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13 *Plaintiffs' Class Counsel*

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

18 EDWARD C. O'BANNON, JR. on behalf
 19 of himself and all others similarly situated,

20 Plaintiffs,

21 v.

22 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION (NCAA); ELECTRONIC
 23 ARTS, INC.; and COLLEGIATE
 LICENSING COMPANY,

24 Defendants.
 25

Case No. 4:09-cv-3329 CW

**PLAINTIFFS' MOTION FOR
 ATTORNEYS' FEES AND COSTS AND
 MEMORANDUM IN SUPPORT THEREOF**

Judge: The Honorable Claudia Wilken
 Courtroom: 2, 4th Floor

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 NOTICE IS HEREBY GIVEN that on September 18, 2014 at 2:00 pm or as soon
3 thereafter as the matter may be heard by the Honorable Claudia Wilken, Plaintiffs seek an order
4 awarding Plaintiffs their reasonable attorneys' fees and costs under 15 U.S.C. § 26, Fed. R. Civ.
5 P. 54(d), and Civil Local Rules 54-1 and 54-5. To the extent possible given the time limitations,
6 Class Counsel and counsel for the National Collegiate Athletic Association ("NCAA") have met
7 and conferred regarding this motion as required by Civil Local Rules 7-3 and 54-5(b)(1).
8

9 Plaintiffs respectfully submit this memorandum in support of their motion for attorneys'
10 fees and costs pursuant to the Clayton Act, 15 U.S.C. § 26; Fed. R. Civ. P. 54(d); and Civil Local
11 Rules 54-1 and 54-5. Awarding reasonable attorneys' fees and costs is required by statute and
12 rule and should be directed against the NCAA in the following amounts, subject to any
13 amendments that Plaintiffs may deem necessary in light of the short time constraints posed by the
14 Civil Local Rules:
15

16 Attorneys' fees: **\$46,856,319.46**

17 Clayton Act recoverable costs: **\$5,555,739.07**

18 Included within the Clayton Act costs are total taxable costs of **\$215,709.43**, which have
19 been filed in a separate Bill of Costs, Dkt. No. 304. These amounts are supported by Class
20 Counsel and co-counsel's¹ time records, accounting entries, and third-party invoices as set forth
21 in the accompanying declarations and exhibits. Declarations of Plaintiffs' counsel firms in
22 support of these records are attached hereto. Class Counsel reserves all rights to amend this
23 motion and supporting documentation, including the bill of costs, as it has not yet had sufficient
24 time to audit these submissions thoroughly and segregate certain time that is more appropriately
25 the subject of a motion in conjunction with Plaintiffs' settlement with Electronic Arts, Inc. (EA)
26

27 ¹ For the sake of convenience, Plaintiffs will use the term "Plaintiffs' counsel" broadly here to
28 refer to all of its counsel who contributed to the prosecution of this litigation.

1 and Collegiate Licensing Company (CLC). In the absence of guidance from the Court on
2 Plaintiffs' Motion for Extension of Time to File Bill of Costs and Motion for Attorney's Fees
3 (Dkt. 297), Plaintiffs file this motion now in compliance with Civil Local Rules 54-1 and 54-5.

4 **I. Introduction**

5 On August 8, 2014, following the conclusion of a three-week bench trial, this Court issued
6 its Findings of Fact and Conclusions of Law, directing the Clerk to enter judgment in favor of the
7 Plaintiff class and noting that "Plaintiffs shall recover their costs from the NCAA." Dkt. 291 at
8 99. That same day, the Court issued its Permanent Injunction (Dkt. 292), and the Clerk entered
9 judgment in favor of the Plaintiffs, specifying that "Plaintiffs recover from Defendant National
10 Collegiate Athletic Association their costs of action" (Dkt. 293).

11 The judgment is the culmination of five years of active litigation that span, *e.g.*, myriad
12 motions to dismiss; complex discovery that included over 80 depositions and scores of discovery-
13 related motions; an entire year of class-certification briefing and proceedings; massive summary-
14 judgment motions as well as *amici curiae* responses; a slew of unsuccessful interlocutory appeal
15 attempts by the NCAA; numerous pre-trial motions filed by the NCAA to stave off trial; and trial
16 preparation and presentation. The complexities of, and risks associated with, this litigation
17 cannot be overstated.

18 Hausfeld LLP supervised and coordinated the work of 43 law firms who contributed
19 resources to this landmark litigation in an effort to match the dozens of attorneys litigating on the
20 NCAA's behalf, including partners and associates from WilmerHale, Munger, Tolles & Olson,
21 and Schiff Hardin, as well as the hundreds of attorneys representing the NCAA's member schools
22 and conferences across the country. Each plaintiffs' firm shared in the considerable risk of non-
23 payment given the unique aspects of this litigation and the NCAA's past success in attaining
24 dismissal based on *Bd. of Regents v. NCAA*, 468 U.S. 85 (1984).

1 The Civil Local Rules, the Federal Rules of Civil Procedure, and the Clayton Act provide
2 for an award of attorneys' fees and costs to the Plaintiffs following the entry of a judgment in its
3 favor. Accordingly, Plaintiffs seek an award of attorneys' fees and costs reasonably incurred as
4 necessary in the successful prosecution of their injunctive claims against the NCAA.²

5 **II. Argument**

6 15 U.S.C. § 26 provides that “[a]ny person, firm, corporation, or association shall be
7 entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction
8 over the parties, against threatened loss or damage by a violation of the antitrust laws, including
9 sections 13, 14, 18, and 19 of this title In any action under this section in which the plaintiff
10 substantially prevails, the court shall award the cost of suit, including a reasonable attorney’s fee,
11 to such plaintiff.” Local Civil Rules 54-1, 54-2, 54-3, 54-4, and 54-5 likewise govern a motion
12 for attorneys’ fees and bill of costs from a prevailing party following a judgment.

13 The Ninth Circuit has explained that reasonable fees and costs span “every item of service
14 which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to
15 advance or protect his client’s interest” *Twin City Sportservice, Inc. v. Charles O. Finley &*
16 *Co., Inc.*, 676 F.2d 1291, 1313 (9th Cir. 1982); *Theme Promotions, Inc. v. News Am. Mktg. FSI,*
17 *Inc.*, 731 F. Supp. 2d 937, 941-42 (N.D. Cal. 2010). Moreover, an award of fees and costs is
18 mandatory under 15 U.S.C. § 26, a feature of the Clayton Act designed to incentivize private
19 enforcement of the antitrust laws and deter anticompetitive behavior. *See Costco Wholesale*
20 *Corp. v. Hoen*, 538 F.3d 1128, 1136-37 (9th Cir. 2008); *see generally Azizian v. Federated Dep’t*
21 *Stores, Inc.*, 499 F.3d 950, 959-60 (9th Cir. 2007).

22 Courts in the Ninth Circuit typically examine the “lodestar” in determining the
23 reasonableness of attorney fees. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir.

24
25
26
27 ² This motion includes taxable costs that Plaintiffs seek to recover in their concurrently filled Bill
28 of Costs.

1 1987). “The ‘lodestar’ is calculated by multiplying the number of hours the prevailing party
2 reasonably expended on the litigation by a reasonable hourly rate.” *Morales v. City of San*
3 *Rafael*, 96 F.3d 359, 363 (9th Cir.1996). And there is a strong presumption that the lodestar
4 figure represents a reasonable fee. *Jordan*, 815 F.2d at 1262. A court may, however, adjust the
5 award from the lodestar figure upon consideration of additional factors that bear upon
6 reasonableness. *Morales*, 96 F.3d at 363.

8 Attendant to this inquiry is an examination of hourly rates. *Jordan*, 815 F.2d at 1262
9 (citing *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984)). In performing this task, a Court can
10 consider: (1) the novelty and complexity of the issues; (2) the special skill and experience of
11 counsel; (3) the quality of representation; and (4) the results obtained. *See Cabrales v. County of*
12 *Los Angeles*, 864 F.2d 1454, 1464 (9th Cir.1988); *Caplan v. CNA Fin. Corp.*, 573 F. Supp. 2d
13 1244, 1249 (N.D. Cal. 2008); *Yahoo!, Inc. v. Net Games, Inc.*, 329 F. Supp. 2d 1179, 1182 (N.D.
14 Cal. 2004).

15
16 **a. Plaintiffs’ counsel’s historical hourly rates are reasonable by any measure.**

17 The hourly rates submitted by Plaintiffs’ counsel in this application are consistent with the
18 rates charged by law firms engaged in similar litigation nationwide. Tables of the attorneys,
19 paralegals, and legal assistants who have worked on this matter, as well as their historical hourly
20 rates are found in the attached declarations. These hourly rates range from \$985 for partners with
21 more than 40 years experience to \$250 for the most junior associate. Paralegal rates are likewise
22 within a reasonable range reflecting seniority and experience.

23
24 These historical rates are reasonable first because they are the standard rates charged by
25 Plaintiffs’ counsel and comparable to the rates that the NCAA has paid for their own counsel in
26 fiercely defending this litigation. As reflected in the attached declarations, the historical rates
27 included in this submission reflect the standard hourly rates of each of the co-counsel law firms
28

1 involved in the prosecution of the litigation; no special adjustments have been made here. On
2 information and belief, Plaintiffs understand the NCAA's counsel of choice in this litigation—
3 WilmerHale, Munger, Tolles & Olson, and Schiff Hardin—to have comparable historical rates.
4 Additionally, Plaintiffs' choice to seek historical rates as opposed to current rates, which the
5 Court has wide discretion to award, *Gates v. Deukmejian*, 987 F.2d 1392, 1406-08 (9th Cir.
6 1992); *Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc.*, 731 F. Supp. 2d 937, 948-49 (N.D.
7 Cal. 2010), reflects the conservative nature of this fee and costs application.

9 The reasonableness of Plaintiffs' counsel's hourly rates is likewise demonstrated by
10 decisions from federal courts nationwide considering and approving Plaintiffs' counsel's very
11 same rates in other antitrust matters. For example, Hausfeld LLP was Interim Co-Lead Counsel
12 in *In re Processed Egg Products Antitrust Litig.*, MDL No. 2002, 2012 WL 5467530 (E.D. Pa.
13 Nov. 9, 2012). There, the court granted the direct purchaser plaintiffs' request for attorney fees in
14 its entirety, conducting a "lodestar cross check" to confirm that percentage fee was appropriate.
15 *Id.* at 6. In performing its analysis, the court determined that Hausfeld LLP's hourly rates were
16 reasonable given the efficiency of the litigation; the division of labor among partners, associates,
17 and staff; and "the complexity of this litigation and the corresponding appropriate need for and
18 use of heavy involvement by experienced attorneys." *Id.* Ultimately, the court approved billing
19 rates ranging from \$470 to \$950 for Hausfeld LLP partners and rates ranging from \$200 to \$340
20 for Hausfeld LLP associates. Decl. of Michael D. Hausfeld at ¶23.

23 Likewise, in *In re Vitamin C Antitrust Litigation* (E.D.N.Y.), in the wake of a successful
24 antitrust price-fixing trial last year, the court approved plaintiffs' fees and costs applications,
25 identifying as reasonable the hourly rates of co-lead counsel Hausfeld LLP and Boies Schiller &
26 Flexner LLP (again, some of the very same hourly rates included here). *In re Vitamin C Antitrust*
27 *Litig.*, 06-MD-1738 BMC JO, 2013 WL 6858853 (E.D.N.Y. Dec. 30, 2013). Those approved
28

1 hourly rates ranged from “a low of \$375 per hour for junior associates to \$980 per hour for senior
2 partners.” *Id.* at *1. The court noted further that “[t]he rates charged by plaintiffs’ counsel are
3 thoroughly reasonable based not only on the market, but on the uniqueness of the case and the
4 high quality of their work. Significantly lower rates would be unreasonable.” *Id.* at *4; Decl. of
5 Michael D. Hausfeld at ¶24.

6
7 Other recent cases in which courts have approved fees after determining Hausfeld LLP’s
8 hourly rates to be reasonable include *In re Air Cargo Shipping Serv. Antitrust Litig.*, No.06-md-
9 1775 (E.D.N.Y.); *In re Municipal Derivatives Antitrust Litig.*, No. 08-2516 (S.D.N.Y.); *In re*
10 *TFT-LCD (Flat Panel) Antitrust Litig.*, MDL 1827 (N.D. Cal.); *In re Flat Glass Antitrust Litig. II*,
11 MDL No. 1942 (W.D. Pa.); *In re Ethylene Propylene Diene Monomer (EPDM)*
12 *Antitrust Litig.*, No. 03-md-1542 (D. Conn.); *In re Endosurgical Prods. Direct Purchaser*
13 *Antitrust Litig.*, No. 05-cv-08809 (C.D. Cal.). Decl. of Michael D. Hausfeld at ¶24. Similar
14 examples concerning rates from other firms abound in the declarations supporting this motion.

15
16 Perhaps the most helpful example, though, is *In re TFT-LCD (Flat Panel) Antitrust Litig.*,
17 MDL 1827 (N.D. Cal.), in which Judge Illston evaluated and approved a fee petition from more
18 than 100 law firms, including Hausfeld LLP and numerous other Plaintiffs’ counsel here, with
19 hourly attorney rates ranging from \$350 to \$1000. *LCD*, Dkt. 6662 (petition), 7688 (order).
20 Plaintiffs’ counsel’s rates are directly in line with the rates approved in *LCD*, and lower in some
21 instances. If that were not evidence enough of prevailing rates for contingency antitrust matters
22 in the Northern District of California, a comprehensive inventory of prevailing rates in the district
23 for all types of litigation can be found in the Declarations of Richard M. Pearl (a noted fees
24 expert) at *Russell v. United States*, No. CV 09-03239 (N.D. Cal.), Dkt. 209; *In re TFT-LCD (Flat*
25 *Panel) Antitrust Litig.*, MDL 1827 (N.D. Cal.), Dkt. 6662-6.

26
27 **b. Plaintiffs’ counsel’s historical hourly rates are all the more reasonable in light of the**
28 **novelty and complexity of the issues, the results obtained, and the high risk of non-**

1 **recovery.**

2
3 Plaintiffs' counsel obtained a stellar result for the injunctive class in this litigation. To
4 begin with, Plaintiffs survived seven motions to dismiss; prevailed at class certification
5 (admittedly a partial victory); obtained partial summary judgment; and won a three-week bench
6 trial. The resulting injunction will have considerable financial benefits for the class, as it may
7 well amount to tens of millions of dollars *each season*, as Class Counsel noted in closing
8 arguments at trial. Moreover, and of critical importance, this is pioneering litigation—without
9 any precedent and lacking any preceding public enforcement. Plaintiffs' counsel contributed
10 staggering resources to this litigation despite considerable uncertainty of any recovery. That
11 uncertainty was underscored at every turn, with the NCAA championing *NCAA v. Board of*
12 *Regents*, 468 U.S. 85 (1984), as somehow dispositive and listing past cases in which it has
13 prevailed on various legal challenges.
14

15 **c. Plaintiffs' counsel's total hours are reasonable.**

16 The hours expended by counsel in this case are reasonable in light of the work required to
17 prove the claims and defeat the defenses asserted. Class Counsel directed the litigation and
18 delegated assignments among co-counsel firms. Among the many significant projects required to
19 prosecute this litigation successfully:
20

- 21 • Lengthy investigation prior to filing the complaint;
- 22 • Preparing and filing initial and subsequent pleadings;
- 23 • Defeating seven motions to dismiss;
- 24 • Taking and defending over 80 party and non-party depositions across the country;
- 25 • Reviewing and organizing hundreds of thousands of pages of documents;
- 26 • Expert class and merits discovery involving over a dozen testifying and non-testifying
27 experts for all parties;
- 28

- 1 • Working with numerous expert witnesses and consulting firms to prepare lengthy reports
- 2 on liability and class certification;
- 3 • Numerous open-records requests to public universities;
- 4 • Extensive discovery motion practice;
- 5 • Traveling to and making multiple appearances before Judges Wilken and Cousins;
- 6 • Briefing, arguing, and obtaining injunctive-class certification, a 15-month process;
- 7 • Briefing, arguing, and obtaining partial summary judgment, including responding to
- 8 commensurate *amici curiae* briefing on First Amendment issues;
- 9 • Fending off two attempts at interlocutory appeal to the Ninth Circuit, as well as numerous
- 10 pre-trial motions;
- 11 • Three-week bench trial and related preparation; and
- 12 • Briefing post-trial motions, including this motion for fees and costs.

13 d. **Plaintiffs' costs are reasonable.**

14 Plaintiffs' Clayton Act costs are reasonable as well. As numerous courts have

15 acknowledged, and as the attached declarations attest to, fee-paying clients typically bear the

16 costs of computerized legal research; attorney travel; photocopying; printing; overnight mail and

17 messengers; and document database hosting, among other charges. *Trs. of the Constr. Indus. &*

18 *Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1259 (9th Cir. 2006);

19 *Blackwell v. Foley*, 724 F.Supp.2d 1068, 1080 (N.D. Cal. 2010). Accordingly, Class Counsel's

20 motion includes \$5,555,739.07 in costs, which are compensable under the Clayton Act because

21 they were vital to the prosecution of this case and are of the type typically billed to clients.

22 So too are Plaintiffs' taxable costs (subsumed with the larger figure compensable under

23 the Clayton Act) appropriate. 15 U.S.C. § 26 requires the Court to award the cost of suit,

24 including a reasonable attorney's fee, to any plaintiff who "substantially prevails" in an action for

1 injunctive relief under the Clayton Act. Civil Local Rule 54-3 details the standards for taxing
2 costs in any litigation, specifying the taxable costs of fees for filing and service of process;
3 reporters' transcripts; depositions; reproduction and exemplification; witness expenses; fees for
4 masters and receivers; costs on appeal; and costs of bonds and security. Class Counsel has
5 submitted accounting records and invoices attesting to these cost items, joined with Plaintiffs'
6 Bill of Costs. These taxable costs are included in the costs recoverable under the Clayton Act
7 fee-shifting statute.
8

9 **III. Conclusion**

10 For the foregoing reasons, the Court should grant Plaintiffs' motion for attorneys' fees and
11 costs, subject to any amendments Plaintiffs may need to submit in light of the short time window
12 afforded Plaintiffs under the Civil Local Rules.
13

14
15
16 Dated: August 22, 2014

Respectfully submitted,

17
18 By: /s/ Sathya Gosselin

19 Michael D. Hausfeld (*pro hac vice*)
20 Hilary K. Scherrer (Cal. Bar No. 209451)
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Plaintiffs' Class Counsel

CERTIFICATE OF SERVICE

I, Sathya S. Gosselin, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am a partner in the law firm of HAUSFELD LLP, and my office is located at 1700 K Street NW, Suite 650, Washington, DC 20006.

On August 22, 2014, I caused to be filed the following **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY'S FEES AND COSTS** and accompanying declarations with the Clerk of Court using the Official Court Electronic Document Filing System, which served copies on all interested parties registered for electronic filing.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Sathya Gosselin
Sathya S. Gosselin