

1 Gregory L. Curtner (*pro hac vice*)
gcurtner@schiffhardin.com
2 Robert J. Wierenga (SBN 183687)
rwierenga@schiffhardin.com
3 Kimberly K. Kefalas (*pro hac vice*)
kkefalas@schiffhardin.com
4 SCHIFF HARDIN LLP.
350 S. Main St., Suite 210
5 Ann Arbor, MI 48104
Telephone: (734) 222-1500
6 Facsimile: (734) 222-1501

7 Attorneys for Defendant
National Collegiate Athletic Association

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

11 EDWARD C. O'BANNON, JR. et. al., on
behalf of themselves and all others similarly
12 situated ,
Plaintiff,
13 v
14 NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, ELETRONIC ARTS INC.,
15 and COLLEGIATE LICENSING COMPANY,
16 Defendants.

Case No. 09-cv-3329-CW

**DEFENDANT NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION'S NOTICE
OF MOTION AND MOTION FOR
LIMITED DISCOVERY ON PLAINTIFFS'
REQUEST FOR ATTORNEYS' FEES &
COSTS**

Dept: Courtroom 2, 4th Floor
Judge: Hon. Claudia Wilken
Hearing: December 8, 2014 at 2:00 PM

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:
2 PLEASE TAKE NOTICE THAT on December 8, 2014, at 2:00 p.m., or as soon the motion shall
3 be heard, in Courtroom 2 of the above-captioned Court, located at 1301 Clay Street, Oakland,
4 California, Defendant National Collegiate Athletic Association (“NCAA”) will, and hereby does,
5 move the Court for permission to take necessary discovery on two important matters that directly
6 impact the reasonableness of the lodestar requested by the Plaintiffs: (1) the deposition of Jon
7 King, a former attorney of Plaintiffs’, regarding his allegations of billing improprieties during the
8 litigation of this case by class counsel, Hausfeld LLP, and (2) limited discovery into the relevant
9 billing entries that the Plaintiffs removed before they resubmitted their motion for fees on
10 October 21, 2014. In support of this motion, the NCAA relies on the points and authorities
11 below.

12 LEGAL STANDARD

13 A motion seeking additional discovery is warranted where the moving party (a)
14 sufficiently describes how the requested discovery will reveal the evidence sought and (b)
15 explains how it will be substantially prejudiced by the denial of its request for additional
16 discovery. *See Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 751 (9th Cir.)
17 (2013) (concluding that request for additional discovery should set forth sufficient factual detail
18 “to raise a reasonable expectation that discovery will reveal’ the evidence he seeks”) (quoting
19 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The Advisory Committee’s note to
20 Rule 23(h)(2) specifically contemplate the Court permitting discovery relevant to objections to
21 motions for attorneys’ fees and costs. Fed. R. Civ. P. 23(h)(2) advisory committee’s note; *see*
22 *also, Alvarado v. FedEx Corp.*, 2009 WL 2969474, at *2 (N.D. Cal. Sept. 11, 2009).

23 I. Jon King’s Deposition Will Produce Information Directly Relevant to the Court’s 24 Inquiry into the Reasonableness of Plaintiffs’ Lodestar.

25 Jon King, formerly a partner at Hausfeld LLP, alleged in a complaint filed in this Court
26 that class counsel, Hausfeld LLP, has conducted a “scheme” of “overstaffing resulting in massive
27 inefficiency and a stunning amount of attorney time being spent” on the litigation of *O’Bannon*.
28 *See King v. Hausfeld*, Case No. 13-0237 (N.D. Cal.), Dkt. 1, ¶ 55 (attached as Ex. A). King’s

1 allegations about Hausfeld LLP's billing practices in litigation, including "a constant obsession
2 and discussion of how to generate 'more lodestar'" and an instruction from Michael Hausfeld "to
3 create false billing records for two attorneys" in another class action lawsuit handled by Hausfeld
4 LLP, are deeply troubling. *See id.* at ¶¶ 124-25. King predicted that on January 17, 2013,
5 Plaintiffs' attorneys' lodestar totaled more than \$20 million, which would mean that Plaintiffs'
6 attorneys claim to have spent another \$20 million or more in attorney time in less than two years
7 between January 17, 2013 and the last day of the *O'Bannon* trial. *See id.* at ¶ 56. King's
8 allegations cast serious doubt on the reasonableness of fees and expenses sought by the Plaintiffs,
9 yet Plaintiffs currently deny that "the number of hours expended [on *O'Bannon*] suggest
10 inefficiency." *See* Dkt. 319 at p. 19.

11 The inconsistencies between, on one hand, Hausfeld LLP's representations to this Court in
12 its fee petitions about Plaintiffs' billing practices and the reasonableness of the requested fees
13 and, on the other hand, King's allegations in his complaint about Hausfeld's billing practices in
14 this case, are stark. These conflicting claims raise significant concerns necessitating limited
15 discovery. The NCAA should be allowed to depose King to inquire into his knowledge of the
16 billing practices of class counsel as they relate to this litigation so that the NCAA can fairly
17 determine the reasonableness of the Plaintiffs' requested fees. This limited discovery is
18 appropriately tailored and warranted in light of the gravity of King's statements and the tens of
19 millions dollar attorneys' fee award at issue.

20
21 **II. There Is a Reasonable Expectation that Limited Discovery on the Removed Billing**
22 **Entries Would Reveal Information Impacting the Reasonableness of Plaintiffs'**
23 **Lodestar.**

24 Plaintiffs have represented to the Court that they have removed time concerning
25 individual damages claims, class damages, and the jury trial cancelled at the last minute by
26 Plaintiffs, from the lodestar in their resubmitted motion for fees and costs, as ordered by the
27 Court. *See* Dkt. 319 at 18 of 23. Plaintiffs acknowledge that the Plaintiffs' attorney time working
28 on these subjects is not properly recoverable. Plaintiffs have refused, however to provide the
NCAA with the billing descriptions to identify the billing entries, work descriptions ,total time, or

1 value of time that Plaintiffs have removed from their time records. In their first motion for
2 attorney's fees, the Plaintiffs sought approximately \$46.9 million in attorney's fees. As of
3 October 29, they now seek approximately \$45.5 million in attorney's fees. *See* Dkt. 324-3. The
4 NCAA's review of Plaintiffs' voluminous billing records will be hampered if it does not obtain
5 attorney's fees billing entries that resulted in a \$1.3 million decrease in the lodestar. The missing
6 billing entries (removal of which resulted in at least a \$1.3 million decrease in the lodestar) are
7 necessary to allow the NCAA to appropriately test for duplication, redundancy, and the continued
8 presence of similar entries and time. The NCAA needs to review the omitted time entries, which
9 record time the plaintiffs admit was not related to the Plaintiffs' success at trial.

10 Comparison of the omitted entries by date, time and subject matter to the entries that were
11 not omitted will allow the NCAA to more efficiently determine if there are other similar billing
12 records or attorney time entries that should not be used to calculate the lodestar. The NCAA
13 should be allowed to independently verify that Plaintiffs removed all of the time and costs that
14 Plaintiffs agree they are not allowed to recover. Further, the Advisory Committee's note to Rule
15 23(h)(2) states that "One factor in determining whether to authorize discovery is the completeness
16 of the material submitted in support of the fee motion[.]" Fed. R. Civ. P. 23(h)(2) advisory
17 committee's note. Here, Plaintiffs state that they removed entries for which they are not entitled
18 to fees, yet their supporting materials did not show which materials they removed, and thus those
19 materials are not "complete[.]" The NCAA is entitled to complete billing records and Plaintiff
20 should be ordered to produce the excised materials.

21
22 **III. The NCAA would be Prejudiced it is not Allowed to Conduct the Limited
Discovery it has Requested.**

23 Denial of the very limited discovery the NCAA seeks would result in actual and
24 substantial prejudice to the NCAA, which could be ordered to pay a unreasonable amount of
25 Plaintiffs' attorneys' fees and costs if it is not allowed to fully investigate class counsel's billing
26 practices and records. The NCAA needs to inquire into the requested matters so that it may fully
27 and adequately respond to the Plaintiffs' motion for fees and costs. Furthermore, the NCAA has
28

1 a right to know what Plaintiffs' fees and costs it is being asked to pay and why. An opponent to
2 whom fees are shifted becomes not unlike an invoiced client, and no such invoiced client would
3 be expected to pay a bill when there is the mere suggestion the billing attorneys are engaging in
4 improper billing practices. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir.
5 2008) ("The number of hours to be compensated is calculated by considering whether, in light of
6 the circumstances, the time could reasonably have been billed to a private client.").

7 **CONCLUSION**

8 For these reasons, the NCAA respectfully requests that the Court grant the NCAA's
9 motion and allow it take Jon King's deposition about class counsel's billing practices in this case
10 and obtain the time entries and costs that Plaintiffs have removed from the bills provided to the
11 NCAA.

12 Respectfully submitted,

13 SCHIFF HARDIN LLP

14 By: /s/ Robert J. Wierenga

15 Robert J. Wierenga (SBN183687)
16 Attorneys for Defendant NCAA
350 S. Main St., Suite 210
Ann Arbor, MI 48104

17 Dated: November 3, 2014

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification to the e-mail addresses registered.

By: /s/ Robert J. Wierenga
Robert J. Wierenga (SBN183687)
SCHIFF HARDIN LLP
Attorneys for Defendant NCAA