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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	**Case No. 4:14-md-2541-CW** **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**
This Document Relates to: ALL ACTIONS EXCEPT *Jenkins v. Nat'l Collegiate Athletic Ass'n*, Case No. 14-cv-02758-CW	Date: July 17, 2019 Time: 2:00 p.m. Place: Courtroom 5, 4th Floor Judge: Hon. Nathanael Cousins

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I. INTRODUCTION

On March 8, 2019, the Court issued its Findings of Facts and Conclusions of Law, ruling in Plaintiffs' favor and ordering that "Plaintiffs shall recover their costs from Defendants."[1] Defendants now seek a 10% "haircut" of Plaintiffs' lodestar. But Defendants do not argue that Plaintiffs' hourly rates are unreasonable, they do not argue that the total hours Plaintiffs billed in this MDL are disproportionate to those billed by Defendants, and they do not argue that Plaintiffs' petition is unreasonable under *any* of the *Kerr* factors. As explained below, Defendants' asserted justifications for a 10% reduction simply do not hold water.

First, Defendants attempt to justify their request for a 10% reduction in the lodestar by pointing to the fact that Plaintiffs (appropriately) opposed Defendants' request for a one-sided production of billing records. This argument is both meritless and a non-sequitur. Defendants do not contend that Plaintiffs failed to properly maintain records to calculate the lodestar. Nor do Defendants explain how Plaintiffs' opposition to a one-sided production of roughly five years of monthly billing records—which would require a massively burdensome and tedious (and, ironically, expensive) privilege review—relates to a request for a reduction in fees. It would be one thing if Defendants were contesting the reasonableness (*e.g.*, efficiency) of Plaintiffs' billings, but they are not. Defendants' request for documents is pending before this Court, and either it will be denied or granted, but under no circumstances does this document dispute support their request for a blanket lodestar reduction.

Second, Defendants argue that Plaintiffs should not be reimbursed for work done to "keep *Jenkins* separate from the consolidated action."[2] Despite having full knowledge of every argument and submission Class Counsel made to the Court, Defendants proffer only a single project that they believe falls within this proposed carve-out: "work that Winston[3] did in connection with the [JPML] proceedings."[4] But even that work furthered the interests of the Consolidated Classes because Winston opposed Defendants' position that all Plaintiffs' claims should be litigated in the Southern

[1] ECF No. 1162, Findings of Fact and Conclusions of Law at 104.
[2] ECF No. 1198, Defs.' Opp'n to Pls.' Mot. for Att'ys' Fees ("Opp'n") at 5.
[3] Winston & Strawn, LLP was the first law firm to represent the *Jenkins* plaintiffs and classes. Later, Hagens Berman Sobol Shapiro LLP and Pearson, Simon & Warshaw would also represent the *Jenkins* plaintiffs.
[4] Opp'n at 5.

District of Indiana, a forum Class Counsel deemed unfavorable. In any event, Defendants cannot argue credibly or with a straight-face that Winston's work on a single procedural proceeding at the inception of a five-year litigation justifies a 10% reduction in Plaintiffs' fee request. The facts are that all of Winston's work in support of the *Jenkins* action also benefitted the Consolidated class members, most of whom also belong to the *Jenkins* classes.

Third, Defendants argue that Plaintiffs should not be reimbursed for work solely related to the damages class. But Plaintiffs have submitted three declarations confirming that they already carved out all such bills. There is thus no factual basis for reducing the lodestar on this ground either.

Defendants further argue that the Court cannot consider certain factors in connection with Plaintiffs' request for a modest multiplier of 1.5, but they have not and cannot dispute that the Supreme Court has expressly authorized courts to award multipliers where plaintiffs achieved "exceptional results" as a result of "superior attorney performance." This authorization encompasses each and every factor Plaintiffs ask this Court to consider. Indeed, the rulings in favor of the Classes in this case—which were "vigorously opposed [] at every turn" by "some of the best, and most well-resourced, defense lawyers in the country"[5]—resolved legal issues that have plagued college athletes for decades. And while Defendants dispute the precise aggregate value of the injunction across all conferences and schools, they do not dispute that the injunction opens the door to individual players negotiating for up to $60,000-$100,000 of previously unpermitted educational benefits, which, when applied to each-and-every one of tens of thousands of Class Members, is clearly an exceptional result.

Finally, as explained below, Plaintiffs' request for costs is reasonable and sufficiently documented, and neither of Defendants' objections to service awards apply to the players-at-issue.

Accordingly, Plaintiffs respectfully request that the Court approve $44,917,341.30 in fees, $975,258.77 in costs (on top of those taxed by the Clerk), and the requested service awards.[6]

[5] *See* ECF No. 745, Order Granting Pls.' and Class Counsel's Mot. for Att'y's Fees, Expenses, and Service Awards ("Damages Order") at 4, 13.

[6] Plaintiffs incorporate by reference here the arguments they presented in the joint letter brief regarding billing records (ECF No. 1184, Jt. Statement of Disc. Dispute), Plaintiffs' motion for judicial review of the Clerk's action on the Bill of Costs (ECF No. 1193, Pls.' Mot. for Review of Clerk's Taxation of Costs; ECF No. 1199, Pls.' Reply ISO Mot. for Review of Clerk's Taxation of Costs), and Plaintiffs' opposition to Defendants' motion to vacate the Clerk's action on the Bill of Costs (ECF No. 1195,

II. ARGUMENT

A. The Court Should Approve Plaintiffs' Lodestar

Defendants do not dispute that Plaintiffs are entitled to reasonable attorneys' fees, calculated by the lodestar method, which multiplies the number of hours reasonably expended by a reasonable hourly rate, while taking into consideration the relevant factors in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). Nor do Defendants contest the reasonableness of Plaintiffs' counsel's hourly rates. Defendants do not contest that the total hours and amounts Plaintiffs billed in this MDL are disproportionate to that billed by Defendants, or are otherwise unreasonable in the context of any of the twelve *Kerr* factors.[7] As explained below, Defendants have not presented a single argument that justifies their request to reduce Plaintiffs' lodestar "by at least 10%" (or any amount).

First, the Local Rules make clear that whether or not a moving party should produce billing records "depend[s] on the circumstances," and that, in any event, such records may be submitted *in camera*. N.D. Cal. L.R. 54-5(b)(2) ("Depending on the circumstances, the Court may require production of an abstract of or the contemporary time records for inspection, including *in camera* inspection, as the Judge deems appropriate."). In other words, even if billing records were necessary to assess this motion (as Plaintiffs explained in the joint letter brief, they are not), the appropriate remedy would be an order requiring "inspection, including *in camera* inspection" of the records in dispute (which should be bilateral)[8]—not the across-the-board "haircut" Defendants seek.[9] *Id.*

Pls.' Opp'n to Defs.' L.R. 7-11 Mot. for Administrative Relief to Vacate Taxed Costs Order), all of which are pending before this Court.

[7] *See also* ECF No. 745, Damages Order at 5-7, 12-16.

[8] As explained in the joint letter brief on billing records, if this Court were to require Plaintiffs to produce certain categories of billing records, it should order Defendants to produce commensurate records, given that comparable information regarding Defendants' billing would be necessary to assess the efficiency of Plaintiffs' work. *See* ECF No. 1184, Jt. Statement of Disc. Dispute at 10.

[9] The cases Defendants cite largely involve the distinct issue of plaintiffs not *maintaining* appropriate contemporaneous billing records, which of course, is necessary to calculate the fees associated with a case. *See Hensley v. Eckerhart*, 461 U.S. 424, 438 n.13 (1983), *Allen v. Berryhill,* 2019 WL 343422, at *4 (N.D. Cal. Jan. 28, 2019); and *Pac. W. Cable Co. v. City of Sacramento, Cal.*, 693 F. Supp. 865, 872 (E.D. Cal. 1988). And, while Defendants cite *Gonzalez* for the proposition that a court "should" make an across-the-board percentage cut when it determines more detailed billing records are necessary, *Gonzalez* expressly provides for other options, including an order compelling the production of appropriately formatted billing records. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1204 n.4 (9th Cir. 2013); *see also Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) ("The lack of contemporaneous billing records does not justify an automatic reduction in the hours claimed").

In any event, Defendants do not present a single argument that supports the production of billing records, let alone a blanket 10% lodestar reduction. Notwithstanding Defendants' argument that the lodestar should be reduced for some of the work attributable to *Jenkins*, they do not dispute that Plaintiffs are entitled to reimbursement of the overwhelming majority of fees related to that action. This is unsurprising given that Defendants themselves have conceded that the "claims in [the] *Jenkins*" complaint are "*identical to*" and "subsumed by" those "asserted in the Consolidated Action," "each of the parties in *Jenkins* . . . were parties in the Consolidated Action," and "the Consolidated Action and *Jenkins* presented identical legal claims and theories."[10] As explained in the joint discovery brief, every major ruling in this MDL up until trial applied to both *Jenkins* and the Consolidated Action, and the work and rulings in *Jenkins* were fully applicable to, and utilized in, the trial of the Consolidated Action. Defendants do not dispute any of these points and cannot deny that the vast majority of work performed in furtherance of the *Jenkins* claims was part-and-parcel of the cost of litigating and winning the trial in the Consolidated Action.

Nevertheless, Defendants insist that Winston must review, redact, and produce five-years of their monthly billing records so that Defendants can identify and ask for the carve out of any fees related to "keep[ing] *Jenkins* separate from the consolidated action."[11] But Defendants, who have full knowledge of all arguments and submissions Winston made to the Court, have identified only a single project that they believe falls within this proposed carve-out: "work that Winston did in connection with the proceedings before the United States Judicial Panel on Multidistrict Litigation."[12] But even that work—an imperceptible blip on the radar in a five-year multi-party antitrust case culminating in a trial—furthered the interests of Plaintiffs in the Consolidated Action because part of Winston's work concerned opposing Defendants' efforts to have all cases heard in a forum they believed would be disadvantageous to the putative classes (*i.e.*, the Southern District of Indiana where the NCAA is headquartered).[13]

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[10] ECF No. 1178, Notice of Mot. and Mot. to *Jenkins v. National Collegiate Athletic Association, et al.*, Case No. 14-cv-02758, at 1, 6 (emphasis added).
[11] Opp'n at 5.
[12] *Id.*
[13] *In re NCAA Athletic Grant-in-Aid Antitrust Litig.*, MDL No. 2541, ECF No. 80, JPML Hr'g Tr. at 20:13-19 (arguing, in the alternative for N.D. Cal.).

Moreover, even if the Court were to find that the JPML work for *Jenkins* should be carved out, this very tiny amount of work could not possibly justify anything approaching even a one percent reduction in the Winston lodestar, let alone a 10% lodestar reduction. Therefore, the appropriate remedy, if the Court were to find that any reduction may be required, would be for Winston to (a) submit a declaration detailing the fees dedicated solely to the JPML work; and/or (b) lodge *in camera* Winston's billing records for the period it worked on the JPML proceedings.

Defendants next claim that Plaintiffs "cannot receive compensation for hours expended on the damages portion of the case because they have already received [money] from the settlement fund for that purpose." Opp'n at 6. Plaintiffs agree—which is precisely why Plaintiffs' counsel for the damages claims provided declarations explaining that they have *already excluded* time that was attributable to the damages portion of the case. *See* ECF No. 1169-2, Simon Decl. ¶¶ 54-57 ("Because PSW has already requested—and the Court has awarded—fees pertaining to the *damages* part of this case, my firm has calculated the specific attorneys' fees attributable to the *injunctive relief* portion of the case." (emphasis in original)); ECF No. 1169-3, Berman Decl. ¶ 8 ("Hagens Berman does not seek now to recover any portion of the attorneys' fees and/or costs that were already awarded from the damages settlement. Instead, we have calculated and included herein, only the fees and expenses specifically attributable to work done for the injunctive portion of this case as outlined below."); ECF No. 1169-4, Pritzker Decl. ¶¶ 10-12 ("All of the hours set forth in Exhibit A reflect work associated only with the Injunctive Relief aspect of the case.").[14]

Finally, Defendants' arguments regarding media activities and clerical work are wholly insufficient to justify either the production of five-years of billing records or a 10% reduction of the lodestar. Opp'n at 6 n.3. In *O'Bannon*, Judge Wilken expressly rejected the NCAA's nearly identical argument regarding media activities, explaining "the Ninth Circuit has allowed counsel to recover work for media-related activities. In this high-profile class action, counsel's media-related work was part of their successful representation of the class."[15] This holding applies with equal force here.

[14] This issue does not relate to Winston, which was not counsel for the damages class.

[15] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2016 WL 1255454, at *8 (N.D. Cal. Mar. 31, 2016) (*citing Davis v. City of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *reh'g denied and opinion vacated in non-relevant part*, 984 F.2d 345 (1993)), *aff'd*, 739 F. App'x 890 (9th Cir. 2018).

Similarly, in *O'Bannon*, the Court rejected nearly all of the NCAA's challenges regarding clerical work. Ultimately, the Court modified the fee award by only $34,391, based on "entries that are purely clerical, including entries for making travel arrangements, opening bank accounts and printing or copying documents," which "represent[ed] two percent of the $1,719,551.35 reduction sought by the NCAA for purportedly clerical work" and *0.075%* of the overall fees sought.[16] This is a far cry from the 10% "haircut" that Defendants seek here, and Defendants' concerns about such entries hardly justify requiring Plaintiffs to undertake the laborious task of reviewing and redacting privileged information from five-years' worth of time entries. To the extent that the Court finds that the lodestar should not encompass hours related to "entries that are purely clerical," Plaintiffs could file a declaration regarding the fees associated with those entries and/or submit those entries for *in camera* review.

B. A Modest 1.5 Multiplier is Warranted

As the Supreme Court held in *Perdue*, and Defendants do not dispute, a court may grant a positive lodestar multiplier when awarding statutory attorneys' fees where counsel achieves "exceptional results" as a "result of superior attorney performance."[17] That is precisely what occurred here. For over five years, Plaintiffs' counsel has "vigorously" advocated against some of the nation's top lawyers over issues that have long plagued college athletes.[18] Following a hard-fought ten-day bench trial, Plaintiffs secured a ruling that Defendants' restraints on the compensation that college athletes in the Classes may receive for athletic services violate the antitrust laws. This is a monumental achievement, and the historic injunction the Court entered will provide substantial benefits worth hundreds of millions of dollars for tens of thousands of Class Members for years to come.

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[16] *Id*. at *10; *see O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 114 F. Supp. 3d 819 (N.D. Cal. 2015) (citation omitted), *objections sustained in part and overruled in part*, 2016 WL 1255454 (N.D. Cal. Mar. 31, 2016).

[17] *Perdue v. Kenny A. ex. rel. Winn*, 559 U.S. 542, 554 (2010); *see Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("There remain other considerations that may lead the district court to adjust the fee upward or downward including the important factor of the 'result obtained.'"); *In re Bluetooth Headset Prod. Liability Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011) (holding that "*[f]oremost* among these considerations" in deciding whether to grant a positive or negative multiplier of the lodestar is the "benefit obtained for the class" (emphasis added)); *see also Kelly v. Wengler*, 822 F.3d 1085, 1102-04 (9th Cir. 2016); *St. Louis Ret. Sys. v. Severson*, 2014 WL 3945655, at *6 (N.D. Cal. Aug. 11, 2014).

[18] *See* ECF No. 745, Damages Order at 13 ("Defendants vigorously opposed plaintiffs at every turn.").

Defendants challenge the exceptional nature of the outcome by arguing that the injunctive-relief obtained is less than the maximum relief sought. But the standard for measuring success should not be measured in comparison to the relief requested, but by the relief obtained. And the results here speak for themselves.[19]

Plaintiffs overcame substantial obstacles to succeed against every Defendant in this action, and, as shown in Dr. Rascher's declaration, the enormous value of the injunction underscores the exceptional nature of the results and the value of the benefits for the class, which strongly supports granting the requested multiplier.[20] *See* ECF No. 1169-1, Rascher Decl. ¶¶ 3, 61-63 (opining that the new benefits that may now become available could, conservatively, be worth as much as $235 million annually, whereas Plaintiffs' lodestar of $29,944,894.20 is just 12.7% of that amount and 3.19% of the four-year value of such benefits). Notably, Defendants do not dispute that under the injunction, individual Class Members could receive both academic achievement bonuses of $60,000 *and* additional academic-related benefits valued by Dr. Rascher at approximately $40,000, over a four-year period.[21] While Defendants take issue with the precise number of schools that will provide these benefits, they do not dispute that a large number of schools will do so. Nor could they, as they have consistently argued that, if given the opportunity, schools would provide greater compensation to their players.[22]

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[19] Defendants argue that "Plaintiffs were plainly dissatisfied with the result" because Plaintiffs filed a cross-appeal (Opp'n at 11), but Plaintiffs' cross-appeal relates solely to the scope of the relief, not liability, whereas Defendants appeal the much broader liability finding. Of course, the more revealing point is that *Defendants* appealed the trial outcome, despite their attempt to downplay its significance.

[20] *See Kelly*, 822 F.3d at 1102-03 (holding that fee applicant who provides "specific evidence that supports the [requested] award" may be given a fee enhancement, and affirming that the district court had relied on "specific evidence in the record" to adequately support its finding that superior attorney performance justified a positive multiplier (internal quotation marks omitted)).

[21] In fact, to be conservative, Dr. Rascher assigned "zero" values to (1) the value of study abroad and the value of the completion of undergraduate education (even if an athlete ends his eligibility by turning professional); (2) the value of additional tutoring; (3) the value of scientific equipment; as well as (4) "other tangible items not included in [COA]." ECF No. 1169-1, Rascher Decl. ¶¶ 20, 40. And while Defendants claim that Dr. Rascher's work assumes that no athlete will take a full-time job after graduation, nothing in the injunction prohibits a full-time employee from obtaining the post-graduate benefits at issue.

[22] *See e.g.*, ECF No. 1128, Defs.' Closing Br. at 45-47. Defendants' reference to Jackson State to support the argument that smaller schools are unlikely to adopt additional forms of compensation is contrary to their argument that early adopters of higher compensation may be schools outside the so-called "Autonomy" conferences. ECF No. 1160, Closing Args. Hr'g Tr. at 116:11-18.

Finally, Defendants' challenges to Dr. Rascher's methodology are based upon demonstrably false premises. For example, Defendants state that "Dr. Rascher assumes that not one conference or school will" impose a cap on the "value of permissible educational compensation" (Opp'n at 12), when, in fact, he expressly capped the value of the internship provided by *every* conference at either zero or $7,500, and his work assumes nearly one hundred schools will offer zero additional benefits.[23] Defendants also claim Dr. Rascher is aggressive to assume each athlete will avail her/himself of one of the three types of post-graduate benefits. However, as he explained, there is nothing in the Injunction that prevents a conference from allowing more than one of these three forms of post-eligibility compensation to be provided to the same class members, so the assumption is conservative.[24] In sum, while Defendants may dispute the precise aggregate value of the injunction to the classes, they do not and cannot dispute the order of magnitude—tens of thousands of class members will have the opportunity to seek to obtain $60,000-$100,000 of previously barred educational benefits. This is nothing short of an exceptional result.[25]

It is also a result that could not have been achieved without superior attorney performance.[26] The case was extremely risky for the classes, requiring Plaintiffs to overcome substantial legal and factual hurdles, but ultimately, Plaintiffs prevailed at every stage, *defeating* Defendants' motion to dismiss, motion for judgment on the pleadings, and motion for summary judgment, and *prevailing* on Plaintiffs' motion for partial summary judgment and at trial against some of the best and most reputable trial lawyers in the country.[27]

[23] ECF No. 1169-1, Rascher Decl. ¶ 37.

[24] *Id.* ¶ 26.

[25] In *O'Bannon*, Judge Wilken did not award a multiplier, in part because Plaintiffs had withdrawn their state law claims and failed to obtain certification of the damages class. Nevertheless, both this Court and the Ninth Circuit characterized the plaintiffs' narrower success of eliminating the NCAA rule prohibiting scholarships up to the cost of attendance as "an excellent result." *O'Bannon*, 2016 WL 1255454 at *4; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 739 F. App'x 890, 894 (9th Cir. 2018). Here, by contrast, Plaintiffs succeeded on all claims against all Defendants and obtained a wide-ranging injunction, which permits a multitude of new benefits conservatively estimated to be worth approximately $100,000 to each class member for years to come. ECF No. 1169-1, Rascher Decl. ¶ 65.

[26] *Kelly*, 822 F.3d at 1102 (citing *Perdue* for importance of this factor in granting multiplier).

[27] Defendants quote *Antoninetti v. Chipotle Mexican Grill, Inc.*, 49 F. Supp. 3d 710, 723-24 (S.D. Cal. 2014) for the proposition that the court denied a requested multiplier despite the "outstanding results obtained," but that was the plaintiff's argument, not the court's holding, which was that plaintiffs had *not* achieved the level of success they claimed. To the extent Defendants read *Reyes v. Bakery and*

While the exceptional results achieved by superior attorney performance alone justifies the requested 1.5 multiplier, review of additional factors further demonstrates that a fee enhancement is appropriate. Defendants do not dispute that the Ninth Circuit has held that a district court should "determine[] whether to modify the lodestar figure, upward or downward, based on factors not subsumed in the lodestar figure."[28] For example, *Perdue* held that when determining whether a multiplier should be awarded, a court may consider both (a) Plaintiffs' counsel's investment; and (b) the likelihood that other attorneys may not have prevailed, which necessarily relates to the novelty and complexity of the case.[29] Both of these factors further support the requested multiplier.

First, over five years of hard-fought litigation, which included a meaningful risk of not prevailing, Plaintiffs expended more than $5.6 million in costs, including $1.34 million in reimbursable costs and nearly $4.3 million in expert costs that, while not reimbursable, were essential in this complex antitrust litigation.[30] There should be no dispute that incurring substantial costs during a protracted litigation may justify a fee enhancement.[31] Nevertheless, without any on-point authority, Defendants argue that the Court cannot consider expert expenditures because such costs are not taxable under the Clayton Act. Opp'n at 9. To the contrary, Plaintiffs' expenditure of over $4 million in necessary but non-reimbursable expenses is precisely the type of "exceptional" circumstance where the lodestar figure "does not adequately represent counsel's . . . 'commitment of resources.'"[32]

Confectionery Union & Industry Int'l Pension Fund, 281 F. Supp. 3d 833, 857 (N.D. Cal. 2017) to hold that exceptional results and superior attorney performance can never justify a fee multiplier, that is contrary to controlling law, including in the Supreme Court's decision in *Perdue*. Moreover, whether those factors could support a positive fee enhancement was not at issue in *Reyes*. *See id.*

[28] *Kelly*, 822 F.3d at 1099 (citing *Perdue*); *id.* at 1100 (citing several other Supreme Court cases for propriety of enhancing lodestar); *Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th Cir. 1996).

[29] *Perdue*, 559 U.S. at 554 ("When a plaintiff's attorney achieves results that are more favorable than would have been predicted based on the governing law and the available evidence, the outcome may be attributable to superior performance and commitment of resources by plaintiff's counsel."); *see Kelly*, 822 F.3d at 1102 (plaintiffs' "commitment of resources" may justify enhancement to lodestar where not adequately accounted for by lodestar figure); *Severson*, 2014 WL 3945655, at *6 (relying on Supreme Court's decision in *Perdue* and Ninth Circuit's decision in *Morales* to hold that 1.5 multiplier was supported by plaintiffs' counsel devotion of significant resources in obtaining injunctive relief and excellent results); *Corns v. Laborers Int'l Union of N. Am.* 62 F. Supp. 3d 1105, 1114 (N.D. Cal. 2014) (courts may grant multiplier where there has been "an extraordinary outlay of expenses" or "particularly protracted litigation").

[30] *See* ECF No. 1169, Fee Motion at 2, 4-13, 21.

[31] *See* cases cited *supra* in footnote 30.

[32] *See Kelly*, 822 F.3d at 1102 (quoting *Perdue*, 559 U.S. at 553-54).

Second, circumstances that create an "exceptional risk[] of not prevailing or recovering any fees," may justify an upward adjustment of the lodestar.[33] Here, the novelty and difficulty of legal and factual issues created just that type of risk for Plaintiffs.[34] Finally, the efficient means by which Plaintiffs overcame these challenges—as illustrated by a lodestar that is less than 75% of plaintiffs' counsel's in *O'Bannon*, and the fact that Defendants do not even challenge the reasonableness of the aggregate hours Plaintiffs billed to this MDL—further supports granting the requested 1.5 multiplier.

C. Defendants' Request for a Negative Multiplier Defies the Court's Order and Controlling Law

There is no merit at all to Defendants' argument that the judgment in this action represents only a "partial victory" (which Defendants have fully appealed) and that a "substantial negative multiplier" is thus necessary to ensure that Plaintiffs do not recover the actual costs of this litigation. Judge Wilken's trial decision completely disposes of this argument when, after rendering the Findings of Fact and Conclusions of Law upon which Defendants' argument hinges, she unequivocally ruled that "Plaintiffs shall recover their costs from Defendants."[35] Defendants' request for a negative multiplier is squarely contrary to that order.

Defendants argue that unless a plaintiff is "fully successful" in obtaining the relief sought, a court may (and should) apply a negative multiplier. Opp'n at 12. But this is not the law. Defendants base their argument on *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and its progeny. Opp'n at 12-13. But as the Supreme Court explained, "[t]he issue in [*Hensley* was] whether a partially prevailing plaintiff may recover an attorney's fee for legal services on *unsuccessful claims*." *Hensley*¸ 461 U.S. at 426 (emphasis added). Like *Hensley*, the lower court cases upon which Defendants rely involved plaintiffs who prevailed on some claims but not others.[36] Here, in contrast, Plaintiffs filed a single

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[33] *See Campbell v. Nat'l Passenger R.R. Corp.*, 718 F. Supp. 2d 1093, 1103 (N.D. Cal. 2010) (Wilken, J.); *see also Bluetooth*, 654 F.3d at 942 ("risk of nonpayment" may justify multiplier).
[34] *See* ECF No. 745, Damages Order at 5 ("Plaintiff's counsel faced real risks in pursuing this case, not the least of which was being initially dismissed on the pleadings as a matter of law based on *O'Bannon*."); *id.* at 5 ("The risk that further litigation might result in plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees.").
[35] ECF No. 1162, Findings of Fact and Conclusions of Law at 104.
[36] *See Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895 (9th Cir. 1995); *Harris v. Marhoefer*, 24 F.3d 16, 17 (9th Cir. 1994); *Willis v. City of Fresno*, 2014 WL 3563310 (E.D. Cal. July 17, 2014), *aff'd*, 680 F. App'x 589 (9th Cir. 2017); *Rodriguez v. Barrita, Inc.*, 53 F. Supp. 3d 1268,

claim—under Section 1 of the Sherman Act, 15 U.S.C. § 1—and prevailed on that claim as to each and every one of the twelve defendants. Without a single unsuccessful claim to point to, Defendants' request for a negative multiplier fails as a matter of law.

Further, as this Court has explained, "the Ninth Circuit reads *Hensley* as 'establishing the general rule that plaintiffs are to be compensated for attorney's fees incurred for services that contribute to the ultimate victory in the lawsuit. . . . Thus, even if a specific claim fails, the time spent on that claim may be compensable, in full or in part, if it contributes to the success of other claims.'"[37] Accordingly, even if *Hensley* were not limited to cases in which a plaintiff lost certain claims (again, it is), Defendants' request for a negative multiplier would still fail because Defendants cannot dispute that the time spent on Plaintiffs' arguments regarding cost-of-attendance and non-education-based compensation and benefits contributed to their successful challenge of "the interconnected set of NCAA rules that limit [compensation]."[38] *See* ECF No. 1162, Findings of Fact and Conclusions of Law at 1; *see also O'Bannon*, 2016 WL 1255454, at *4 (rejecting NCAA's request for negative multiplier even though, unlike here, plaintiffs did *not* prevail on all claims, and finding that "the work related to abandoned claims share[d] a common core of facts with the successful antitrust claims").

D. Plaintiffs' Costs Are Reasonable and Should Be Awarded

The motion for fees and costs sought $1,346,741.69 in costs, $363,783.03 of which overlapped with the Bill of Costs.[39] Defendants did not object to the Bill of Costs and, on May 2, 2019, the Clerk taxed Defendants $305,476.77 out of the $363,783.03 requested in the Bill of Costs.[40] Plaintiffs filed

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1289-90 (N.D. Cal. 2014); *Antoninetti*, 49 F. Supp. 3d at 725; *United States ex rel. Doe v. Biotronik, Inc.*, 2015 WL 6447489 (E.D. Cal. Oct. 23, 2015).

[37] *O'Bannon*, 114 F. Supp. at 829 ; *see also Willis*, 2014 WL 3563310, at *5 ("In short, Hensley found that if successful and unsuccessful claims share a common core of facts or were based on related legal theories, work done on unsuccessful claims may be included in a fee award."); *compare United States ex rel. Doe v. Biotronik, Inc.*, 2015 WL 6447489, at *10 ("[m]any of [plaintiff's] claims [] are dissimilar and cannot have risen from the same 'core facts'")), *aff'd*, 716 F. App'x 590 (9th Cir. 2017); *Schwarz*, 73 F.3d at 904 ("The unsuccessful claims did not involve the same course of conduct as her successful claim and the efforts expended on the unsuccessful claims did not contribute to her prevailing on the successful claim."); *Antoninetti*, 49 F. Supp. 3d at 725 (plaintiff dropped consumer-protection claim and tort claims, and settlement was limited to unrelated ADA and Unruh Act claims).

[38] In addition, "[a] plaintiff who did not achieve every goal yet still 'obtained excellent results . . . should recover a fully compensatory fee.'" *O'Bannon*, 739 F. App'x 890, 894 (9th Cir. 2018) (*quoting Hensley*, 461 U.S. at 435). As explained in Section II.B., the result here was clearly "excellent."

[39] ECF No. 1169, Fee Motion at 1; ECF No. 1190, Taxation of Costs.

[40] ECF No. 1190, Taxation of Costs.

1 a timely motion for judicial review of $49,905.69 of the disallowed costs (ECF No. 1193), which they
2 later reduced to $45,689.05 in their reply motion.[41] Defendants allowed the deadline to file a motion
3 for judicial review to pass, but later improperly sought judicial review under the guise of an
4 "Administrative Motion."[42] As set forth in the briefings on the Bill of Costs, the Clerk's taxation of
5 $305,476.77 should remain intact, and Plaintiffs respectfully request that the Court tax Defendants an
6 additional $45,689.05 of the disallowed costs from the Bill of Costs. Plaintiffs further request that the
7 Court award Plaintiffs $975,258.77 of the additional $982,958.66 in costs sought in the motion for
8 fees and costs. As set forth below, Defendants' challenges to these costs fail.

9 **a. Plaintiffs Provided Sufficient Support for the Requested Costs**

10 Before filing the motion for fees and costs, Plaintiffs asked Defendants what information they
11 may need in order to decide whether they oppose the amounts sought, but Defendants did not respond
12 until after Plaintiffs filed their motion.[43] Thereafter, Defendants filed a joint letter brief regarding
13 billing records to support Plaintiffs' request for fees, but did not request additional documentation
14 regarding costs.[44] Nevertheless, Defendants now ask Plaintiffs to absorb nearly $1 million of costs
15 based upon newly raised concerns regarding the purported need for such documentation.

16 As the Supreme Court has held, "trial courts need not, and indeed should not, become green-
17 eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to
18 achieve auditing perfection." *Fox v. Vice,* 563 U.S. 826, 838 (2011). Following this guidance, this
19 Court places a limited burden of production on Plaintiffs to show that "costs claimed [] are reasonable
20 in the context of the litigation." *O'Bannon*, 2016 WL 1255454, at *12. Only one case cited by
21 Defendants required plaintiffs to provide "invoice[s] or other document[s]" to support a motion for
22 costs—*Tuttle v. Sky Bell Asset Mgmt.*—and Judge Wilken already considered that case and declined
23 to follow it under similar circumstances.[45] Plaintiffs have met their burden of documenting their

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[41] ECF No. 1199, Pls.' Reply ISO Mot. for Review of Clerk's Taxation of Costs at 2.
[42] ECF No. 1194, Defs.' L.R. 7-11 Mot. for Administrative Relief to Vacate Taxed Costs Order.
[43] ECF No. 1169-3, Berman Decl. ¶ 27.
[44] *See* ECF No. 1184, Jt. Statement of Disc. Dispute.
[45] *O'Bannon*, 2016 WL 1255454, at *13. Defendants' reliance on *Banas* (Opp'n at 14) is misplaced, since the *Banas* court relied solely on the standards for recovering costs under Delaware state law. *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 976 (N.D. Cal. 2014). Defendants' reliance on *Cruz*, where the court declined printing costs for a failure to "provide the cost billed per page, the number

request by providing invoices[46] and detailed summary charts itemizing each category of requested costs.[47] But even if this Court were to determine that more documentation is needed, as stated in the Kessler Declaration, Plaintiffs are willing and able to make "[c]opies of invoices and contemporaneously made records evidencing these costs [] available at the Court's request."[48]

b. Plaintiffs Are Entitled to the Requested Costs

Defendants allege that many of the costs requested by Plaintiffs are "not compensable," but their conclusory arguments lack factual or legal support. To the contrary, Plaintiffs are entitled to recover "reasonable out-of-pocket litigation expenses that would normally be charged to a fee paying client"[49]—which is precisely what Plaintiffs request here.[50]

Travel Expenses. Defendants ask this Court to reduce the roughly $250,000 in costs associated with out-of-town travel expenses Plaintiffs incurred over this five-year litigation. Notably, however, Defendants have not argued that Plaintiffs' travel costs were disproportionate to those incurred by Defendants, nor that these are not costs that "would normally be charged to a fee paying client."[51] Defendants also cite *Cruz* for the proposition that Plaintiffs' local travel expenses are not reimbursable. Opp'n at 15. But, in its denial of such costs, *Cruz* merely held that "Plaintiff has not cited authority indicating that his various miscellaneous expenses, which include but are not limited to local travel, are allowable."[52] Here, in contrast, Plaintiffs have cited cases holding that Plaintiffs are entitled to all costs that "would not normally be charged to a fee paying client."[53] Defendants have not and cannot dispute that local travel costs fall squarely within this category.

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of pages, any information about the documents that were copied" (*Cruz v. Starbucks Corp.*, 2013 WL 2447862, at *10 (N.D. Cal. June 5, 2013)) is inapposite, since Plaintiffs have provided such documentation and are willing and able to provide any further records necessary upon the Court's request (Kessler Decl. ¶ 29). ECF No. 1168-1, Bill of Costs Itemized Summary at 173-185. Tellingly, the Clerk already taxed these printing costs. ECF No. 1190, Taxation of Costs.

[46] ECF No. 1168-1, Bill of Costs Itemized Summary.

[47] ECF No. 1169-1, Kessler Decl. ¶ 28; ECF No. 1169-2, Simon Decl. at 43; ECF No. 1169-3, Berman Decl. at 174; ECF No. 1169-4, Pritzker Decl. at 11.

[48] ECF No. 1169-1, Kessler Decl. ¶ 29.

[49] *Trustees of Const. Indus. & Laborers Health & Welfare Tr. v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006).

[50] This includes the $8,400.57 of costs that the Clerk disallowed in connection with the Bill of Costs, but for which Plaintiff did not request judicial review.

[51] *See Redland Ins. Co.*, 460 F.3d at 1257.

[52] *Cruz*, 2013 WL 2447862, at *10-11.

[53] *See Redland Ins. Co.*, 460 F.3d at 1257.

Professional Services, and Miscellaneous Costs. Defendants contend that Plaintiffs' request for "miscellaneous" and "professional services" should be denied. Opposition at 15. These requested costs encompass expenses that are entirely appropriate for reimbursement such as secretarial overtime, investigative research, graphic design work and media duplication fees incurred during discovery. As explained above, Plaintiffs are willing to provide supporting invoices if the Court requests.

Video Streaming Service Costs. Defendants assert that Plaintiffs are not entitled to recover $2,653.60 in costs incurred for the live video stream of Amy Huchthausen at trial because the Court ordered Plaintiffs to bear such costs in the first instance. Opp'n at 16-17 (*citing* ECF No. 1016 at 6). Pursuant to that order, Plaintiffs initially bore those costs, but after prevailing at trial, the Court ordered that Plaintiffs "recover their costs from Defendants,"[54] which necessarily includes costs associated with Ms. Huchthausen's video testimony. Accordingly, Plaintiffs are entitled to recover those costs now. Defendants further argue that the $2,617.01 in video streaming service costs incurred on September 17, 2018 and September 19, 2018 were "unnecessary" because Plaintiffs did not present video at trial on either of those days. Opp'n at 16. But these costs, which Plaintiffs incurred to set up and test equipment and video links, were reasonable and necessary to ensure efficient live streaming of Amy Huchthausen's trial testimony.

Color Copy Printing Costs. Defendants argue that Plaintiffs' $210,101.60 in color copy and printing costs "should be reduced by 50% because they are unnecessary and excessive." Opp'n at 17. But, as in *O'Bannon*, the copying and printing costs incurred by Plaintiffs, while substantial, were "reasonable in the context of the litigation"[55] and documented in Plaintiffs' Bill of Costs.[56]

Withdrawn Requests for Costs. Plaintiffs withdraw their requests to recover (a) $6,122.89, associated with depositions that Defendants characterize as related solely to the damages portion of the case; and (b) $1,577 in *pro hac vice* application fees.

E. The Requested Service Awards Are Reasonable

Finally, Defendants "do not object in principle to plaintiffs' request for service awards," and

[54] ECF No. 1162, Findings of Fact and Conclusions of Law at 104.
[55] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2016 WL 1255454, at *12 (holding that $143,542.49 in "copying and printing costs claimed by Plaintiffs [we]re reasonable").
[56] ECF No. 1168-1, Bill of Costs Itemized Summary at 173-185; *see supra*, n.47.

their assertion that this request is "overbroad" is premised upon misunderstandings of Plaintiffs' request. *First*, Defendants argue that plaintiffs who are receiving service awards from the damages settlement "should not receive additional service awards here, with the exception of Shawne Alston who testified at trial." But, with respect to named plaintiffs from the damages settlement, Plaintiffs have limited their request to Alston and Hartman, both of whom testified at trial. Defendants concede that Alston is entitled to the proposed service award because he prepared for and testified at trial and they offer no reason why Hartman, who also testified at trial, should be treated any differently. *Second*, Defendants argue that, "to the extent plaintiffs are seeking service awards for named plaintiffs who produced documents but declined to sit for deposition, that request should be denied." To be clear, Plaintiffs are *not* seeking awards for any plaintiffs in this category, as each of the proposed service-award recipients—Alston, Hartman, Jenkins, Hayes, and James—sat for depositions. In the absence of a single relevant objection, Plaintiffs respectfully request that the Court approve service awards in the amount of (a) $15,000 each for Alston, Hartman and Jenkins, each of whom sat for a deposition and testified at trial; and (b) $10,000 each for Hayes and James, each of whom sat for a deposition and participated extensively in the prosecution of the case.

III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court award Plaintiffs $44,917,341.30 in fees and $975,258.77 in costs, and the requested service awards.

Dated: June 28, 2019

Respectfully submitted,

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/s/ Jeffrey L. Kessler
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