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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS EXCEPT *Jenkins v. Nat'l Collegiate Athletic Ass'n*, Case No. 14-cv-02758-CW

MDL Docket No. 4:14-md-02541-CW

DEFENDANTS' NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFFS' CLOSING ARGUMENT

Hearing Date: December 18, 2018
Time: 9:30 a.m.
Place: Courtroom 6, 2nd floor
Judge: Hon. Claudia Wilken

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NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFFS' CLOSING ARGUMENT

Please take notice that on December 18, 2018, at 9:30 a.m., or as soon hereafter as the matter may be heard by the Court, at the courtroom of the Honorable Claudia Wilken, Courtroom 6, 2nd floor, United States District Court, 1301 Clay Street, Oakland, California, Defendants hereby move the Court for an order striking portions of Plaintiffs' Closing Argument. Specifically, Defendants move the Court to strike those portions of Plaintiffs' Closing Argument in which Plaintiffs improperly rely on the testimony of their economic expert witnesses, Dr. Daniel Rascher and Dr. Roger Noll, to support substantive assertions of fact.

Defendants' present motion is based on this Notice of Motion and Motion, the Argument that follows, the concurrently filed Declaration of Karen Lent and its Exhibit A, any reply papers that Defendants may file and the arguments of counsel.

Defendants move to strike those portions of Plaintiffs' Closing Argument in which Plaintiffs improperly rely on the testimony of their economic expert witnesses, Dr. Daniel Rascher and Dr. Roger Noll, to support substantive assertions of fact. The law is clear that, while an expert may rely on hearsay or other inadmissible evidence to explain the basis for his opinion, that evidence itself is not admissible for its truth simply because the expert relied on it. Accordingly, even though it may have been unobjectionable for Dr. Rascher and Dr. Noll to recite supposed historical facts as part of the basis for certain of their opinions, what Plaintiffs now try to do—rely on those recitations as the evidentiary basis for the historical facts themselves—is not allowed. Yet, as Defendants show in Exhibit A to this brief, throughout their Closing Argument, Plaintiffs rely for their truth on numerous factual assertions that Drs. Rascher and Noll made in their testimony. Such reliance on purported "facts" to which Drs. Rascher and Noll testified is impermissible, and renders the accompanying factual assertions unsupported by record evidence. Accordingly, the factual assertions in Plaintiffs' Closing Argument identified in Exhibit A should be stricken.

ARGUMENT

Pursuant to Rule 703 of the Federal Rules of Evidence, although experts may base their opinions on hearsay or other inadmissible evidence, such hearsay or other inadmissible evidence is not an appropriate basis for establishing the truth of what it asserts. Fed. R. Evid. 703; Fed. R. Evid. 703 advisory committee's note to the 2000 Amendment; *see also Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) (audit reports, inadmissible but relied on by the experts, were not admissible "to establish the truth of what they assert."); *In re James Wilson Assocs.*, 965 F.2d 160, 172-73 (7th Cir. 1992) (Posner, J.) ("The fact that inadmissible evidence is the (permissible) premise of the expert's opinion does not make that evidence admissible for other purposes, purposes independent of the opinion."); *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983) ("An expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his expert opinion, Fed. R. Evid. 703, but not as general proof of the truth of the underlying matter, Fed. R. Evid. 802."); *United States v. United Techs. Corp.*, No. 3:99-cv-093, 2005 WL 6199561, at *3 (S.D. Ohio Feb. 2, 2005) (in a bench trial, the court may consider inadmissible evidence on which an expert relies "solely as a basis for the expert opinion and not as

substantive evidence" (citation omitted)). As Judge Posner explained in rejecting for their truth certain factual assertions relied upon by an expert, "[i]f for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party's lawyer told him, the lawyer cannot in closing argument tell the jury, 'See, we proved X through our expert witness A.' That was the hand-off attempted in this case." *In re James Wilson Assocs.*, 965 F.2d at 173.

And that is precisely the kind of hand-off the Plaintiffs' Closing Argument attempts in this case. Plaintiffs are relying on the testimony of Drs. Rascher and Noll, who based their opinions in part on inadmissible material outside the trial record of this case. As it relates to those opinions, Plaintiffs may do so. But, Plaintiffs now cite testimony from Drs. Rascher and Noll simply reciting that same inadmissible material for its alleged truth, which Plaintiffs may not do. For example, Plaintiffs contend that "many financial aid offices have used their discretion to increase the 'miscellaneous-expense' COA cash stipend paid since *O'Bannon* by thousands of dollars without the need for any bylaw change," citing only to Dr. Noll's direct testimony for the truth of that contention. (Pls' Closing at 41 n.266 (citing Noll Decl. ¶¶ 55, 64-66).) Plaintiffs assert that "[u]niversities tout the fact that their housing and athletic facilities permit Class Members to avoid interacting with non-athletes," citing only to Dr. Rascher's direct testimony for the truth of that assertion. (*Id.* at 21 n.134 (emphasis omitted) (citing Rascher Decl. ¶ 138).) Plaintiffs state that, "In [2015-16], 75% of the scholarship players on the University of Florida men's basketball team received SAF money—with payments ranging up to more than $1,800—on top of their COA scholarships," citing only to Dr. Rascher's testimony for the truth of that proposition. (*Id.* at 26 n.167 (citing Rascher Decl. ¶ 66).) And they contend that, "[a]lso in 2016, UCLA and Under Armour entered into a deal worth $280 million, which at the time was the richest deal ever entered into between a school and its apparel partner," citing only to Dr. Rascher's testimony for the truth of that assertion. (*Id.* at 28 n.188 (citing Rascher Decl. ¶ 50).) Exhibit A sets forth these and numerous other instances in which Plaintiffs improperly rely on assertions of fact from Dr. Rascher or Dr. Noll for the truth of those facts.

Because Plaintiffs repeatedly fail to support these factual assertions with admitted evidence apart from their experts' recitation of facts on which they relied for certain opinions, these portions

1 of Plaintiffs' Closing Argument should be stricken. Courts regularly grant motions to strike such
2 inadmissible evidence from parties' post-trial briefs. *See*, *e.g.*, *International Custom Prods., Inc. v.*
3 *United States*, 878 F. Supp. 2d 1329, 1350 (Ct. Int'l Trade 2012) (granting defendant's motion to
4 strike portions of plaintiff's post-trial brief, concluding that the "purported facts were not in evi-
5 dence and [could] not be considered by the Court"), *aff'd*, 748 F.3d 1182 (Fed. Cir. 2014); *United*
6 *Stars Indus., Inc. v. Plastech Engineered Prods., Inc.*, No. 06-cv-0349-C, 2007 WL 1655113, *1
7 (W.D. Wisc. June 5, 2007) (striking a section of Plastech's post-trial brief which relied on matters
8 that were never adduced at trial or allowed into the record), *aff'd on other grounds*, 525 F.3d 605
9 (7th Cir. 2008); *Kothmann Enterprises, Inc. v. Trinity Indus., Inc.*, 455 F. Supp. 2d 608, 615 n.6
10 (S.D. Tex. 2006) (granting defendant's motion to strike plaintiffs' post-trial brief references to
11 documents and evidence which were expressly excluded by the court during trial); *In re Midway*
12 *Airlines, Inc.*, 221 B.R. 411, 419 (Bankr. N.D. Ill. 1998) (granting debtor's motion to strike por-
13 tions of bankruptcy trustee's post-trial brief exhibit because the portions in question included nota-
14 tions and calculations that "were never identified on the . . . exhibit list, were not authenticated by
15 any witness, and were not offered or admitted into evidence"). And this Court should do so here.

16 **CONCLUSION**

17 For the foregoing reasons, Defendants' motion to strike the portions of Plaintiffs' Closing
18 Argument identified in Exhibit A should be granted.

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Dated: November 9, 2018

Respectfully submitted,

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FILER'S ATTESTATION

I, Karen Lent, am the ECF user whose identification and password are being used to file Defendants' Motion to Strike Portions of Plaintiffs' Closing Argument. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Karen Lent