow distracting the jury from the central issues at bar, lengthening the trial, and wasting time and judicial resources. Rule 403 disfavors such a result. *See, e.g., Ioane v. Spjute*, No. l:07-CV-0620 AWI EPG, 2016 U.S. Dist. LEXIS 115868, at *32 (E.D. Cal. Aug. 29, 2016)(Rule 403 serves to avoid the introduction of "large quantities of extrinsic evidence to create mini-trials regarding tangentially related matters.")

1. The NLRB Decision is Unduly Prejudicial

The NLRB ALJ's decision included inflammatory findings, e.g. characterizing the Glassdoor post as a "reckless and impetuous reaction," "childish ridicule," and "a tantrum". Further, despite precluding discovery into discrimination, the ALJ concluded, without the benefit of a full record, that IXL did not discriminate against Duane. These determinations are inherently prejudicial. They also invade the province of the jury which, as factfinder, must assess credibility based on sworn testimony of witnesses and other evidence introduced at trial. [1]

IXL's motivation is clear: it seeks to use the imprimatur of an "expert" judge to sway the jury to replace their independent, *de novo* determinations with the ALJ's conclusion that Duane lacks credibility and IXL's key witnesses were truthful. However, "experts" cannot give conclusions on ultimate issues.

[1] This court avoided this very morass by excluding the NLRB decision in *O'Bannon v. National Athletic Collegiate Athletic Assoc.*, No. C 09-3329-CW, at p. 7 (N.D. Cal. May 30, 2014) (J. Wilkens), *see* Sanghvi Decl., Exh. 3 (Order). Plaintiffs note that defendant in that case successfully argued for exclusion of the NLRB decision because: (1) the NLRB decision with its factual findings and legal conclusions was hearsay; (2) the NLRB decision concerned a definition not at issue in the Sherman Act case in federal district court; and (3) even if the NLRB decision was not hearsay, Rule 403 argued strongly against its exclusion because of the risk the jury would give it undue influence such that it would interfere or usurp their role as fact finder, and cause unnecessary confusion. [*see* Sanghvi Decl., Exh. 4 (MIL) at p. 13-16].

The jury also would not be served by the Court taking judicial notice of the NLRB decision. Introducing even the existence of the NLRB action could lead the jury to conclude that Duane is litigious. To forestall such a conclusion, Plaintiffs would need to introduce evidence explaining the purpose of the NLRB, that Duane filed a charge, that the NLRB determined the charge warranted a hearing and filed a Complaint in its own name. On balance, the NLRB proceeding has little, if any, probative value which is outweighed by the prejudice to plaintiffs. Fed. R. Evid. 403.

2. EEOC's Letter of Determination (LOD) Will Confuse the Jury

Plaintiffs expect Defendants to admit the EEOC LOD to argue that IXL did not deny Duane's request for accommodation or discriminate based on gender identity. [*See e.g.* ECF No. 70-1; *see also* ECF No. 79] ("The EEOC … determined that IXL *did not deny Duane a reasonable accommodation*.") (emphasis added). Because IXL has routinely mischaracterized the EEOC LOD throughout this litigation, Plaintiffs anticipate it will continue to misrepresent the actual findings. The EEOC did not uncover sufficient evidence to issue an adverse finding: this is a far cry from deeming IXL "innocent" of the allegations. Further, the findings as to gender identity and disability discrimination are irrelevant to jury's determination of whether IXL retaliated against Duane. The jury must decide whether Duane reasonably believed that IXL discriminated when he posted on Glassdoor, not whether IXL actually discriminated. In fact, Plaintiffs can succeed on a retaliation claim even if Duane was legally inaccurate in believing he experienced discrimination, as long as his belief was reasonable. As with the NLRB decision, there is a risk that the jury will improperly accord undue weight to the EEOC decision as it relates to the reasonableness of Duane's beliefs.

3. EDD's Award of Unemployment Benefits is Irrelevant

Duane's application for unemployment benefits and the EDD's decision awarding benefits are irrelevant. "[U]nemployment benefits received by a successful plaintiff in an employment discrimination action are not offsets against a backpay award." *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 346-47 (9th Cir. 1982). Thus, Duane's unemployment benefits are not relevant to the backpay calculation. Moreover, his receipt of unemployment threatens to unfairly prejudice plaintiffs by misleading the jury into believing Duane would receive a windfall should the jury award damages. This erroneous conclusion would thwart Title VII's central objective of eradicating

discrimination and making its victims whole. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); Fed. R. Evid. 403. Lastly, IXL's arguments for opposing Duane's application for unemployment mirror its justification for termination advanced here, and therefore cumulative.

Hearsay is a "statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The NLRB decision and hearing testimony and the EEOC Letter of Determination are just that - out of court verbal or written declarations that Defendant seeks to offer as truth, – *inter alia* that Duane lacks credibility, Duane attempted to harm IXL's recruitment, IXL legitimately fired Duane (NLRB); and the EEOC concluded the IXL accommodated Duane and did not discriminate based on his transgender identity. *United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007) ("judicial findings of facts are hearsay, inadmissible to prove the truth of the findings unless a specific hearsay exception exists"). Thus, these agency finds should certainly be excluded.

The NLRB Order and the ALJ's Decision are not admissible public records exception. Fed. R. Evid. 803(8). A public record does not overcome a hearsay objection unless the document relates to an event to which the author could testify. *United States v. Chu Kong Yin*, 935 F.2d 990, 999 (9th Cir. 1991)(citation omitted). The NLRB ALJ is not a witness, and if he were, his testimony would constitute an inadmissible legal conclusion. *Sullivan v. Dollar Tree Stores, Inc*, No. CV-07-5020-EFS, 2008 U.S. Dist. LEXIS 89478, at *9 (E.D. Wash. Apr. 10, 2008) (citation omitted).

III. CONCLUSION

For the foregoing reasons, the Court should grant the Plaintiffs' motion *in limine*.

Respectfully submitted,

Dated: September 26, 2018

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By: */s/ Ami Sanghvi*
AMI SANGHVI, Senior Trial Attorney
Attorney for Plaintiff EEOC

Dated: September 26, 2018

THE MAREK LAW FIRM

By: */s/ David Marek*
DAVID MAREK
Attorney for Plaintiff-Intervenor Duane

LOCAL RULE 5-1(i)(3) ATTESTATION

I, Ami Sanghvi, am the ECF User whose ID and password are being used to file the Motion for Partial Summary Judgment. In compliance with Local Rule 5-1(i)(3), I hereby attest that David Marek concurred in this filing

Dated: September 26, 2018

/s/ Ami Sanghvi
AMI SANGHVI, Senior Trial Attorney

ROBERTA L. STEELE, SBN 188198 (CA)
MARCIA L. MITCHELL, SBN 18122 (WA)
AMI SANGHVI, SBN 4407672 (NY)
DAMIEN A. LEE SBN 430135 (WASH. D.C.)
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
San Francisco District Office
450 Golden Gate Ave., 5th Floor West
P.O. Box 36025
San Francisco, CA 94102
Telephone No. (415) 522-3071
Fax No. (415) 522-3425
ami.sanghvi@eeoc.gov

DAMIEN A. LEE, SBN 430135 (WASH. D.C.)
Seattle Field Office
909 First Ave., Ste. 400
Seattle, WA 98104
Telephone No. (206) 220-6915
Fax No. (206) 220-6911
damien.lee@eeoc.gov

Attorneys for Plaintiff EEOC

DAVID MAREK, SBN
THE MAREK LAW FIRM, INC.
228 Hamilton Avenue
Palo Alto, CA 94301
Telephone No. (917) 721-5042
david@marekfirm.com

Attorney for Plaintiff-Intervenor Duane

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and ADRIAN SCOTT DUANE, Plaintiff Intervenor, vs. IXL Learning, Inc., Defendant.	Case No.: 3:17-cv-02979-VC **DECLARATION OF AMI SANGHVI IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* NO. 1 RE:** Pretrial Date: October 15, 2018 Time: 10:00 Am Courtroom: 4, 17th Floor Judge: Hon. Vince Chhabria Trial Date: October 22, 2018

I, Ami Sanghvi, declare as follows:

1. I am an attorney for the plaintiff in this action, the U.S. Equal Employment Opportunity Commission (EEOC). I am the lead attorney responsible for the litigation of the above-caption case.

1. Attached hereto and incorporated herein as **Exhibit 1** is a true and correct copy of the CA EDD Notice of Wages Used for Unemployment Insurance Claim, dated March 10, 2015 (EEOC_000073).

2. Attached hereto and incorporated herein as **Exhibit 2** is a true and correct copy of the CA EDD Notice of Determination/Ruling, dated February 3, 2015 (EEOC_000108).

3. Attached hereto and incorporated herein as **Exhibit 3** is a true and correct copy of the Order Resolving Motions *in Limine* (Docket Nos. 1063, 1069) in *O'Bannon, et al. v. NCAA, et al*., No. CV 09-01967 (N.D. Cal May 30, 2014) ECF No. 1105.

4. Attached hereto and incorporated herein as **Exhibit 4** is a true and correct copy of the Defendant NCAA's Motions *in Limine* in *O'Bannon, et al. v. NCAA, et al*., No. CV 09-01967 (N.D. Cal May 14, 2014) ECF No. 1069.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on September 26, 2018, in San Francisco, California.

/s/ Ami Sanghvi

AMI SANGHVI
Senior Trial Attorney
Equal Employment Opportunity Commission
450 Golden Gate Avenue, 5th Fl. W., POB 36025
San Francisco, CA 94102
(415) 522-3071

Exhibit 1

SOCAL AUTHORIZATION CENTER - 857
PO BOX 19009
SAN BERNARDINO, CA 92423-9009
(909) 799-8703

Adrian Scott Duane

Employment Development Department
State of California

DE 1545

NOTICE OF WAGES USED FOR UNEMPLOYMENT INSURANCE (UI) CLAIM

*RULING REQUESTS MUST BE POSTMARKED BY **03-13-15**

YOUR ACCOUNT NO. 463-0411-9 | BR. NO. 00

IXL LEARNING, INC.
777 MARINERS ISLAND BLVD STE 600
SAN MATEO CA 94404-5046

PREDECESSOR ACCOUNT NO.

CLAIM DATE 01-04-15

***IF INFORMATION ABOUT WAGES IS CORRECT AND YOU DO NOT WISH TO REQUEST A RULING, NO FURTHER ACTION IS NECESSARY. THIS FORM IS FOR YOUR RECORDS.**

THE PERSON NAMED BELOW HAS RECEIVED UI BENEFITS BASED IN TOTAL OR IN PART ON WAGES YOU REPORTED.

CLAIMANT'S NAME	NAME WAGES REPORTED UNDER	SOCIAL SECURITY NUMBER	OTHER SOCIAL SECURITY NUMBER
AS DUANE	A DUANE	REDACTED	

WAGES YOU REPORTED BY QUARTER USED TO ESTABLISH THIS CLAIM (BASED ON STANDARD BASE PERIOD)

FOR INFORMATION REGARDING BASE PERIOD, SEE ENCLOSED INSTRUCTIONS

12-31-13	03-31-14	06-30-14	09-30-14
$ 20319.96	$ 20500.02 ✓	$ 23780.02 ✓	$ 20500.02 ✓

TOTAL WAGES REPORTED BY YOU
$ 85,100.02

TOTAL WAGES REPORTED BY YOU AND ALL OTHER EMPLOYERS TO ESTABLISH THIS CLAIM ..... $ 85,100.02

THE PERCENTAGE OF BENEFITS CHARGEABLE TO YOUR RESERVE ACCOUNT IS ..... 100.000 %

THE CLAIMANT'S WEEKLY BENEFIT AMOUNT IS $450 TO A MAXIMUM BENEFIT AMOUNT OF ..... $ 11700

You have received an unfavorable ruling notice for separation date 01-08-14. The maximum charges for each week benefits are paid will be $ 450.00. You may request a ruling for any separation(s), after 01-08-14. ✓

RULINGS: To request a ruling, supply the information below and mail to the address in the upper left corner.

1. Give date(s) of separation(s) and rehire(s) (if any) during quarters used to establish this claim.
   Separation(s) Dates(s) 1/8/2015 Rehire(s) Date(s) N/A
2. Did the claimant notify you that he/she quit? ☐ Yes ☑ No
3. Give complete details about separation Scott Duane was discharged for misconduct. He showed extremely poor judgment and ethical values by deliberately defaming IXL Learning in a public space. Scott knew or should have known that the actions were not in line with the standards of behavior as an employee of IXL Learning.

The above statements were taken from business records or are based on knowledge of the undersigned.

PRINT NAME Marcela Prado DATE 3.10.15

SIGNATURE/TITLE Human Resources Coordinator PHONE NUMBER (650) 372-4221

DE 1545 Rev. 55 (8-11) CU

CONFIDENTIAL

IXL2000004

EEOC_000073

Exhibit 2

EMPLOYMENT DEVELOPMENT DEPT
OAKLAND PRIMARY CAL CENTER
PO BOX 12906
OAKLAND CA 94604-2906

Employment Development Department
State of California

NOTICE OF DETERMINATION / RULING

DATE MAILED 02/03/15
BENEFIT YEAR BEGAN 01/04/15

IXL LEARNING 0210
777 MARINERS ISLAND BLVD 600
SAN MATEO CA 94404

EDD TELEPHONE NUMBERS:

ENGLISH	1-800-300-5616
SPANISH	1-800-326-8937
CANTONESE	1-800-547-3506
MANDARIN	1-866-303-0706
VIETNAMESE	1-800-547-2058
TTY	1-800-815-9387

CONCERNING THE UNEMPLOYMENT INSURANCE CLAIM OF:

A S DUANE
SSN REDACTED

YOU PROVIDED INFORMATION REGARDING THE ELIGIBILITY OF THE CLAIMANT NAMED ABOVE UNDER CALIFORNIA UNEMPLOYMENT INSURANCE CODE (CUIC) SECTION 1256. WE HAVE CONSIDERED ALL OF THE AVAILABLE FACTS AND REACHED THE CONCLUSION STATED BELOW. PLEASE DO NOT RESUBMIT THE SAME ELIGIBILITY INFORMATION IN REPLY TO ANY FUTURE CLAIMS NOTICES. THIS DECISION IS FINAL UNLESS MODIFIED, RECONSIDERED, OR APPEALED.

YOU DISCHARGED THE CLAIMANT FOR BREAKING ONE OF YOUR RULES. AFTER CONSIDERING THE AVAILABLE INFORMATION, THE DEPARTMENT FINDS THE REASONS FOR DISCHARGE DO NOT MEET THE DEFINITION OF MISCONDUCT CONNECTED WITH THE WORK.

YOUR RESERVE ACCOUNT WILL BE SUBJECT TO CHARGES.

SEPARATION DATE: 01/08/14
RESERVE ACCOUNT NUMBER: 4630411-9

APPEAL:

YOU HAVE THE RIGHT TO FILE AN APPEAL IF YOU DO NOT AGREE WITH ALL OR PART OF THIS DECISION.

TO APPEAL, YOU MUST DO ALL OF THE FOLLOWING:

A. COMPLETE THE ENCLOSED APPEAL FORM (DE1000M) OR WRITE A LETTER STATING THAT YOU WANT TO APPEAL THIS DECISION. IF YOU WRITE A LETTER TO APPEAL, EXPLAIN WHY YOU DO NOT AGREE WITH THE DEPARTMENT'S DECISION. WRITE THE

Employment Development Department
State of California

CLAIMANT'S NAME AND SOCIAL SECURITY NUMBER ON EACH DOCUMENT YOU SUBMIT TO THE DEPARTMENT (TITLE 22, CALIFORNIA CODE OF REGULATIONS, SECTION 5008).

B. MAIL THE DE1000M OR YOUR LETTER TO THE ADDRESS OF THE OFFICE LISTED ON THE FIRST PAGE OF THIS DECISION.

C. FILE YOUR APPEAL WITHIN TWENTY (20) DAYS OF THE MAIL DATE OF THIS NOTICE OR NO LATER THAN 02/23/15.

APPEAL INFORMATION:

WHEN YOUR APPEAL IS RECEIVED, YOUR CASE WILL BE REVIEWED. IF THE DECISION REMAINS THE SAME, WE WILL SEND YOUR APPEAL TO THE OFFICE OF APPEALS. IF YOU APPEAL AFTER THE 20 DAYS, YOU MUST INCLUDE THE REASON FOR THE DELAY. THE ADMINISTRATIVE LAW JUDGE WILL DETERMINE WHETHER YOU HAD GOOD CAUSE FOR THE DELAY. IF THE ADMINISTRATIVE LAW JUDGE DETERMINES YOU DID NOT HAVE GOOD CAUSE FOR SUBMITTING YOUR APPEAL LATE, YOUR APPEAL WILL BE DISMISSED.

THE OFFICE OF APPEALS WILL SEND YOU A LETTER WITH THE DATE, PLACE, AND TIME OF YOUR HEARING AND A PAMPHLET EXPLAINING APPEAL HEARING PROCEDURES. AT THE HEARING, THE ADMINISTRATIVE LAW JUDGE WILL LISTEN TO YOU, EXAMINE THE FACTS, AND MAKE A DECISION. YOU MAY HAVE A REPRESENTATIVE OR SOMEONE ELSE HELP YOU.

DE1080 EZ REV. 1 (06-05) (MTO)

Exhibit 3

GLENN D. POMERANTZ (State Bar No. 112503)
glenn.pomerantz@mto.com
KELLY M. KLAUS (State Bar No. 161091)
kelly.klaus@mto.com
CAROLYN HOECKER LUEDTKE (State Bar No. 207976)
carolyn.luedtke@mto.com
ROHIT K. SINGLA (State Bar No. 213057)
rohit.singla@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

GREGORY L. CURTNER (*Pro Hac Vice*)
gcurtner@schiffhardin.com
ROBERT J. WIERENGA (State Bar No. 183687)
rwierenga@schiffhardin.com
KIMBERLY K. KEFALAS (*Pro Hac Vice)*
kkefalas@schiffhardin.com
SCHIFF HARDIN LLP
350 Main St., Suite 210
Ann Arbor, MI 48104
Telephone: (734) 222-1500
Facsimile: (734) 222-1501

Attorneys for Defendant
National Collegiate Athletic Association

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

IN RE NCAA STUDENT-ATHLETE NAME AND LIKENESS LICENSING LITIGATION	Case No. 09-CV-1967-CW **DEFENDANT NCAA'S MOTIONS *IN LIMINE*** Judge: Hon. Claudia Wilken Date: May 28, 2014, 2:00 p.m. Courtroom: 2, 4th Floor

TABLE OF CONTENTS

Page

Motion *In Limine No. 1*: To Exclude Evidence and Argument About Injuries in College Sports. 1

Motion *In Limine No. 2*: To Exclude Evidence and Arguments about Licensing Unrelated to Live Broadcasts, Rebroadcasts or Clips, or Videogames. 3

Motion *In Limine No.* 3: To Exclude References to the Chicago Regional NLRB Director's Decision Regarding College Athlete Unionization. 5

Motion *In Limine No.* 4: To Exclude Reports of Third-Party Observers and Media About Collegiate Athletics. 8

Motion *In Limine No.* 5: To Bar Admission of Walter Byers' Book "Unsportsman-Like Conduct" 9

Motion *In Limine No.* 6: To Preclude Expert Testimony by Taylor Branch and Ellen Staurowsky. 11

A. Both Taylor Branch and Ellen Staurowsky are Conduits for Hearsay 11

B. Mr. Branch Lacks any Expertise or Experience Regarding College Sports 14

Motion *In Limine No.* 7: To Bar Admission of Walter Byers' Deposition Testimony from the *White V. NCAA* Case. 16

Motion *In Limine No.* 8: To Bar References to Wealth or Income of any Defense Witness or NCAA or University Employee. 17

Motion *In Limine No.* 9: To Exclude the Admission of Student-Athlete Eligibility Forms Authored by Schools or Conferences. 19

Motion *In Limine No.* 10: To Exclude Evidence Concerning Adjudicated or Alleged Criminal Conduct Unrelated to the Rules at Issue Here. 19

Motion *In Limine No.* 11: To Exclude References to Whether the NCAA Called any Current or Former Student-Athletes. 21

Motion *In Limine No.* 12: To Preclude Evidence or Argument About Supposedly Less Restrictive Alternatives that Dr. Noll has not Analyzed. 21

Motion *In Limine No.* 13: To Exclude Testimony of Mary Willingham if the Court Excludes the Testimony of NCAA Witnesses not Listed by Name in Rule 26 *Disclosures*. 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Am. Motor Inns, Inc. v. Holiday Inns, Inc.,
521 F.2d 1230 (3d Cir. 1975) 22, 24

Am. Needle, Inc. v. NFL,
560 U.S. 183 (2010) 22

Arrington v. NCAA et al.,
1:11-cv-06536 (N.D. Ill.) 1

Barrueto v. Fernandez Larios,
No. 99-0528-CIV, 2003 WL 25782075 (S.D. Fla. Sept. 18, 2003) 12, 15

Brumley v. Albert E. Brumley & Sons, Inc.,
No. 3:08-CV-1193, 2010 WL 1439972 (M.D. Tenn. Apr. 9, 2010) 10

County of Tuolumne v. Sonora Cmty. Hosp.,
236 F.3d 1148 (9th Cir. 2001) 22, 24

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993) 14

Disability Advocates, Inc. v. Paterson,
No. 03-CV-3209 (NGG)(MDG), 2009 WL 1312112 (E.D.N.Y. May 8, 2009) 9

Doe v. Texaco, Inc.,
No. C06-02820 WHA, 2006 WL 2850035 (N.D. Cal. Oct. 5, 2006) 8

Draper v. Airco, Inc.,
580 F.2d 91 (3d Cir. 1978) 18

Factory Mut. Ins. Co. v. Alon USA L.P.,
705 F.3d 518 (5th Cir. 2013) 13

Ford v. Nationwide Mut. Fire Ins. Co.,
214 F. Supp. 2d 11 (D. Me. 2002) 2

Garcia v. Sam Tanksley Trucking, Inc.,
708 F.2d 519 (10th Cir. 1983) 18

Geddes v. United Fin. Group,
559 F.2d 557 (9th Cir. 1977) 18

Gilchrist v. Jim Slemons Imports, Inc.,
803 F.2d 1488 (9th Cir. 1986) 7

TABLE OF AUTHORITIES
(continued)

Page

Heltsley v. Harris,
No. 06-2626 CW, 2007 WL 2318950 (N.D. Cal. Aug. 13, 2007) 11

Horta v. Sullivan,
4 F.3d 2 (1st Cir. 1993) 9

Hub v. Sun Valley Co.,
682 F.2d 776 (9th Cir. 1982) 17

Hynix Semiconductor Inc. v. Rambus, Inc.,
Nos. CV-00-20905RMW, C-05-00334 RMW, C-06-00244 RMW, 2008 WL 282376 (N.D. Cal. Jan. 28, 2008) 7

In re Dreier LLP,
Nos. AP 10-03493 (SMB), 10-05447 (SMB), 2014 WL 47774 (Bankr. S.D.N.Y. Jan. 3, 2014) 20

In re WorldCom, Inc. Sec. Litig.,
No. 02 CIV 3288 DLC, 2005 WL 375315 (S.D.N.Y. Feb. 17, 2005) 20, 21

In Re: NCAA Student Athlete Concussion Injury Litig.,
MDL No. 2492 (N.D. Ill) 1

Jinro Am. Inc. v. Secure Invs., Inc.,
266 F.3d 993 (9th Cir. 2001), opinion amended on denial of reh'g, 272 F.3d 1289 (9th Cir. 2001) 12, 15

Johnson v. Am. Honda Motor Co., Inc.,
No. CV 10-126-M-JCL, 2012 WL 1067103 (D. Mont. Mar. 28, 2012) 7

Koufakis v. Carvel,
425 F.2d 892 (2d Cir. 1970) 18

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 14

L-3 Commc'ns Corp. v. OSI Sys., Inc.,
No. 02 CIV. 9144 (PAC), 2006 WL 988143 (S.D.N.Y. Apr. 13, 2006) 18

Larez v. City of Los Angeles,
946 F.2d 630 (9th Cir. 1991) 9

Levinson v. Westport Nat'l Bank,
Nos. 3:09CV269(VLB), 3:09-CV-1955(VLB), 3:10CV261(VLB), 2013 WL 2181042 (D. Conn. May 20, 2013) 20

TABLE OF AUTHORITIES
(continued)

Page

Lewis v. City of Chicago,
563 F. Supp. 2d 905 (N.D. Ill. 2008) aff'd sub nom., *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427 (7th Cir. 2009) 2

M&H Tire Co., Inc. v. Hoosier Racing Tire Corp.,
733 F.2d 973 (1st Cir. 1984) 23

Malletier v. Dooney & Bourke, Inc.,
525 F. Supp. 2d 558 (S.D.N.Y. 2007) 13

Marvel Characters, Inc. v. Kirby,
726 F.3d 119 (2d Cir. 2013) 12, 13

NCAA v. Bd. of Regents of Univ. of Okla.,
468 U.S. 85 (1984) 23, 24

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.,
185 F.3d 957 (9th Cir. 1999) 1

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) 15

Rambus, Inc. v. Infineon Technologies AG,
222 F.R.D. 101 (E.D. Va. 2004) 6, 7, 8

Recreational Developments of Phoenix, Inc. v. City of Phoenix,
220 F. Supp. 2d 1054 (D. Ariz. 2002),
aff'd 77 F. App'x 983 (9th Cir. 2003) 14, 15

Rouse v. Duke Univ.,
914 F. Supp. 2d 717 (M.D.N.C. 2012) aff'd, 535 F. App'x 289 (4th Cir. 2013) 10

Ruffalo's Trucking Serv. v. Nat'l Ben-Franklin Ins. Co.,
243 F.2d 949 (2d Cir. 1957) 20

SEC v. Jasper,
678 F.3d 1116 (9th Cir. 2012) 16

Stewart v. Wachowski,
574 F. Supp. 2d 1074 (C.D. Cal. 2005) 8

Sullivan v. Dollar Tree Stores, Inc.,
623 F.3d 770 (9th Cir. 2010) 5

Tanaka v. Univ. of S. Cal.,
252 F.3d 1059 (9th Cir. 2001) 22

TABLE OF AUTHORITIES
(continued)

Page

Texaco Inc. v. Dagher,
547 U.S. 1 (2006) 22

Turner v. Burlington N. Santa Fe R.R. Co.,
338 F.3d 1058 (9th Cir. 2003) 13

United States v. Baker,
432 F.3d 1189 (11th Cir. 2005) 9

United States v. Chu Kong Yin,
935 F.2d 990 (9th Cir. 1991) 10

United States v. Cox,
536 F.2d 65 (5th Cir. 1976) 20

United States v. Duenas,
691 F.3d 1070 (9th Cir. 2012) 16, 17

United States v. Ferguson,
No. 3:06CR137CFD, 2007 WL 4240782 (D. Conn. Nov. 30, 2007) 18

United States v. Freeman,
498 F.3d 893 (9th Cir. 2007) 14

United States v. Hagege,
437 F.3d 943 (9th Cir. 2006) 10

United States v. Resnick,
594 F.3d 562 (7th Cir. 2010) 9, 10

United States v. Salerno,
505 U.S. 317 16

United States v. Skillman,
922 F.2d 1370 (9th Cir. 1990) 2, 20

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940) 18

Walker v. NCAA et al.,
1:13-cv-00293 (E.D. Tenn.) 1

White v. NCAA,
No. CV 06-0999 VBF (C.D. Cal.) 16, 17

Woodfox v. Cain,
No. 06-789-JJB, 2012 WL 1867089 (M.D. La. May 22, 2012) 10

TABLE OF AUTHORITIES
(continued)

Page

REGULATORY CASES

Northwestern University and College Athletes Players Ass'n, No. 13-RC-121359 (NLRB Mar. 26, 2014) 5

Northwestern University and College Athletes Players Ass'n, No. 13-RC-121359 (NLRB Apr. 24, 2014) 6

FEDERAL RULES

Fed. R. Civ. P. 26 ..... 24, 25

Fed. R. Civ. P. 32(a)(8) 16, 17

Fed. R. Evid. 401 ..... 2, 9, 19

Fed. R. Evid. 402 8

Fed. R. Evid. 403 ..... passim

Fed. R. Evid. 703 ..... 5, 11, 12, 13

Fed. R. Evid. 801 ..... 9, 11

Fed. R. Evid. 802 ..... 8, 10

Fed. R. Evid. 803 ..... 5, 6

Fed. R. Evid. 804 ..... 16, 17

FEDERAL REGULATIONS

16 C.F.R. § 3.54(b) 6

TREATISES

10 Phillip E. Areeda, *Antitrust Law* ¶ 1760d, at 369 (1991) 22

11 Phillip E. Areeda, *Antitrust Law* ¶ 1913b, at 375-76 (2011) 22, 23

8A Alan Wright et al., *Federal Practice and Procedure Civil* § 2150 (3d ed.) 17

29 Charles Alan Wright & Victor James Gold, *Fed. Practice and Proc. Evidence* § 6273 (1st ed. 1997) 13

1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 403[03], at 403–36 to 403-39 (1989 ed.) 2

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

Phillip Areeda, *The Rule of Reason-A Catechism on Competition*, 55 Antitrust L.J. 571, 581 (1986) 23

U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* 30 (Aug. 19, 2010) 23

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on May 28, 2014 at 2:00 p.m., pursuant to Paragraph 3(f) of the Court's Standing Pre-Trial Order, the National Collegiate Athletic Association ("NCAA") will and hereby does move *in limine* as follows.

Motion *In Limine No. 1*: To Exclude Evidence and Argument About Injuries in College Sports.

The Court should exclude any evidence of or relating to injuries or the risk of suffering injuries in the course of participating in intercollegiate athletics. Such evidence is irrelevant in this antitrust case and plaintiffs' only purpose in admitting it would be to encourage the Jury to decide this case based on their sympathies for student-athletes ("SAs") who have been injured rather than on evidence of anticompetitive harm or procompetitive benefits of the challenged rules.

Simply put, this antitrust case is not about injuries to SAs. The plaintiffs do not allege that any NCAA rules or policies related to injuries or health insurance are unlawful. They do not claim and are not seeking any damages from physical injuries, such as medical expenses. They do not claim that any challenged conduct is resulting in increased injuries.

Any plaintiff who wants to pursue legal claims related to any injuries he claims to have suffered will have his separate day in court. Many such claims have been consolidated in a separate Multidistrict Litigation proceeding in the Northern District of Illinois. *In Re: NCAA Student Athlete Concussion Injury Litigation*, MDL No. 2492 (N.D. Ill). In that proceeding, plaintiffs' counsel in this case—Hausfeld LLP and Hagens Berman Sobol Shapiro LLP—are representing two sets of plaintiffs alleging claims related to injuries on behalf of a purported class of SAs that include the plaintiffs here. *See Walker v. NCAA et al.*, 1:13-cv-00293 (E.D. Tenn.) (Hausfeld); *Arrington v. NCAA et al.*, 1:11-cv-06536 (N.D. Ill.) (Hagens Berman).

However, such injuries have nothing to do with the issues in this antitrust case. Even if plaintiffs were claiming damages from or seeking to prevent personal injuries—which they are not—they could not obtain relief under the antitrust laws. *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 964 (9th Cir. 1999) ("Plaintiffs are correct that individuals that suffer personal injury cannot claim medical expenses as 'injury to business or

property,' and that the smokers are therefore barred from asserting RICO or antitrust claims.").

The plaintiffs' actual claim here is that the NCAA and others have unreasonably restrained trade by conspiring to prevent SAs from being paid for what they allege is the use of their name, image and likeness ("NIL") in live broadcasts, rebroadcasts or clips, and videogames. TCAC ¶ 7. Evidence that SAs have been injured or risk injury would not make it any more or less probable that any SA's NIL was actually used in any live broadcast, rebroadcast, clip or videogame. Fed. R. Evid. 401. And such evidence has nothing to do with the NCAA rules being challenged, because those rules have nothing to do with injuries. Thus, the evidence would not make it any more or less probable that the challenged rules harmed competition. Nor would the evidence make it any more or less probable that the challenged rules preserve a clear line of demarcation between college and professional sports, maintain competitive balance, ensure that SAs receive an education or increase output.

In these circumstances, evidence of injuries or the risk of injuries could only encourage the Jury to decide this antitrust case based on their understandable sympathy for SAs that have suffered or may suffer injuries rather than on evidence of the rules' competitive effects. That is the very definition of "unfair prejudice" under Rule 403: "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, advisory committee note. Evidence will cause "unfair prejudice" if it "'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established propositions in the case.'" *United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 403[03], at 403–36 to 403–39 (1989 ed.)).

Evidence of injuries is a paradigmatic example and courts regularly exclude it under Rule 403. *See*, *e.g.*, *Lewis v. City of Chicago*, 563 F. Supp. 2d 905, 919 (N.D. Ill. 2008) *aff'd sub nom., Lewis v. City of Chicago Police Dep't*, 590 F.3d 427 (7th Cir. 2009) (evidence of "plaintiff's difficulties in obtaining medical treatment created a substantial risk that the jury might reach a verdict out of sympathy for Plaintiff" where plaintiff had no claim that surgery was improperly denied); *Ford v. Nationwide Mut. Fire Ins. Co.*, 214 F. Supp. 2d 11, 15 (D. Me. 2002) (excluding

"sympathy-inducing testimony" about severe injuries in car accident that was the subject of insurance dispute).

It is unfortunate when any athlete at any level is injured. That is why injuries in college sports are the subject of a robust public debate. But they have no place in the trial of this antitrust case—especially where plaintiffs' counsel are litigating those issues in other cases against the NCAA. Evidence of or relating to injuries or the risk of injuries to SAs should be excluded.

Motion *In Limine No. 2*: To Exclude Evidence and Arguments about Licensing Unrelated to Live Broadcasts, Rebroadcasts or Clips, or Videogames.

The Court should exclude any evidence relating to licensing for any product other than live broadcasts, rebroadcasts or clips of game footage, and videogames. Plaintiffs have confirmed in open Court these are the only three kinds of licensing at issue in this case. Evidence regarding jerseys, apparel, bobble heads, or other merchandise or memorabilia should be excluded.

At the very outset of this Court's hearing on the parties' motions for summary judgment, plaintiffs' counsel represented to Your Honor that this case is about alleged restraints on licensing of SAs' NIL for three purposes—and three purposes only: (1) live broadcasts, (2) rebroadcasts or clips of game footage, and (3) videogames:

> THE COURT: So what we have before us at the moment, and we've got some serious case management questions, but we will talk about that later, but what we have at the moment is only the antitrust claims, ***only the antitrust plaintiffs only against NCAA and only about live broadcast, archival clips, and video games***, and we have claims for damages and for injunction.
>
> ***MR. HAUSFELD. Yes, Your Honor.***
>
> ….
>
> ***THE COURT: Only that, no more than that***, no less than that?
>
> ***MR. HAUSFELD: I think you have it correct, Your Honor.***

Summ. J. Hr'g Tr. 4:17-5:4, Feb. 20, 2014 (emphases added).

The individual plaintiffs seek damages as to live broadcasts, rebroadcasts or clips of game footage, and videogames—and not for any restraint on licensing their NIL for any other purpose. This Court's definition of the injunctive class includes only current or former SAs "whose images, likenesses and/or names may be, or have been, included or could have been included . . . in ***game***

footage or ***in videogames***." Dkt. No. 1025 at 47-48 (emphasis added). Thus, current and former SAs can be members of the class even if their NIL has never been used in any merchandise and even if the NCAA member institution they attended never sold a jersey related to them.

Evidence related to jerseys or other merchandise is irrelevant because—as plaintiffs told this Court—this antitrust case is not about any restriction on SAs' ability to license their NIL for any of these purposes. And even if evidence of jerseys, apparel and other merchandise were relevant, it is far more likely to mislead, confuse and overburden than assist the Jury.

Since plaintiffs are not complaining about any restriction on their ability to license their NIL for merchandise, their only purpose in introducing evidence of these products would be to mislead the Jury into believing that NCAA member institutions are selling commercial products using the NIL of current SAs. That would be would be classic "unfair prejudice," Fed. R. Evid. 403, because the claim is demonstrably false. As NCAA officials have testified under oath, NCAA rules "generally prohibit[] NCAA member institutions from selling commercial products that utilize the name, image or likeness of a current student-athlete. For example, schools may not sell t-shirts or posters that feature current student-athletes, nor may they sell replica jerseys with the names of current student-athletes." *See* Dkt. No. 944-7 (Lennon Decl. ¶ 18). Indeed, this is clear from the face of the NCAA Bylaws: "Items that include an individual student-athlete's name, picture or likeness (e.g., ***name on jersey, name or likeness on a bobblehead doll***), other than informational items (e.g., media guide, schedule cards, institutional publications), ***may not be sold***." *See* Dkt. No. 944-2 (Division I Manual at 68, Bylaw 12.5.1.1(h)) (emphases added).

A sideshow of explaining rules regarding products that are ***not*** in the case will add to the Jury's already challenging task of making sense of what ***is*** in the case. The Jury will be instructed to apply complex antitrust principles to 18 individual plaintiffs, a class of current and former SAs from many decades at hundreds of different NCAA member institutions, and licensing for what plaintiffs allege is the use of their NIL in three different ways. If evidence of jerseys, apparel and other merchandise is admitted, the NCAA will have to introduce still more evidence that NCAA rules prohibit member institutions from using SAs' NIL in these products and that these products do not use SAs' names or images. Thus, the Jury will have to consider evidence about other kinds

of licensing, but only for a limited purpose, while being careful not to base their decision upon it because those products are not at issue in the case.

Plaintiffs are not complaining that they cannot license their NIL for jerseys, apparel, bobble heads or other merchandise or memorabilia. They cannot complain if evidence regarding these products is excluded—and it should be.

Motion *In Limine No.* 3: To Exclude References to the Chicago Regional NLRB Director's Decision Regarding College Athlete Unionization.

Plaintiffs should be precluded from introducing the recent decision of the Chicago Regional NLRB director in *Northwestern University and College Athletes Players Ass'n*, No. 13-RC-121359 (NLRB Mar. 26, 2014). Although the NCAA was not a party to the NLRB proceeding, plaintiffs have twice asked this Court to consider this decision in connection with the parties' summary judgment motions, which suggests they will do the same at trial. Dkt. Nos. 1016, 1023, 1024, 1027. Plaintiffs have identified the decision on their exhibit list, *see* Trial Exhibit 2098, and plaintiffs have indicated that they plan to file a motion *in limine* seeking permission to admit this decision. This request should be denied. The NLRB decision is hearsay that plaintiffs want to use to suggest to the Jury that some other authority has already decided for them that SAs are no different than professional athletes. That is improper and the NLRB decision should be excluded. Nor should plaintiffs' experts be able to refer to the decision under Rule 703.

To begin with, the Regional Director's *legal* conclusion that Northwestern football SAs are "employees" for purposes of the National Labor Relations Act ("NLRA") is hearsay because it is not a "factual finding." The Ninth Circuit has squarely held that "[p]ure legal conclusions are not admissible as factual findings under" the public records exception for "factual findings from a legally authorized investigation." Fed. R. Evid. 803(8)(A)(iii); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010). Thus, the Ninth Circuit held that legal conclusions in a Department of Labor report were inadmissible "for the obvious reason that a legal conclusion is not a factual statement." *Sullivan*, 623 F.3d at 777. So, too, with the NLRB Regional Director's conclusion that Northwestern football SAs are "employees" for purposes of the NLRA.

Moreover, the NLRB decision is legally irrelevant here because the definition of

"employee" under the labor laws is unrelated to any disputed issue in this Sherman Act case.

The NLRB decision's *factual findings* are also inadmissible hearsay. *Rambus, Inc. v. Infineon Technologies AG*, 222 F.R.D. 101 (E.D. Va. 2004), is closely on point. The Court there held that an Initial Decision of an Administrative Law Judge at the Federal Trade Commission ("FTC") was inadmissible hearsay for two reasons. *First*, the FTC decision was "not the type of document subject to admission under Rule 803(8)(C)." *Id.* at 109. That was because the "Initial Decision from the FTC proceedings [wa]s currently being reviewed by the full Commission" which had the authority to 'adopt, modify, or set aside the findings, conclusions, and the rule or order contained in the initial decision.'" *Id.* at 108 (quoting 16 C.F.R. § 3.54(b)). This "lack of finality and the presence of an ongoing appeal foreclose a determination that the Initial Decision constitutes an agency's 'factual finding.'" *Id*.

Second, the FTC decision "lack[ed] the indicia of trustworthiness necessary for its admission under Rule 803(8)(C). *Id.* at 109. According to the Court, "the fact that the Initial Report is subject to *de novo* review and thus is preliminary in nature also casts doubt upon its 'trustworthiness.'" *Id.* at 108. Further, the "'trustworthiness' of the Initial Decision is significantly undercut by the absence from the FTC proceedings of the party against whom the ALJ's report is sought to be here admitted." *Id.*

The Court acknowledged that some courts have held that agency decisions can qualify for the public record exception. However, the Court ***distinguished*** these cases because "significantly different" circumstances "counsel[ed] a different result for several reasons." *Id.*

This case presents the same circumstances and requires the same result. The NCAA was not even a party to the NLRB proceeding, and the Board has granted review of the Regional Director's decision because "it raises substantial issues warranting review." *See* Board Decision at 1, *Northwestern University and College Athletes Players Ass'n*, No. 13-RC-121359 (NLRB Apr. 24, 2014). Indeed, the Board seeks briefing during the trial of this case on, among other issues, "[w]hat test should the Board apply to determine whether grant-in-aid scholarship football players are 'employees'" and "what is the proper result here, applying the appropriate test?" *See id.*, Notice to File Briefs at 1 (NLRB May 12, 2014). Like the Court in *Infineon*, we have found "no

decision in which a preliminary administrative report, then undergoing a *de novo* review, has been admitted, over objection, under" the public records exception. 222 F.R.D. at 108 n.10.

Even if the NLRB decision were not hearsay, it should be excluded under Rule 403 because, like the FTC decision in *Infineon*, the Jury "likely would give undue weight to the findings of the ALJ" and the measures to mitigate that risk would "create confusion of the issues and would create a serious risk of misleading the jury." *Id.* at 110 (excluding FTC decision under Rule 403 even if it was not hearsay). After hearing that a government official has concluded that SAs at one college are "employees" under the NLRA, the Jury may "find it difficult to evaluate independently" whether there are differences between SAs and professional athletes. *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1500 (9th Cir. 1986) (noting risk of "unfair prejudice" from EEOC determination); *see also*, *e.g.*, *Johnson v. Am. Honda Motor Co., Inc.*, No. CV 10-126-M-JCL, 2012 WL 1067103, at *2 (D. Mont. Mar. 28, 2012) (admitting ALJ report "would result in the substantial possibility of unfair prejudice by making it extremely difficult for the jury to conduct an independent evaluation"). In *Hynix Semiconductor Inc. v. Rambus, Inc.*, Nos. CV-00-20905RMW, C-05-00334 RMW, C-06-00244 RMW, 2008 WL 282376 (N.D. Cal. Jan. 28, 2008), Judge Whyte excluded a decision of the full FTC (a decision that reversed the Initial Decision at issue in *Infineon*). The court was "very concerned about the undue weight or even *de facto* collateral estoppel effect that a jury would accord to the FTC's liability opinion." *Id.* at *4.

Explaining or instructing the Jury about what the NLRB decision means—and does not mean—will create more prejudice, not less. The NLRB decision involved a novel labor law question. The Court will have to explain that issue to the Jury—while also explaining that the NLRA is a separate statute that is different from the antitrust laws and is not at issue here. Further, the full NLRB in Washington is reviewing the decision and either party could still appeal to the Circuit Court of Appeals. *See Hynix*, 2008 WL 282376, at *4 (Whyte, J.) (excluding FTC decision under Rule 403 because "[t]here is no guarantee that the Commission's opinion will survive" further review). The Court will have to explain the role of the NLRB Regional Director, the administrative fact-finding process, the parties' rights to appeal, and the potential effect of state laws that prohibit unionization by public employees.

"One can hardly envision a more confusing and misleading scenario. Nor can one conjure a more wasteful exercise." *Infineon*, 222 F.R.D. at 111. Evidence in an antitrust case "is certainly not simple, and the instructions, even without introduction of [an administrative law decision], will be quite complex. It would be utterly wasteful, even if manageable at all, to overlay that evidence and those instructions with . . . a series of mini-trials respecting the reliability of the findings in" the NLRB decision. *Id.* The NLRB decision should be excluded.

Motion *In Limine No.* 4: To Exclude Reports of Third-Party Observers and Media About Collegiate Athletics.

Plaintiffs should be precluded from introducing evidence or argument based on hearsay statements in the media or by advocacy groups such as the Knight Commission, the Drake Group or the National College Players Association. There is a robust public debate going on about college sports—on campus and in the blogosphere, in the newspapers and on ESPN, at various "commissions" and in the halls of Congress. But the Jury in this case must decide the issues before it based on competent evidence admissible in this Court. Third-party opinions and judgments are not such evidence and should be excluded under Fed. R. Evid. 402, 403 and 802.

Plaintiffs' submissions to this Court and the parties' pretrial meet and confer on this motion *in limine* strongly suggest that plaintiffs intend to turn reporters and advocacy groups into witnesses by introducing what they have written outside the courtroom. For example, plaintiffs have proffered a report by the Knight Commission on Intercollegiate Athletics entitled, "College Sports 101: A Primer on Money, Athletics and Higher Education in the 21st Century." Trial Exhibit 2286. Plaintiffs have also proffered numerous other reports and policy papers by the Knight Commission. *See* Trial Exhibits 2280, 2282-2285, 2287. And, as set forth below in Motion No. 6, plaintiffs experts' reports are replete with quotations from these and similar sources.

All such evidence is classic hearsay. It is well established that "newspaper articles do not fall within any exception to the hearsay rule." *Doe v. Texaco, Inc.*, No. C06-02820 WHA, 2006 WL 2850035, at *3 (N.D. Cal. Oct. 5, 2006); *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1090 (C.D. Cal. 2005) ("Generally, newspaper articles are considered hearsay under Rule 801(c) when

offered for the truth of the matter asserted."); *see also United States v. Resnick*, 594 F.3d 562, 570 n.4 (7th Cir. 2010) (book excerpts were "certainly hearsay"); *United States v. Baker*, 432 F.3d 1189, 1211 n.23 (11th Cir. 2005) (news article was inadmissible as double hearsay of reporter's account of what eyewitnesses stated); *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993) (same).

Quotations within news accounts are hearsay, too, *even if the quoted statements would otherwise be admissible under a hearsay exception*. Thus, press accounts of what NCAA officers or employees have said are also hearsay—even if on their own they would be admissible as party admissions. *See Larez v. City of Los Angeles*, 946 F.2d 630, 641-42 (9th Cir. 1991) (admitting newspaper articles quoting LAPD Chief was reversible error because they "were offered for the truth of the matter asserted: that [the police chief] did in fact make the quoted statement"). The only way to admit these kinds of quotations from news articles would be to call the reporters to testify that the quoted individuals actually made the statements quoted.

Reports issued by advocacy groups such as the Knight Commission and the "National College Players Association" are also classic hearsay. *See*, *e.g.*, *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209 (NGG)(MDG), 2009 WL 1312112, at *3 (E.D.N.Y. May 8, 2009) (excluding "policy paper" by State Coalition for Adult Home Reform as inadmissible hearsay).

In addition, evidence from these groups should be excluded because much of their work concerns issues that the Jury in this case will not be asked to decide and is therefore irrelevant. Fed. R. Evid. 401. And to the extent that these groups have examined issues related to this case, evidence of judgments made by groups with the (often false) patina of officialdom would distract and confuse the Jury in making its judgments about those issues. Fed. R. Evid. 403.

In short, plaintiffs cannot introduce evidence of what reporters, interested observers, or critics have written or said outside the courtroom about college sports. Nor, as set forth below in Motion No. 6, can plaintiffs do so through their experts.

Motion *In Limine No.* 5: To Bar Admission of Walter Byers' Book "Unsportsman-Like Conduct".

A book authored by former NCAA President Walter Byers following his retirement is inadmissible hearsay not subject to any exception.

Plaintiffs and their experts have repeatedly cited excerpts from this book. *See*, *e.g.*, Dkt. No. 896-7 at 9; Dkt. No. 898-20 at 3-4, 26; Dkt. No. 898-28 at 17. In the pretrial meet and confer, plaintiffs confirmed that they intend for their experts to rely at trial on statements in the book.

However, excerpts from a book written and published outside the courtroom are "certainly hearsay" if offered to prove the truth of their contents. *Resnick*, 594 F.3d at 570 n.4; *see also Rouse v. Duke Univ.*, 914 F. Supp. 2d 717, 724 (M.D.N.C. 2012) *aff'd*, 535 F. App'x 289 (4th Cir. 2013) ("excerpt from a book" was inadmissible hearsay); *Woodfox v. Cain*, No. 06-789-JJB, 2012 WL 1867089, at *4 (M.D. La. May 22, 2012) ("The biography of Judge Ramshur is both irrelevant and hearsay, and therefore must be excluded."); *Brumley v. Albert E. Brumley & Sons, Inc.*, No. 3:08-CV-1193, 2010 WL 1439972, at *6 (M.D. Tenn. Apr. 9, 2010) (noting "significant hearsay problems" with "book excerpts"); Fed. R. Evid. 802.

At summary judgment, plaintiffs argued that the contents of Byers' book were admissible for their truth because Byers was deposed by written question in this matter and "confirmed" the statements written in the book. Dkt. No. 957-1 at 2. But Plaintiffs chose not to designate any of that deposition testimony by written question for this trial. Further, even if they had, Byers' deposition testimony could only serve to authenticate the copy of his book. His deposition testimony does nothing whatsoever to eliminate the hearsay problem. *See United States v. Hagege*, 437 F.3d 943, 958 (9th Cir. 2006) (noting "the unremarkable observation that a document which is authentic may still contain inadmissible hearsay") (citing *United States v. Chu Kong Yin*, 935 F.2d 990, 1000 (9th Cir. 1991) ("The government cites no authority for the proposition that hearsay within any authenticated documents is automatically admissible. This argument confuses discrete foundational requirements for the admission of a writing; a document may be authentic, but still contain inadmissible hearsay.")). A witness cannot "confirm" his own hearsay statements and thereby render them admissible for their truth.

Even if Byers were treated as a declarant-witness at trial, his prior statements would only be admissible either to impeach his testimony, or to rehabilitate his testimony after an attempt to impeach, or if they were statements made to identify another person the witness had perceived. Fed. R. Evid. 801(d)(1). The contents of Byers' book do not meet any of these exceptions, and the

book cannot be admitted for its truth. Nor, as set forth below in Motion No. 6, can it be admitted through plaintiffs' experts.

Motion *In Limine No.* 6: To Preclude Expert Testimony by Taylor Branch and Ellen Staurowsky.

Plaintiffs' purported experts Taylor Branch and Dr. Ellen Staurowsky should be precluded from offering expert testimony. Both purported experts are on plaintiffs' trial witness list and are being proffered merely as end-run conduits for inadmissible hearsay—the kind of media and advocacy group reports discussed in Motion No. 4 above. In addition, Mr. Branch, an investigative journalist who has written a single article on college sports, cannot testify as an expert because he lacks the qualifications to serve as an expert on issues related to college sports.[1]

A. Both Taylor Branch and Ellen Staurowsky Are Conduits for Hearsay

Branch and Staurowsky's experts' reports suggest that they are vehicles for an end-run around the hearsay rules, which is not permitted under Rule 703.

For example, Dr. Staurowsky—plaintiffs' purported expert regarding amateurism—cites, among other things, fourteen articles from ESPN's website, 16 articles from *USA Today*, two reports by the Knight Commission, blogs written by college sports fans, and an Associated Press article quoting a tweet by the University of Texas football coach. Dr. Staurowsky is not relying on them for data or back-up for her own independent opinions. Rather, she is explicitly just channeling what these other people have to say. Indeed, it often appears that the opinions of plaintiffs' experts are no more than pointing to certain out-of-court statements of third parties, *e.g.*:

[1] The NCAA did not seek to strike this proffered expert testimony at summary judgment because no summary judgment issue turned on their testimony. As such, these arguments were not "evidentiary objections" or "*Daubert* Motions" required to be filed simultaneously with dispositive motions under this Court's Case Management Scheduling Orders. *See* Dkt. Nos. 246, 326. Regardless, plaintiffs would not be prejudiced by the Court's consideration of this motion *in limine* since plaintiffs will have ample time to respond to the motion. This Court has previously granted motions *in limine* to exclude expert testimony filed after this Court has ruled on summary judgment. *See*, *e.g.*, *Heltsley v. Harris*, No. 06-2626 CW, 2007 WL 2318950, at *1 (N.D. Cal. Aug. 13, 2007) (granting in part defendant's motion *in limine* to exclude expert testimony); *id.*, Dkt. No. 53 (motions *in limine* filed by *Harris* defendants on July 31, 2007); *id.,* Dkt. No. 30 (Order dated June 4, 2007 denying defendants' motion for summary judgment).

> ***A growing chorus*** of leading figures in college sports recognizes that it is untenable for universities, conferences and the NCAA to obtain ever-increasing revenues from college sports—now billions of dollars annually—while prohibiting the athletes whose efforts produce those revenues from receiving any share.

Dkt. No. 898-20 at 23 (emphasis added). Staurowsky then quotes what a variety of other people have supposedly said or written about college sports. *Id.* at 23-25. She also quotes extensively from Mr. Byers' book, which is hearsay for the reasons set forth above. *See id.* at 3-4, 26.

Likewise, Mr. Branch quotes what Mr. Byers and various college presidents and coaches have said—in some cases three-quarters of a century ago. Dkt. No. 898-28 at 9-10, 12, 16-17. Indeed, Mr. Branch's report is a veritable Russian Matryoshka nesting doll of hearsay. He purports to incorporate into his report an e-book, which was itself based on an article in *The Atlantic Monthly*, which then quotes numerous people—*including plaintiffs' counsel*—who are often just themselves repeating what others have supposedly told them. Dkt. No. 898-28 at 2. Mr. Branch also attempts to incorporate a "Three-Point Reform Agenda for Sports in Higher Education" posted on his blog.

Courts have held that this kind of testimony which does nothing more than publish hearsay to the Jury is inadmissible. *See Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1006 (9th Cir. 2001), *opinion amended on denial of reh'g*, 272 F.3d 1289 (9th Cir. 2001) (reversing jury verdict where trial court admitted expert testimony based on "newspaper articles and a few anecdotal examples, some of them clearly hearsay"); *see also Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (excluding expert testimony consisting of "by and large undergirded by hearsay statements . . . concerning Marvel's general practices towards its artists during the relevant time period"); *Barrueto v. Fernandez Larios*, No. 99-0528-CIV, 2003 WL 25782075, at *3 (S.D. Fla. Sept. 18, 2003) (excluding expert testimony by investigative journalists "offered in lieu of factual witnesses" that was a "recitation of historical facts based on information conveyed by others, much of which is hearsay").

It is true that, under Rule 703, "facts or data" that an expert has relied upon to form his or her opinion "need not be admissible for the opinion to be admitted." Fed. R. Evid. 703. A substantive expert can, for example, rely on hearsay as the basis for a conclusion. It is quite

another thing, however, for a party to use an expert as a mouthpiece for putting voluminous hearsay before a jury: "Rule 703 was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion." *Factory Mut. Ins. Co. v. Alon USA L.P.*, 705 F.3d 518, 524 (5th Cir. 2013) (citation and internal quotation marks omitted); *see also Marvel Characters*, 726 F.3d at 136 ("Although the Rules permit experts some leeway with respect to hearsay evidence, Fed. R. Evid. 703, a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.") (citation and internal quotation marks omitted).

As a leading treatise explains, "Rule 703 does not authorize admitting hearsay on the pretense that it is the basis for expert opinion when, in fact, the expert adds nothing to the out-of-court statements other than transmitting them to the jury. In such a case, Rule 703 is inapplicable and the usual rules regulating the admissibility of evidence control." 29 Charles Alan Wright & Victor James Gold, *Fed. Practice and Proc. Evidence* § 6273 (1st ed. 1997) (footnotes omitted).

Accordingly, plaintiffs' experts cannot merely report to the Jury what other people have said in reports, articles or books, what the supposed "growing chorus" of editorial writers have concluded, or a mere "recitation of historical facts based on information conveyed by others, much of which is hearsay".

The potential for undue prejudice here is very great, a danger Rule 703 explicitly recognizes: "if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. "The presumptive evidence that otherwise is inadmissible *will be kept out* unless the court determines that any potential prejudice is *substantially outweighed* by the probative value." *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1061-62 (9th Cir. 2003) (first emphasis added); *see also Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 666 (S.D.N.Y. 2007).

Plaintiffs cannot make this showing. Here, the potential prejudice from hearsay is not confined to a discrete document or piece of evidence that serves as the linchpin to an expert's

analysis. The hearsay problem in this case involves dozens of articles and reports by third-parties who quote still dozens more people. The NCAA will not have any opportunity to cross-examine any of these authors, much less any of the people quoted in them. Permitting plaintiffs' experts to repeat or summarize these statements would turn the trial into a Congressional hearing on college sports rather than an adversary proceeding under the Federal Rules of Evidence. The Rules of Evidence do not permit that result simply because a party has designated an expert who has collected together hostile press reports and blogs.

B. Mr. Branch Lacks Any Expertise or Experience Regarding College Sports

Mr. Branch should be precluded from offering expert testimony for the additional reason that he lacks the necessary expertise or experience regarding college sports.

The Federal Rules "grant expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)). When an expert "cease[s] to apply his specialized knowledge," he is "no longer testifying as an expert but rather as a lay witness." *United States v. Freeman*, 498 F.3d 893, 902 (9th Cir. 2007).

Here, however, the sole basis that Mr. Branch offers for his "expertise" in collegiate athletics is that he wrote a single article about the NCAA for *The Atlantic Monthly*, and subsequently expanded that article into an e-book and a set of recommendations on his personal website. Dkt. No. 898-28 at 2. He does not purport to have any relevant education or training, any professional experience in the field of collegiate athletics, or any other relevant expertise other than the mere fact that he has publicly opined about collegiate athletics. True, Mr. Branch is an award-winning historian, but only for his work on subjects far removed from collegiate athletics.

Courts have routinely held that such qualifications provide an insufficient foundation for the admission of expert testimony. For example, the plaintiffs in *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, who were challenging a city ordinance banning nightclubs for swingers, sought to admit the expert testimony of "an award-winning investigative journalist" regarding his "research conducted for a book on the lifestyle of swingers." 220 F. Supp. 2d 1054,

1062 (D. Ariz. 2002), *aff'd* 77 F. App'x 983 (9th Cir. 2003). The court held this testimony was inadmissible, noting that "regardless of [the witness's] accomplishments as an investigative journalist, Plaintiffs have not established that he is qualified to provide *expert* testimony regarding the sexual practices and cultural mores of swingers. . . . In the absence of any relevant expertise, [the witness's] sociological observations are merely impressionistic generalizations about the swinger lifestyle." *Id.* (emphasis in original) (citation and internal quotation marks omitted); *see also Jinro*, 266 F.3d at 1005-06 (reversing jury verdict due to trial court's admission of testimony by an expert whose qualifications were "glaringly inadequate, amounting to little more than the limited perspective of a professional investigator whose work experience had exposed him to instances of corrupt business behavior").

The mere fact that a witness has an interest in a subject, or has conducted research into the subject, does not qualify the witness as an expert. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 948 (N.D. Cal. 2010) (purported expert's "interest and study on the subjects of marriage, fatherhood and family structure are evident from the record, but nothing in the record other than the bald assurance of [the expert] suggests that [his] investigation into marriage has been conducted to the same level of intellectual rigor characterizing the practice of anthropologists, sociologists or psychologists") (citations and internal quotation marks omitted).

Simply put, Mr. Branch is not an expert on college sports simply because he wrote an article—even a long one—about the subject. That standard would mean that any of the hundreds of reporters currently writing about issues in college sports could testify as an expert. And it would mean that reporters are experts on whatever they decide to report about.

The Federal Rules of Evidence do not confer such expert status on journalists. "A journalist may be an 'expert' in gathering facts, but it will be the jury's role to determine the facts in issue in this case." *Barrueto*, 2003 WL 25782075, at *5-6 (excluding testimony of "highly experienced investigative journalist"). Mr. Branch's testimony offers nothing more than his own opinions on the basis of hearsay. Mr. Branch should be precluded from testifying as an expert.

Motion *In Limine No.* 7: To Bar Admission of Walter Byers' Deposition Testimony from the *White V. Ncaa* Case.

Plaintiffs should be precluded from introducing testimony by former NCAA President Walter Byers in *White v. NCAA*, No. CV 06-0999 VBF (C.D. Cal.). The Magistrate Judge has already held that plaintiffs cannot use Byers' testimony in *White* pursuant to Federal Rule of Civil Procedure 32(a)(8). Dkt. No. 374. For much the same reasons set forth in the Magistrate Judge's order, plaintiffs should not introduce Byers' *White* testimony under Rule 804(b)(1)(B), either.

Under Rule 804(b)(1)(B), Byers' former testimony in *White* is inadmissible hearsay unless the NCAA had "an opportunity and similar motive" to cross-examine Byers at his deposition in *White* as it would have in this case. Fed. R. Evid. 804(b)(1)(B). The "'similar motive' analysis is 'inherently a factual inquiry' based on 'the similarity of the underlying issues and on the context of the . . . questioning.'" *United States v. Duenas*, 691 F.3d 1070, 1089 (9th Cir. 2012) (quoting *United States v. Salerno*, 505 U.S. 317, 326 (Blackmun, J., concurring)); *see also SEC v. Jasper*, 678 F.3d 1116, 1128-1129 (9th Cir. 2012) (affirming exclusion of statements made during SEC investigation from later civil trial, because of the "difference in the nature of the SEC's motivation" between the investigation and the trial). At bottom, "the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness of the earlier occasion." Fed. R. Evid. 804, advisory committee note.

There are significant differences between this case and *White* that would make it unfair for plaintiffs to introduce Byers' testimony on the issues here—where the NCAA cannot fully cross-examine Byers on those issues. The *White* litigation was much narrower than this case. Unlike the plaintiffs here, the *White* plaintiffs did not challenge the core NCAA rule that SAs cannot receive any payment above the value of an athletic scholarship. Rather, the *White* plaintiffs alleged that the value of athletic scholarships as defined by NCAA rules were inadequate to cover the full cost of attending college. The plaintiffs in the *White* litigation did not seek to change NCAA rules about NIL licensing, nor did they seek a share of revenue from videogames, television broadcasting, or rebroadcasting. Accordingly, the NCAA had no motivation to cross-examine Byers regarding issues relevant to the NCAA rules about NIL licensing or NCAA

practices regarding broadcast, rebroadcast, clip or videogame licensing.

The Magistrate Judge reached the same conclusion in holding that plaintiffs could not use Byers' *White* deposition under Rule 32(a)(8). That decision is instructive because the standards for admitting prior testimony under that Rule and Rule 804(b)(1)(B) are very similar. Just as the "similar motive" analysis focuses on "the similarity of the underlying issues" and the "fairness" of holding a party to its prior cross-examination, "[a] deposition taken in an earlier case can be used in another case under Rule 32(a)(8) only if a substantial identity of issues exists between the two cases and the cross-examination conducted in the deposition 'would satisfy a reasonable party who opposes admission in the present lawsuit.'" Dkt. No. 374 at 4 (quoting *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 (9th Cir. 1982)). Indeed, while not identical, "Rule 32(a)(8) and Evidence Rule 804(b)(1) will usually lead to the same conclusion on admissibility of a deposition from a prior action." 8A Alan Wright et al., *Federal Practice and Procedure Civil* § 2150 (3d ed.).

In applying the similar Rule 32(a)(8) standard, the Magistrate Judge concluded that the NCAA "did not have an interest or motive to cross-examine Byers in *White* regarding the NCAA's rules on the use of student-athletes' names and images, as the issues in *White* focused exclusively on the NCAA's rules and regulations on financial aid." Dkt. No. 374 at 4. Indeed, in briefing before the Magistrate Judge, plaintiffs could "not reference a single instance in which the NCAA's rules on the use of student-athletes' names and likenesses were discussed during Byers' deposition in *White*." *Id.* at 4-5. The Magistrate Judge was "unconvinced that the two cases involve the same subject matter merely because both involve 'alleged unfair restrictions on players' rights, and the NCAA's justifications for the same'" as plaintiffs argued. *Id.* at 5.

White and this case lack the "similarity of the underlying issues" that is required to admit Byers' testimony in *White* under Rule 804(b)(1)(B). *Duenas*, 691 F.3d at 1089.

Motion *In Limine No.* 8: To Bar References to Wealth or Income of any Defense Witness or NCAA or University Employee.

In the parties' pretrial meet and confer, plaintiffs' counsel confirmed that they intend to offer evidence or elicit testimony about the salary of school and NCAA employees. Any such references to or evidence of the wealth or income of any defense witness or NCAA or university

employee should be excluded. The evidence is irrelevant and plaintiffs' only purpose in admitting it would be to ask the Jury to find against the NCAA by suggesting that some people who work in college sports are paid too much. That reasoning has nothing to do with the antitrust laws and the "unfair prejudice" to the NCAA of having to rebut it would substantially outweigh any probative value of admitting evidence of salaries or wealth.

The salary or wealth of a defense witness says nothing about whether trade has been unreasonably restrained. Evidence of a defense witness's salary or wealth does not shed any light on whether the NCAA rules being challenged expand or limit consumer choice or restrict or increase output. Nor would such evidence make it any more or less probable that there exists any market for any group license of NIL. The evidence is irrelevant. *See, e.g., United States v. Ferguson*, No. 3:06CR137CFD, 2007 WL 4240782, at *1 (D. Conn. Nov. 30, 2007) (excluding salary of AIG executive as irrelevant); *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, No. 02 CIV. 9144 (PAC), 2006 WL 988143, at *6 (S.D.N.Y. Apr. 13, 2006) (excluding evidence of witness's wealth as "clearly irrelevant"). Plaintiffs' aim must be to suggest to the Jury that it should find against the NCAA because people who work in college athletics earn more than they deserve. Those incorrect policy arguments have voices in the public discussion of college sports, but they have no basis in antitrust law.

The Supreme Court has warned, particularly in antitrust cases, that such "appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940); *see also Garcia v. Sam Tanksley Trucking, Inc.*, 708 F.2d 519, 522 (10th Cir. 1983) ("Reference to the wealth or poverty of either party, or reflection on financial disparity, is clearly improper argument."); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) (granting a new trial in part because "[c]ounsel repeatedly made reference to the wealth of the defendants in contrast to the relative poverty of the plaintiff"); *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970) ("[S]uggesting that the defendant should respond in damages because he is rich and the plaintiff is poor, are grounds for a new trial."). *Cf. Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir.

1977) ("[T]he financial standing of the defendant is inadmissible as evidence in determining the amount of compensatory damages to be awarded.").

Motion *In Limine No.* 9: To Exclude the Admission of Student-Athlete Eligibility Forms Authored by Schools or Conferences.

Plaintiffs should be barred from introducing student-athlete eligibility forms used by NCAA member institutions or conferences, other than the NCAA-approved student-athlete eligibility forms. There is no evidence that the NCAA was aware of the contents of any such forms, much less that it had any role in drafting or contributing to the use of any such forms. Nor is there any evidence that any NCAA rule required NCAA member institutions to use any of these forms or that there was any association-wide agreement to do so. The fact that there is evidence that only some institutions used their own forms shows exactly the opposite. Accordingly, there is no evidence that any institution-specific forms were part of the alleged antitrust conspiracy in this case. Evidence of such forms is therefore irrelevant to the facts and issues in this case, and would serve only to cause unfair prejudice by confusing the issues. Fed. R. Evid. 401, 403.

Motion *In Limine No.* 10: To Exclude Evidence Concerning Adjudicated or Alleged Criminal Conduct Unrelated to the Rules at Issue Here.

Plaintiffs should be precluded from introducing evidence pertaining to any adjudicated or alleged criminal conduct by any SA or any NCAA member institution that does not consist of a violation of the NCAA rules challenged here. This case is about a discrete set of NCAA rules that prohibit payments to SAs for the use of their NIL and whether those rules violate the antitrust laws. This case is not about whether SAs or certain university employees have violated—or have been investigated in connection with potential violations—of other laws.

During meet-and-confer, plaintiffs only identified one episode of alleged criminal conduct regarding which they intend to introduce evidence at trial: the indictment of Professor Julius Nyang'oro, an professor at the University of North Carolina ("UNC") who was accused of offering fraudulent courses. Evidence that some SAs or university employees have violated or have been accused of violating other laws has no place in this trial. Such evidence is irrelevant and, in any event, merely "'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than

the established propositions in the case.'" *Skillman*, 922 F.2d 1370 at 1374 (citation omitted). As such, the evidence is inadmissible under Federal Rule of Evidence 403.[2]

"It is hornbook law that indictments cannot be considered as evidence . . . ." *United States v. Cox*, 536 F.2d 65, 72 (5th Cir. 1976). Indeed, plaintiffs cannot use the indictment to prove the truth of any alleged academic impropriety at UNC because the indictment is hearsay. *See*, *e.g.*, *Levinson v. Westport Nat'l Bank*, Nos. 3:09CV269(VLB), 3:09-CV-1955(VLB), 3:10CV261(VLB), 2013 WL 2181042, at *1-2 (D. Conn. May 20, 2013); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288 DLC, 2005 WL 375315, at *9 (S.D.N.Y. Feb. 17, 2005); *Ruffalo's Trucking Serv. v. Nat'l Ben-Franklin Ins. Co.*, 243 F.2d 949, 953 (2d Cir. 1957) ("The indictment, since it was only hearsay, was clearly inadmissible for any purpose.").

The indictment of Mr. Nyang'oro is also irrelevant. The conduct of which Mr. Nyang'oro is accused is not alleged to have been part of the supposed antitrust conspiracy to preclude SAs from licensing the rights to use their NIL. Rather, plaintiffs' only purpose in introducing the indictment would be to "put the Government's imprimatur" on their allegations, *In re WorldCom,* 2005 WL 375315, at *9, and to "provoke[]" the Jury's "instinct to punish," *Skillman*, 922 F.2d at 1374 (citation omitted), the NCAA for alleged academic impropriety at UNC.

That is completely improper. Indeed, courts have excluded indictments even where the accused have later pled guilty and even where their conduct alleged formed the basis for the plaintiffs' claims, which is not the case here. *See*, *e.g.*, *In re Dreier LLP*, Nos. AP 10-03493 (SMB), 10-05447 (SMB), 2014 WL 47774, at *10 (Bankr. S.D.N.Y. Jan. 3, 2014) (indictment of convicted Ponzi scheme architect not admissible in action to recover fraudulent transfers); *Levinson*, 2013 WL 2181042, at *1-2 (excluding indictment of Bernie Madoff and associates in action to recover fraudulent transfers); *In re WorldCom*, 2005 WL 375315, at *9 (excluding evidence of indictments of convicted WorldCom executives in trial of securities fraud action against WorldCom).

[2] During pretrial meet and confer, plaintiffs did agree that they would not attempt to offer evidence concerning sexual abuse at Penn State, but they would not agree to a blanket exclusion on references to criminal conduct.

Even in a criminal case against an indicted defendant, "[t]he Government cannot rely on an indictment to prove its case at trial," so plaintiffs "here cannot rely on the Government's indictment to prove theirs." *Id.* at *9. For the same reasons, plaintiffs should not be able to introduce evidence of or relating to any other alleged or adjudicated criminal conduct, either.

Motion *In Limine No.* 11: To Exclude References to Whether the NCAA Called any Current or Former Student-Athletes.

Plaintiffs should not be permitted to argue or refer to the fact that the NCAA has not called as witnesses any current or former football or men's basketball SA other than employees of the NCAA or its member institutions (who are not as a result class members). Doing so would improperly mislead the Jury into thinking that the NCAA was unable to persuade any current or former football or men's basketball SA to testify. Fed. R. Evid. 403. That is not the case. Rather, the applicable Rules of Professional Conduct prohibited counsel for the NCAA from contacting any absent class members to discuss the issues in this case.

The NCAA should not be prejudiced by its counsel's compliance with its ethical obligations. Thus, plaintiffs should not tell the Jury that the NCAA could not persuade class members to testify unless they are willing to give the NCAA the opportunity to speak with them. Indeed, it would be appropriate for the Jury to be told that the NCAA was barred from communicating with all former and current men's basketball and football SAs who are part of the certified class.

If plaintiffs will permit the NCAA's counsel to contact members of the class, they should inform the NCAA and the Court so that the parties can agree upon procedures for ensuring class members' rights are protected and the NCAA can pursue communications to prepare for trial.

Motion *In Limine No.* 12: To Preclude Evidence or Argument About Supposedly Less Restrictive Alternatives that Dr. Noll has not Analyzed.

Plaintiffs should be precluded from offering evidence or argument about less restrictive alternatives other than those that their antitrust expert, Dr. Noll, has analyzed based on evidence of what occurs in other sports.

To the extent the Court holds the jury must apply full rule of reason analysis,[3] plaintiffs must "show that 'any legitimate objectives can be achieved in a substantially less restrictive manner.'" Dkt. No. 1025 at 7-8 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)). The Ninth Circuit requires plaintiffs also to "show that 'an alternative is substantially less restrictive *and* is virtually as effective in serving the legitimate objective without significantly increased cost.'" *County of Tuolumne v. Sonora Cmty. Hosp.,* 236 F.3d 1148, 1159 (9th Cir. 2001) (first emphasis in original) (other emphasis omitted) (quoting 10 Phillip E. Areeda, *Antitrust Law* ¶ 1760d, at 369 (1991)).

In addition, the Court "must place some reasonable bounds on the jury's ability to speculate about possible alternatives." 11 Phillip E. Areeda, *Antitrust Law* ¶ 1913b, at 375 (2011) ("Areeda"). Specifically:

> [P]laintiffs cannot be permitted to offer possible less restrictive alternatives whose efficacy is mainly a matter of speculation. A skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements. Proffered less restrictive alternatives should either ***be based on actual experience in analogous situations elsewhere*** or else be fairly obvious. Tending to defeat such an offering would be the defendant's evidence that the proffered alternative has been tried but failed, that it is equally or more restrictive, or otherwise unlawful.

Id. at 375-76 (emphasis added). Absent a bar on speculation, "the imaginations of lawyers" would be guaranteed to "conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade[,]" and "courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide 'adequate' protection for legitimate commercial interests." *Am. Motor Inns, Inc. v.*

[3] The NCAA preserves, and does not waive, its position that the less restrictive alternative analysis does not apply to the NCAA's amateurism rules, which are necessary to the core product of its members' joint venture: a unique, amateur collegiate model of athletics. *See*, *e.g.*, Dkt. No. 926 at 8-9; Dkt. No. 978 at 8. Indeed, the Supreme Court has held that this extended analysis "has no application" to restraints that "involve[] the core activity of the joint venture itself," *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006), and that, instead, the rule of reason analysis can be applied to core joint venture activity in "the twinkling of an eye." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010).

Holiday Inns, Inc., 521 F.2d 1230, 1249-50 (3d Cir. 1975).[4] Juror speculation on less restrictive alternatives would be especially improper here, because, as the Court has stated, "the NCAA must be given some leeway to adopt anticompetitive rules without running afoul of the Sherman Act." Order re Mot. to Dismiss, Dkt. No. 876 at 10; *see also id*. at 15 ("*Board of Regents* gives the NCAA 'ample latitude' to adopt rules preserving 'the revered tradition of amateurism in college sports.'") (quoting *NCAA v. Bd. of Regents of Univ. of Okla*., 468 U.S. 85, 120 (1984)).

Hence, (1) less restrictive alternatives must be based on "analogous situations elsewhere," 11 Areeda ¶ 1913b, at 375, and (2) the NCAA "needs ample latitude" to preserve amateurism, 468 U.S. at 120. This means that plaintiffs can offer evidence and argument of less restrictive alternatives only to the extent that their antitrust experts analyzed such alternatives based on actual experiences in other sports.

Here, plaintiffs' antitrust experts have clearly set forth these alternatives and their bases in "actual experience." In his report, under the heading "*A Less Restrictive Alternative*," Dr. Noll set forth two very specific methods "to address whether the objectives that are served by a reasonable definition of amateurism could be achieved by a less restrictive rule." Dkt. No. 896-5 at 134.

First, Dr. Noll proposes to "rely on the definitions of amateurism that have been adopted by other organizations." *Id.* He opines that "[t]he policies in other amateur sports identify less restrictive alternatives that the NCAA could have adopted." *Id.* Thus, one source of a potentially less restrictive alternative is "analogous situations elsewhere" in amateur sports. 11 Areeda ¶ 1913b, at 375.

Second, Dr. Noll proposes that "[r]evenues from licensing the bundle of the intellectual

[4] *See also M&H Tire Co., Inc. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 987 (1st Cir. 1984) (rejecting "less restrictive alternatives" that "are more hypothetical than practical"); Phillip Areeda, *The Rule of Reason-A Catechism on Competition*, 55 Antitrust L.J. 571, 581 (1986) ("The other troubling element of the less-restrictive alternative analysis is where to stop. If four ventures of five firms would be better than one venture of twenty firms, wouldn't five ventures of four firms each be even better and so on? This is a highly qualitative judgment for which there are no clear answers."); *cf.* Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* 30 (Aug. 19, 2010) ("Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.").

property of a college and the NILs of its team members would be divided between a college and its team members in accordance with common practices in other markets, and then the team share would be divided among team members in equal shares, again in accordance with common market practices." Dkt. No. 896-5 at 134. The "common market practices" for distributing licensing revenue that Dr. Noll has examined are "practices in professional sports." *Id.* at 88-89.

In turn, "rely[ing] upon the liability opinion of Dr. Noll," Rascher Merits Report at ¶ 11, Dr. Rascher opines that "[m]ajor sports leagues"—in particular, "the experience of players in the NFL and NBA" —"provide reasonable and non-speculative yardsticks for damages." *Id.* ¶ 6. Thus, another source of a potentially less restrictive alternative is supposedly "analogous situations" in professional sports.

The jury must decide whether doing what other sports organizations do would be "as effective," *Cnty. of Tuolomne*, 236 F.3d at 1159, to the NCAA's "maintenance of a revered tradition of amateurism in college sports" and to the "preservation of the student-athlete in higher education." *Bd. of Regents*, 468 U.S. at 120. Plaintiffs cannot ask the Jury to "conjure up some method," *Am. Motor Inns,* 521 F.2d at 1249, for achieving those ends that has no basis in what any other sports organization—amateur or professional—has ever done. The Court should bar plaintiffs from offering evidence or argument about any supposed less restrictive alternative other than those that their experts have analyzed based on the actual practices of other sports.

Motion *In Limine No.* 13: To Exclude Testimony of Mary Willingham if the Court Excludes the Testimony of NCAA Witnesses not Listed by Name in Rule 26 Disclosures.

Plaintiffs during meet and confer indicated that they intend to file a motion to exclude testimony of any NCAA's witnesses not named by name in the NCAA's Rule 26 disclosures and not deposed in this case, even if that witness submitted a declaration in support of summary judgment. The NCAA opposes that motion on a variety of grounds to be set forth in its forthcoming opposition brief. For instance, the NCAA believes that the disclosure of witnesses as declarants on summary judgment six months before trial is more than adequate notice for a trial witness. In addition, the NCAA has offered to make the identified witnesses available for a deposition, if possible, prior to their testimony at trial. This offer of a deposition should cure any

alleged prejudice.

However, in the event the Court disagrees and is inclined to grant plaintiffs' motion *in limine*, the NCAA moves in the alternative to exclude the testimony of Mary Willingham, a witness on plaintiffs' live trial witness disclosure who was not listed in plaintiffs' Rule 26 disclosures and who was not deposed, but who did submit a declaration in support of plaintiffs' motion for summary judgment. The NCAA asked to take Ms. Willingham's deposition upon learning of plaintiffs' position about allegedly improper late disclosure of witnesses, but plaintiffs to date have not agreed. The NCAA asserts that all witnesses disclosed through declarations on summary judgment are proper live trial witnesses, but if the Court disagrees, the NCAA asks that the Court order a deposition of Ms. Willingham prior to trial, or in the alternative, order that Ms. Willingham be stricken from plaintiffs' witness list.

CONCLUSION

For the foregoing reasons, the Court should grant the NCAA's motions *in limine*.

Respectfully submitted,

DATED: May 14, 2014

MUNGER, TOLLES & OLSON LLP

By: */s/ Caroyln Hoecker Luedtke*
Caroyln Hoecker Luedtke

Attorneys for Defendant
National Collegiate Athletic Association

GLENN D. POMERANTZ (State Bar No. 112503)
glenn.pomerantz@mto.com
KELLY M. KLAUS (State Bar No. 161091)
kelly.klaus@mto.com
CAROLYN HOECKER LUEDTKE (State Bar No. 207976)
carolyn.luedtke@mto.com
ROHIT K. SINGLA (State Bar No. 213057)
rohit.singla@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

GREGORY L. CURTNER (*Pro Hac Vice*)
gcurtner@schiffhardin.com
ROBERT J. WIERENGA (State Bar No. 183687)
rwierenga@schiffhardin.com
KIMBERLY K. KEFALAS (*Pro Hac Vice)*
kkefalas@schiffhardin.com
SCHIFF HARDIN LLP
350 Main St., Suite 210
Ann Arbor, MI 48104
Telephone: (734) 222-1500
Facsimile: (734) 222-1501

Attorneys for Defendant
National Collegiate Athletic Association

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

IN RE NCAA STUDENT-ATHLETE NAME AND LIKENESS LICENSING LITIGATION,	Case No. 09-CV-1967-CW **[PROPOSED] ORDER GRANTING DEFENDANT NCAA'S MOTIONS *IN LIMINE***

The Court, having considered Defendant NCAA's Motions *in Limine*, and the submissions of the Antitrust Plaintiffs ("APs") in connection therewith, HEREBY ORDERS that the Motions are GRANTED as follows:

NCAA's Motion *in Limine* No. 1 is GRANTED. APs shall be precluded from offering any evidence of or relating to injuries or the risk of suffering injuries in the course of participating in intercollegiate athletics.

NCAA's Motion *in Limine* No. 2 is GRANTED. APs shall be precluded from offering any evidence of relating to licensing (or inability to license) any product other than live broadcasts, rebroadcasts or clips of game footage, and videogames, including but not limited to jerseys, apparel, bobble heads, or other merchandise or memorabilia.

NCAA's Motion *in Limine* No. 3 is GRANTED. APs shall be precluded from introducing or referencing the recent decision of the Chicago Regional NLRB director in *Northwestern University and College Athletes Players Ass'n*, No. 13-RC-121359 (NLRB Mar. 26, 2014).

NCAA's Motion *in Limine* No. 4 is GRANTED. APs shall be precluded from introducing evidence or argument based on hearsay statements in the media or by advocacy groups such as the Knight Commission, the Drake Group or the National College Players Association. In addition, APs' experts shall be precluded from quoting or referring to any such statements.

NCAA's Motion *in Limine* No. 5 is GRANTED. APs shall be precluded from introducing Walter Byers' book *Unsportsmanlike Conduct*. In addition, APs' experts shall be precluded from quoting or referring to this book.

NCAA's Motion *in Limine* No. 6 is GRANTED. Dr. Ellen Staurowsky and Taylor Branch shall be precluded from testifying at trial.

NCAA's Motion *in Limine* No. 7 is GRANTED. APs shall be precluded from introducing testimony by former NCAA President Walter Byers in *White v. NCAA*, No. CV 06-0999 VBF (C.D. Cal.).

NCAA's Motion *in Limine* No. 8 is GRANTED. APs shall be precluded from offering any evidence of or relating to, or making any reference to, the wealth or income of any defense witness, NCAA employee or university employee.

NCAA's Motion *in Limine* No. 9 is GRANTED. APs shall be precluded from introducing student-athlete eligibility forms used by NCAA member institutions or conferences, other than the NCAA-approved student-athlete eligibility forms.

NCAA's Motion *in Limine* No. 10 is GRANTED. APs shall be precluded from introducing evidence pertaining to any adjudicated or alleged criminal conduct by any SA or any NCAA member institution that does not consist of a violation of the NCAA rules challenged here, including but not limited to the indictment of Professor Julius Nyang'oro of the University of North Carolina.

NCAA's Motion *in Limine* No. 11 is GRANTED. APs shall be precluded from referring to or making arguments regarding the fact that the NCAA has not called as witnesses any current or former football or men's basketball student-athlete other than employees of the NCAA or its member institutions.

NCAA's Motion *in Limine* No. 12 is GRANTED. APs shall be precluded from offering evidence or argument about less restrictive alternatives other than those that their antitrust expert, Dr. Noll, has analyzed and included in his reports based on evidence of what occurs in other sports.

[*If necessary:* NCAA's Motion *in Limine* No. 13 is GRANTED. [APs shall make Mary Willingham available for a deposition prior to trial.] [APs shall be precluded from calling Mary Willingham as a witness at trial.]]

IT IS SO ORDERED.

Dated: _____

_____
HON. CLAUDIA WILKEN
Chief United States District Judge

Exhibit 4

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD O'BANNON, et al.

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; ELECTRONIC ARTS INC.; and COLLEGIATE LICENSING COMPANY,

Defendants.
/

No. C 09-3329 CW

ORDER RESOLVING MOTIONS IN LIMINE (Docket Nos. 1063, 1069)[1]

On May 28, 2014, the Court held a pretrial conference and heard arguments regarding the parties' motions in limine. After considering the parties' submissions and oral argument, the Court resolves the motions in limine as set forth below.

I. Plaintiffs' Motions in Limine

A. No. 1: Motion to Exclude Non-Expert Live Witnesses from Testifying in the NCAA's Case Who Were Not Made Available for Live Testimony in Plaintiffs' Case-in-Chief

Plaintiffs move to preclude three of the NCAA's witnesses -- Mark Emmert, David Berst, and Wallace Renfro -- from testifying at trial unless the NCAA makes them available to testify during Plaintiffs' case-in-chief.

This motion is DENIED. As explained at the pretrial conference, each live witness will only be called to testify once, at which time each side will conduct both its direct and cross-examinations. Accordingly, it is not necessary to ensure that the

[1] All citations in this order to docket numbers refer to the docket in case no. 09-1967.

NCAA's non-expert witnesses be made available to testify during Plaintiffs' case-in-chief. Plaintiffs will have an opportunity to question these witnesses fully when the NCAA presents its defense case. If the NCAA does not intend to call Mr. Renfro or Mr. Berst, then it shall notify Plaintiffs by 11:00 a.m. on June 4, 2014, as set forth below, and Plaintiffs may use their depositions.

B. No. 2: Motion to Exclude Testimony of Previously Undisclosed NCAA Witnesses, or Requiring the NCAA to Produce Them for Deposition Prior to Trial

Plaintiffs move to preclude nine of the NCAA's non-party witnesses from testifying at trial.[2] Plaintiffs contend that the NCAA failed to disclose these witnesses under Federal Rule of Evidence 26 and that, as a result, they have not had an opportunity to depose any of these witnesses.

This motion is GRANTED in part and DENIED in part. The NCAA may call the following six witnesses at trial: Britton Banowsky, David Brandon, Mary Sue Coleman, Mark Hollis, Bernard Muir, and Harris Pastides. Plaintiffs have known for several months that these witnesses might be called to testify at trial because each of them submitted a declaration in support of the NCAA's motion for summary judgment in December 2013. As discussed at the pretrial conference, the NCAA shall make each of these witnesses available, by video-conference if necessary, for a deposition of up to four hours no less than seventy-two hours before the witness is called to testify at trial. These witnesses will only be

[2] Plaintiffs originally moved to preclude twelve of the NCAA's witnesses from testifying but the NCAA, in its opposition brief, withdrew three of those witnesses: Dustin Page, Kendall Spencer, and Wendy Walters.

permitted to testify on the matters discussed in their summary judgment declarations and only to the extent permitted by the ruling on Plaintiffs' motion in limine no. 7.

The NCAA may not call Kevin Anderson, Michael Drake, and Rod McDavis because it did not provide Plaintiffs with adequate notice that these witnesses might testify at trial.

C. No. 3: Motion to Exclude Testimony of John Paul "Sonny" Vaccaro

This motion is GRANTED. The NCAA has proffered no relevant testimony from Mr. Vaccaro on any disputed issues of fact in this case.

D. No. 4: Motion to Exclude Witnesses, Except for One Party Representative, from the Courtroom Unless They Are Testifying

This motion is DENIED as moot in light of the NCAA's representation that only one of its testifying corporate representatives will be present during the trial.

E. No. 5: Motion to Exclude Evidence of Failure to Mitigate

Plaintiffs have withdrawn this motion.

F. No. 6: Motion to Preclude Evidence and Argument That There Is No Restraint on Former College Athletes

Plaintiffs have withdrawn this motion.

G. No. 7: Motion to Preclude Speculative Testimony From Conference Commissioners and University Administrators

Plaintiffs move to exclude the testimony of Division I conference commissioners and university administrators regarding the NCAA's procompetitive justifications of (1) competitive balance, (2) amateurism, and (3) the integration of academics and athletics.

This motion is GRANTED in part and DENIED in part. Both the conference commissioners and university administrators may testify about amateurism and the integration of academics and athletics. However, only the conference commissioners may testify about competitive balance.

Federal Rule of Evidence 701 precludes lay witnesses from offering opinion testimony on matters that are not "rationally based on the witness's perception." Fed. R. Evid. 701(a). Under this rule, the university administrators who submitted summary judgment declarations are not qualified to offer their opinions on whether the challenged restraint enhances competitive balance among Division I football or basketball teams. These administrators -- many of whom do not even work in the athletic department of their respective universities -- cannot express probative opinions about the level of competitive balance between schools based solely on their experience implementing the challenged NCAA rules or observing how they operate within individual schools. The conference commissioners, in contrast, may potentially offer probative testimony on this subject because their work regularly exposes them to competition between schools.

H. No. 8: Motion to Preclude Evidence of Offsets

Plaintiffs have withdrawn this motion.

I. No. 9: Motion to Preclude Evidence of Aggregate College Athlete Graduation Rates

This motion is DENIED. Plaintiffs' contention that this evidence is irrelevant and prejudicial does not justify excluding it at this stage. Concerns about relevance and prejudice are reduced significantly when, as here, a case is tried to a judge

instead of a jury. See EEOC v. Farmer Bros. Co., 31 F.3d 891, 898 (9th Cir. 1994) ("[I]n a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial.").

J. No. 10: Motion to Permit Presentation of National Labor Relations Board Factual Findings

This motion is DENIED. Plaintiffs may not introduce the factual findings set forth in the recent decision of the Chicago Regional Director of the National Labor Relation Board (NLRB) in Northwestern University & College Athletes Players Association, No. 13-RC-121359, 2014 WL 1246914 (Mar. 26, 2014).

K. No. 11: Motion to Preclude Evidence and Argument Regarding the Promoting-Other-Sports Justification and Require an Offer of Proof on the Integration-of-Athletics-and-Education Justification

This motion is DENIED. Although the NCAA may not argue that the challenged restraint helps promote women's sports or less prominent men's sports, it will not be precluded from presenting evidence merely because it relates to women's sports or less prominent men's sports. This evidence may be relevant to other disputed issues of fact and, like the evidence discussed above, carries a minimal risk of prejudice because this case will not be tried to a jury. The Court may exercise its traditional power to regulate the admission of evidence at trial to ensure that time is not wasted on the presentation of irrelevant evidence or previously rejected arguments concerning women's sports and less prominent men's sports. Accordingly, it is not necessary to exclude any evidence or arguments on this subject at the present stage nor to require an offer of proof on the NCAA's argument that

the integration of academics and athletics is a legitimate procompetitive justification.

L. No. 12: Motion to Preclude Evidence and Argument Regarding Single Enterprise Defense

This motion is DENIED as moot. The NCAA has represented that it will withdraw its single-enterprise defense and "will not introduce evidence that it is a single enterprise" at trial. NCAA Opp. MILs at 21. These representations shall not preclude the NCAA from presenting evidence or arguing that it operates as a joint venture.

M. No. 13: Motion to Preclude Evidence and Argument Regarding Affirmative Defense of Consent

This motion is DENIED. As explained at the pretrial conference, motions in limine are not a proper vehicle for resolving dispositive issues of law.

II. NCAA's Motions in Limine

A. No. 1: Motion to Exclude Evidence and Argument About Injuries in College Sports

This motion is DENIED. Plaintiffs may present evidence of injuries suffered by student-athletes to the extent that it is relevant to their claims in this case. Once again, this evidence carries a minimal risk of prejudice because this case will be tried to a judge instead of a jury.

B. No. 2: Motion to Exclude Evidence and Arguments about Licensing Unrelated to Live Broadcasts, Rebroadcasts or Clips, or Videogames

This motion is DENIED. Plaintiffs may present evidence or arguments concerning licensing unrelated to live broadcasts, archival footage, and videogames to the extent that they are relevant to their claims in this case.

C. No. 3: Motion to Exclude References to the NLRB Decision Regarding College Athlete Unionization

This is GRANTED. As noted above, Plaintiffs may not introduce as evidence any of the factual findings or legal conclusions contained in the NLRB Chicago Regional Director's decision in Northwestern University, No. 13-RC-121359, 2014 WL 1246914. Plaintiffs may, however, cite this decision, to the extent that it is relevant, as non-binding legal authority in their trial brief.

D. No. 4: Motion to Exclude Reports of Third-Party Observers and Media About Collegiate Athletics

This motion is GRANTED in part and DENIED in part. Plaintiffs may not introduce any media reports or reports produced by third-party groups, such as the Knight Commission,[3] for the truth of the matter asserted in those reports. Plaintiffs' experts, however, may refer to certain facts or data contained in these reports to explain how they formed their opinions. Federal Rule of Evidence 703 permits an expert witness to rely on inadmissible facts or data if "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Here, experts for both parties relied on facts and data contained in media reports and the Knight Commission report; accordingly, these experts may refer to relevant portions of those reports to explain how they formed their opinions.

As noted at the pretrial conference, Plaintiffs may also introduce statements from the Knight Commission report for

[3] The NCAA also moved to preclude Plaintiffs from introducing any reports produced by the Drake Group but Plaintiffs, in their opposition, indicated that they do not intend to introduce any such reports.

impeachment purposes. Those statements, however, may not be introduced for the truth of the matter asserted therein unless Plaintiffs can show that they were made "under penalty of perjury." See Fed. R. Evid. 801(d)(1)(A) (providing that a declarant's prior statement does not constitute hearsay if it "is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition"). The Federal Rules of Evidence make clear that, while a witness's prior inconsistent statements may always be used for impeachment purposes, they may only be introduced as substantive evidence if they were made under oath. See Pope v. Savings Bank of Puget Sound, 850 F.2d 1345, 1356 (9th Cir. 1988) (noting that "prior inconsistent statements given in a prior proceeding under oath may come in as substantive evidence" under Rule 801(d)(1)(A) (emphasis added)).

E. No. 5: Motion to Bar Admission of Walter Byers' Book, Unsportsmanlike Conduct

This motion is GRANTED. Mr. Byers' book constitutes inadmissible hearsay and, as such, may not be introduced for the truth of the matter asserted therein. As noted above, however, under Federal Rule of Evidence 703, Plaintiffs' experts may refer to any facts or data contained in the book to the extent that they actually relied on those facts or data in forming their opinions and experts in their field would have reasonably relied on the same facts and data.

F. No. 6: Motion to Preclude Expert Testimony by Taylor Branch and Ellen Staurowsky

The NCAA moves to preclude two of Plaintiffs' experts, Taylor Branch and Ellen Staurowsky, from testifying. First, it moves to

preclude Mr. Branch from offering expert opinion testimony under Federal Rule of Evidence 702 on whether or not amateurism is a legitimate procompetitive justification for the challenged restraint. Second, it moves to preclude Dr. Staurowsky from testifying because it contends that she is merely a conduit for the admission of hearsay evidence.

This motion is GRANTED in part and DENIED in part. Mr. Branch is precluded from testifying as an expert under Rule 702 because his testimony will not "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Although Mr. Branch is a renowned writer and historian, his expert report consists mostly of historical facts, etymological information, and quotations from secondary sources, none of which appears to be in dispute. The report also contains information that appears in the reports of Plaintiffs' other experts. Thus, because Mr. Branch's report will not aid the Court in understanding any of the evidence or determining any facts in issue, his testimony cannot satisfy the requirements of Rule 702. As discussed at the pretrial conference, Plaintiffs may propose a narrative of historical facts and etymological information to be included in the parties' statement of undisputed facts. If the NCAA objects to the inclusion of any of these facts without a principled basis, the Court will reconsider allowing Mr. Branch to testify.

Unlike with Mr. Branch, the NCAA does not challenge Dr. Staurowsky's qualifications under Rule 702. Dr. Staurowsky may therefore testify on any of the subjects discussed in her expert report. As explained above, she may refer to facts or data

contained in media reports or reports produced by third parties provided that she actually relied on those facts and data to form her opinion and experts in her field would also reasonably rely on the same facts and data. See Fed. R. Evid. 703.

G. No. 7: Motion to Bar Admission of Walter Byers' Deposition Testimony from the White v. NCAA Case

This motion is GRANTED in part and DENIED in part. Plaintiffs may present portions of Mr. Byers' White deposition testimony that concern subjects on which the NCAA had a "similar motive" to cross-examine him as it would have had in the present case. Fed. R. Evid. 804(b)(1)(B).[4] Plaintiffs may not, however, introduce any portions of Mr. Byers' deposition testimony concerning any other subject nor may they use Mr. Byers' deposition testimony as a conduit for the admission of any evidence that would otherwise be inadmissible, such as Mr. Byers' book.

H. No. 8: Motion to Bar References to Wealth or Income of any Defense Witness or NCAA or University Employee

This motion is DENIED. Evidence of income or wealth derived from revenue generated by college athletics is potentially relevant and carries a minimal risk of prejudice because this case will proceed as a bench trial.

---

[4] The NCAA notes that the magistrate judge in this case previously ruled that Plaintiffs could not rely on Mr. Byers' deposition testimony from White under Federal Rule of Civil Procedure 32(a)(8) because White involved different subject matter from the present case. See Fed. R. Civ. P. 32(a)(8) ("A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties"). Even if the magistrate judge's decision were binding on this Court, however, it would be inapposite here because it was decided under a different legal standard before Plaintiffs had fully developed their theory of the present case.

I. No. 9: Motion to Exclude the Admission of Student-Athlete Eligibility Forms Authored by Schools or Conferences

This motion is DENIED. Plaintiffs may introduce student-athlete eligibility forms produced by NCAA Division I schools or conferences; however, Plaintiffs must present some evidence of a nexus between these forms and the NCAA.

J. No. 10: Motion to Exclude Evidence Concerning Adjudicated or Alleged Criminal Conduct Unrelated to the Rules at Issue Here

This is GRANTED. Plaintiffs failed to provide a substantive opposition to this motion and have not identified any instances of alleged or adjudicated criminal conduct relevant to this case.

K. No. 11: Motion to Exclude References to Whether the NCAA Called any Current or Former Student-Athletes

This motion is DENIED as moot. Plaintiffs represented that the parties have reached an agreement to resolve this motion.

L. No. 12: Motion to Preclude Evidence or Argument About Supposedly Less Restrictive Alternatives That Dr. Roger Noll Has Not Analyzed

This motion is DENIED. Plaintiffs represented at the hearing that they will not proffer any less restrictive alternatives at trial that their experts did not discuss in their reports. To the extent that Plaintiffs' experts intend to rely on any "new facts" to support their proffered less restrictive alternatives, as Plaintiffs indicated at the pretrial conference, they must disclose those facts to the NCAA by 5:00 p.m. on May 30, 2014.

M. No. 13: Motion to Exclude Testimony of Mary Willingham if the Court Excludes the Testimony of NCAA Witnesses not Listed by Name in Rule 26 Disclosures

This motion is DENIED as moot in light of Plaintiffs' representation at the hearing that they do not intend to call Willingham as a witness.

CONCLUSION

The parties' motions in limine (Docket Nos. 1063, 1069) are resolved as set forth above.

Before 5:00 p.m. on May 30, 2014, Plaintiffs shall disclose to the NCAA any new facts on which their experts intend to rely to support their proffered less restrictive alternatives. The NCAA shall file a list of every witness it intends to call at trial by 11:00 a.m. on June 4, 2014. Plaintiffs shall file proposed language for the injunction that they are seeking by 4:00 p.m. on June 6, 2014. The parties shall work in good faith to produce a joint statement of undisputed facts -- including any narrative of historical facts -- which they shall submit to the Court no later than June 6, 2014.

The deadline for the NCAA to submit its trial brief is hereby continued to June 5, 2014. The brief shall not exceed twenty-five pages in length.

A bench trial of no more than fifteen days shall commence at 8:30 a.m. on June 9, 2014.

IT IS SO ORDERED.

Dated: 5/30/2014

CLAUDIA WILKEN
United States District Judge

IMAI, TADLOCK, KEENEY & CORDERY, LLP
R. RANDY WERTZ
rrwertz@itkc.com
220 Montgomery Street, Suite 301
San Francisco, California 94104
Telephone: (415) 675-7000
Facsimile: (415) 675-7008

YOUNG BASILE HANLON & MACFARLANE, P.C.
JEFFREY D. WILSON (PRO HAC VICE)
wilson@youngbasile.com
EDDIE D. WOODWORTH (PRO HAC VICE)
woodworth@youngbasile.com
3001 W. Big Beaver Road, Suite 624
Troy, Michigan 48084
Telephone: (248) 649-3333
Facsimile: (248) 649-3338

Attorneys for Defendants
IXL Learning, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and ADRIAN SCOTT DUANE, Plaintiff-Intervenor, v. IXL LEARNING, INC., Defendant.	Case No.: 3:17-cv-02979-VC Hon. Vince Chhabria Courtroom: 4, 17th Floor Hearing Date: October 15, 2018 Hearing Time: 10:00 AM **RESPONSE TO PLAINTIFF EEOC'S MOTION *IN LIMINE* NO. 1 RE: EXCLUSION OF GOVERNMENTAL PROCEEDINGS**

I. INTRODUCTION/BACKGROUND

Now comes Defendant IXL Learning, Inc. ("IXL") and for its Opposition to Plaintiff's Motion *in Limine* Number 1 hereby states as follows:

Plaintiff seeks by means of this Motion to exclude all evidence of the administrative litigation record between the parties, which occurred prior to its filing of the instant case. Specifically, Plaintiff opposes any discussion of or the introduction of evidence related to (1) the prior NLRB proceedings and resulting ALJ decision; (2) Plaintiff's prior investigation of and findings on Duane's EEOC charge against IXL; and (3) Duane's application for unemployment insurance benefits. IXL opposes Plaintiff's Motion as to the first two of these categories. IXL does not intend on introducing evidence pertaining to the Employment Development Department proceedings.

The salient facts are contained throughout the record and all need not be restated herein. Importantly, Plaintiffs claim only that IXL retaliated against Duane in violation of Title VII and the ADA by firing him for alleged opposition activity contained in his December 30, 2014 Glassdoor.com post (the "Post").

In a separate proceeding conducted by the National Labor Relations Board (NLRB), Duane alleged that he was fired for asserting group complaints about discrimination and working conditions in the Post, and the NLRB filed a complaint against IXL on July 29, 2015. ECF Doc. No. 70-1 at 12. The case was tried before Administrative Law Judge Gerald M. Etchingham (the "ALJ") in November 2015. Duane, along with IXL employees Mishkin and Keyes testified in the trial. *Id.*

On April 28, 2016, the ALJ issued a 37-page opinion dismissing all allegations against IXL, holding that Duane's accusations of discriminatory practices by IXL was "maliciously untrue" and made by him with "reckless disregard of whether it was true or false" as his real intention in his "angered state of mind was to hurt or damage" IXL's ability to recruit employees. *Id.* at 12-13. The ALJ found that Duane's Post was "childish ridicule" in the nature of a personal attack on IXL and that it was "so disloyal and recklessly disparaging" of IXL to lose protection under the Act. *Id*. at 13. Specifically, the ALJ held that IXL terminated Duane "at a time when Duane was readying to resign from [IXL] after being satisfied with [IXL]'s flexibility in granting him 25-30 days of sporadic remote work and 2 months of disability leave and Duane was terminated because he made his angry, impulsive, and false claim of discrimination against [IXL] in his December 30 Glassdoor.com posting intended by Duane to harm [IXL]'s reputation and dissuade

prospective employee recruits from coming to [IXL] for employment." *Id.* The NLRB in Washington, D.C. adopted the findings and conclusions of the ALJ on June 10, 2016, and no further appeals were taken. *Id*.

On a parallel track, Duane filed a charge of discrimination with the EEOC on March 17, 2015, alleging violations of Title VII and the ADA. *Id*. Duane alleged that IXL discriminated and retaliated against Duane on the basis of his sex and disability. *Id*. The EEOC issued a letter of determination, dismissing Duane's Title VII and ADA claims of discrimination due to insufficient evidence to support those claims, and finding reasonable cause on the sole claim of retaliation. *Id*. The EEOC determined that IXL did not deny Duane a reasonable accommodation and that IXL did not discriminate against or discharge Duane because he is transgender. *Id*.

II. LEGAL STANDARD/ARGUMENT

Contrary to Plaintiff's Motion, Ninth Circuit authority consistently permits the introduction of evidence from prior administrative proceedings between the parties: "While administrative law determinations are obviously not binding on the Court or the jury, they are admissible to the extent they are probative of an element of Plaintiff's claim." *Plummer v. W. Int'l Hotels Co*., 656 F.2d 502, 504 (9th Cir. 1981) (stating that 'while prior administrative determinations are not binding, they are admissible evidence' and reversing district court's decision to exclude a decision of the Equal Employment Opportunity Commission finding discrimination in a Title VII action). In the context of a discrimination action, '[a]n EEOC determination, prepared by professional investigators on behalf of an impartial agency, has been held to be a highly probative evaluation of an individual's discrimination complaint.'" *Id*. at 505. *Joo Lee v. Raytheon Co.*, 2017 WL 5640542 (N.D. Cal). "[T]he *Plummer* ruling is not restricted solely to EEOC findings of probable cause but extends to similar administrative determinations . . . ." *Heyne v. Caruso*, 69 F.3d 1475, 1483 (9th Cir. 1995). "In the Ninth Circuit, EEOC cause determinations have been characterized as admissible per se in Title VII suits. *AmanteaCabrera v. Potter*, 279 F.3d 746, 749 (9th Cir.2002)." *Madani v. BHVT Motors, Inc.*, 2006 WL 1127149, *5 (D. AZ.)

In support of their Motion *in Limine*, Plaintiffs fail to offer any applicable case law relevant to this issue. Instead they cite boilerplate Title VII jurisprudence, and offer the record of an unreported order resolving a motion in *limine* by Judge Claudia Wilken. (See Plaintiff's MIL 1, p.3, note 1). However, the motion brought in that case sought to exclude reference to a previous decision of the NLRB, in a separate

case involving different parties. Plainly, Judge Wilken's order has no bearing on the question presented here - whether to exclude the records of prior administrative proceedings involving the same parties and similar questions of fact and law.

The administrative record in this case also reveals the shifting and inconsistent legal theories advanced by Plaintiff Duane. His EEOC charge of includes claims of discrimination based on his use of protected leave, requests for accommodation, sex and gender identity, in addition to a generalized retaliation claim.[1] To prevail at trial on that retaliation claim, Plaintiffs must demonstrate that Duane's alleged opposition activity was the "but for" cause of his termination. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). In other words, they must prove that without the alleged opposition activity in the Post, Duane would not have been terminated. A jury must be permitted to hear any prior claims that are inconsistent with that allegation as well as the EEOC's determination that those claims lack sufficient evidence. The jury will know what Duane originally alleged and what the EEOC is now claiming. To place those facts in context, the jury should be informed why the EEOC proceeded only with one of Duane's many claims.

Finally, Plaintiffs contend that IXL mischaracterizes the findings of the EEOC and the NLRB. Of course, this is a point that it can make at trial to the jury, and is a classic objection that goes to the weight a jury will accord to evidence, rather than its admissibility. *See, e.g., Galvan v. City of La* Habra, 2014 WL 1370747, *4 (N.D. Cal.), *quoting Elston v. Toma*, No. 01–1124, 2004 WL 1853119, *2 (D. Or. Aug.17, 2004) ("In any event, [plaintiff's] alleged mischaracterization of testimony would affect only the weight given to the testimony by the Court rather than the admissibility of the testimony."); (*Perez v. State Farm Mut. Auto Ins. Co.*, 2011 WL 8601203, *8 (N.D. Cal.) ("Whether Bashline's analysis and conclusions misrepresent or mischaracterize the Cripe and Rubinfeld Reports goes to the weight of his testimony rather than its admissibility.").

III. CONCLUSION

Wherefore, Plaintiff's Motion *in Limine* Number 1 should be denied.

[1] In fact, Plaintiffs cited liberally to Duane's Charge of Discrimination in their summary judgment briefs, relying on the allegations in the charge to establish the existence of face issues requiring trial. For example, in their main brief on summary judgment, Plaintiffs reference Duane's EEOC charge as supporting evidence for more than twenty-five contentions. Plaintiffs should not be allowed to reverse course now and claim that the administrative record and Duane's allegations are inadmissible.

Respectfully submitted,

Dated: October 3, 2018

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: */s/ Eddie D. Woodworth*

Jeffrey D. Wilson (*Pro Hac Vice*)
wilson@youngbasile.com
Eddie D. Woodworth (*Pro Hac Vice*)
woodworth@youngbasile.com

-and-

IMAI, RADLOCK, KEENEY & CORDERY, LLP
R. Randy Wertz
rrwerts@itkc.com

Attorneys for Defendant
IXL Learning, Inc.

PROOF OF SERVICE

STATE OF MICHIGAN, COUNTY OF OAKLAND
U.S. Equal Employment Opportunity Comm. v. IXL Learning, Inc.
Case No.: 3:17-CV-02979-VC

I am employed in the County of Oakland, State of Michigan; I am over the age of eighteen (18) and not a party to the within action; my business address is 3001 W. Big Beaver Road Suite 624, Troy, MI 48084. On October 3, 2018, I served the foregoing document(s) described as **Response to Plaintiff EEOC's Motion *in Limine* No. 1 Re: Exclusion of Governmental Proceedings** on all interested parties to this action by delivering a copy thereof via electronic mail to each of said interested parties at the following address(es):

Ami Sanghvi Equal Employment Opportunity Commission 350 The Embarcadero, Suite 500 San Francisco, CA 94105 P: (415) 625-5640 F: (415) 625-5657 ami.sanghvi@eeoc.gov	Attorneys for Plaintiff US EEOC
David Marek The Marek Law Firm 228 Hamilton Avenue Palo Alto, CA 94301 P: (917) 721-5042 david@marekfirm.com	Attorneys for Proposed Plaintiff-Intervenor Adrian Scott Duane

☐ **(BY MAIL)** I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our firm's office address in Troy, Michigan. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY ELECTRONIC SERVICE)** I caused such document to be delivered via electronic mail.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on October 3, 2018 at Troy, Michigan.

/s/ Eddie D. Woodworth
Eddie D. Woodworth