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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

This Document Relates to:

ALL ACTIONS

Case No. 4:14-md-02541-CW

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' 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

## I. INTRODUCTION AND FACTS

Defendants erroneously ask this Court to strike 35 statements in Plaintiffs' closing argument, arguing 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." ECF No. 1125 ("Motion to Strike"), at 1. Defendants' motion should be denied for at least three independent reasons.

*First*, Defendants merely quote passages from Plaintiffs' closing argument, which frequently represent argument, general assertions of fact, or inferences from the evidence in general, without identifying any particular *evidence* that Defendants claim is inadmissible for its truth. Plaintiffs' brief is a closing argument, not evidence in and of itself. So the issue is not whether statements in the closing argument are themselves admissible. And because Defendants do not identify which specific facts supposedly lack evidentiary support for their truth (or why they are inadmissible), the Motion to Strike rests on flawed and indecipherable arguments, and should be denied for that reason alone.

*Second*, even if Defendants had identified specific facts that could only be admitted as evidence relied upon by Plaintiffs' experts, the underlying facts would still be admitted insofar as they serve to explain the basis of the experts' opinions. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1264 (9th Cir. 1984) (Rule 703 "permits such hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion"). Defendants nonetheless argue that any statements in the closing argument that cite generally to expert testimony (in whole or in part) that in turn relies upon supposedly inadmissible evidence must be struck in their entirety, without even identifying any evidence that the experts relied upon or why. Even if Defendants (sometimes) correctly cite the Rule 703 standards, the relief they seek is untethered to a correct application of the Rule.

*Third*, Defendants either waived their objections, or the Court has already overruled them. Defendants do not bother to address whether they objected to the admission into evidence of any specific evidence that they now claim is inadmissible (either for the truth of the matter asserted or as a basis for the experts' opinions). Many of their objections are brand new, first raised after trial. By failing to object to such allegedly inadmissible evidence until this late date, Defendants have precluded

Plaintiffs from providing argument (and even additional evidence) in response. And to the extent that Defendants *did* timely raise at trial some of the objections in their Motion to Strike, the Court rejected them. *Compare* Ex. A to Lent Decl. *with* Defs. Objs. to Direct and Rebuttal Testimony of Dr. Daniel A. Rascher (ECF No. 1026) *and* Defs. Objs. to Direct and Rebuttal Testimony of Roger G. Noll (ECF No. 1031). Therefore, Defendants have either waived all of their evidentiary objections or the Court has already overruled them.

## II. ARGUMENT

### A. The Motion to Strike should be denied, because Defendants do not cite any evidence that they claim is inadmissible for the truth of the matter asserted.

Defendants seek to exclude passages from Plaintiffs' closing argument but do not identify any *evidence* cited by Plaintiffs that allegedly is inadmissible for the truth of the matter asserted. Two examples show this flaw in the Motion to Strike with respect to all 35 passages.

*First*, Defendants ask the Court to strike numerous statements in Plaintiffs' closing argument that cited not only to testimony relied upon by Plaintiffs' experts but also to *other* evidence. For one example of many, Defendants ask the Court to strike Plaintiffs' argument that the "NCAA rules do not regulate how students use these cash payments. . . ." *See* Ex. A to Lent Decl. (quoting Plaintiffs' closing argument, at 25 n.159). In support of that argument, Plaintiffs cite "NCAA (Lennon) Tr. 35:7-16 (NCAA does not monitor how athletes spend COA stipends); *id.* 38:4-24 (same); Trial Tr. (Lennon) 1353:6-15 (same); Hostetter Tr. 85:13-86:20 (neither NCAA nor ACC regulates how COA stipends are administered by schools or spent by athletes); Noll Decl. ¶¶ 59-60." *See id*. But Defendants do not even contend that Mr. Lennon's or Mr. Hostetter's testimony does not support Plaintiffs' argument or is inadmissible (in fact, all of this testimony was admitted). Moreover, Defendants do not identify any evidence cited by Dr. Noll that they consider inadmissible. As a result, Defendants' contention that Plaintiffs rely on inadmissible evidence for their argument that "NCAA rules do not regulate how students use these cash payments" is as incomprehensible as it is baseless. Numerous other statements in the closing argument that Defendants challenge similarly rely on citations to evidence other than the testimony of Dr. Noll and Dr. Rascher.

*Second*, even when Defendants challenge passages in Plaintiffs' closing argument that cite only to expert testimony by Dr. Noll and Dr. Rascher, Defendants never identify the supporting *evidence* that they claim is inadmissible (or explain why it allegedly is inadmissible for the truth of the matter asserted). For example, Defendants ask the Court to strike the following statement:

> [T]he trial evidence—including the evidence documenting the successful history of the Power Five's limited autonomy to increase Class Member compensation, and the historical evidence documenting the undisputed popularity of college sports when conferences individually set all rules on athlete compensation—*established that even if the challenged restraints offered any procompetitive benefits, individual conference rulemaking could achieve such benefits in a less-restrictive and more-efficient manner*.

*See* Ex. A to Lent Decl. (quoting Plaintiffs' closing argument, at 3-4 n.20) (italicized text added for completeness). In support of that statement, Plaintiffs cited Trial Tr. (Noll) 297:17-299:14; Rascher Decl. ¶ 178; Noll Decl. ¶¶ 30-31. *See id*. But Defendants do not identify any evidence cited by those experts in their declarations or at trial that allegedly is inadmissible for the truth of the matter asserted.

In light of Defendants' failure to identity the underlying evidence they claim is inadmissible, the cases they cite are inapposite. In two cases, a party timely and successfully objected to *specific* proffered evidence during trial. In *In re James Wilson Assocs.*, 965 F.2d 160, 172 (7th Cir. 1992), the bankruptcy court excluded testimony by an architect who "planned to testify about the physical condition of the building as reported to him by the consulting engineer." The Seventh Circuit upheld the exclusion of that hearsay testimony, because the engineer was not called as a witness and "it is improper to use an expert witness as a screen against cross-examination." *Id.* at 173. Similarly, in *Paddack*, 745 F.2d 1254 (9th Cir. 1984), the Ninth Circuit explained that "[d]uring the bench trial, the Employer objected to the admission of the audit reports into evidence." *Id.* at 1257. In contrast to those cases, Defendants do not identify any evidence that is inadmissible for the truth of the matter asserted but instead only identify arguments that allegedly rely on unidentified, allegedly inadmissible evidence.[1]

[1] In another case cited by Defendants, the court merely held that an expert's reliance on otherwise inadmissible evidence does not make the evidence admissible for the truth of the matter asserted. *United States v. United Techs. Corp.*, 2005 WL 6199561 (S.D. Ohio Feb. 2, 2005) ("Rules 702 and 703 do not, however, permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible.").

Defendants also cite a series of inapposite cases in which courts struck portions of post-trial briefs that referred to evidence that was excluded during trial as a result of timely objections. In one case, "Plaintiff referenced certain purported evidence that Plaintiff attempted to introduce at trial and which the Court excluded by sustaining an evidentiary objection from Defendant. As such, these purported facts were not in evidence and cannot be considered by the Court." *Int'l Custom Prods., Inc. v. United States*, 878 F. Supp. 2d 1329, 1350 (Ct. Int'l Trade 2012), *aff'd on other grounds*, 748 F.3d 1182 (Fed. Cir. 2014). In another case cited by Defendants, the defendant "relie[d] on an exhibit … that was not received in evidence" and made arguments for which there was "no evidence." *United Stars Indus., Inc. v. Plastech Engineered Prods., Inc.*, 2007 WL 1655113, at *1 (W.D. Wis. June 5, 2007), *aff'd on other grounds*, 525 F.3d 605 (7th Cir. 2008). These cases bear zero resemblance to the situation at hand, where Defendants do not identify the specific evidence that they claim is inadmissible for the truth of the matter asserted, and, as discussed below, either did not timely raise at trial any objection to admissibility or did lodge such an objection and had it overruled.[2] In sum, Defendants' Motion to Strike is too incomprehensibly vague and not susceptible to analysis, and for this reason alone should be denied in its entirety.

**B. Even if some of the expert testimony relied on by Plaintiffs in their closing argument had been admitted only as a basis for expert opinions, those statements could still be considered for the purpose of explaining the basis of those opinions.**

Even if Defendants had identified evidence that is inadmissible for the truth of their matter asserted, their Motion to Strike still would be improper. In *Paddack*, the Ninth Circuit stated, "[a]lthough we agree that the audit reports and their summaries are based in part on inadmissible hearsay, we are uncertain whether the district court considered, as it should have, the audits for the limited purpose of explaining the basis of the expert's testimony under Rule 703." 745 F.2d at 1256. The Court also stated that Rule 703 "permits such hearsay, or other inadmissible evidence, upon which

[2] The remaining two cases cited by Defendants are similarly inapposite. *See Kothmann Ent., Inc. v. Trinity Indus., Inc.*, 455 F. Supp. 2d 608, 615 n.6 (S.D. Tex. 2006) ("The motion to strike is granted insofar as the posttrial brief refers to evidence that this court has not admitted."); *In re Midway Airlines, Inc.*, 221 B.R. 411, 419 (Bankr. N.D. Ill, 1998) ("The Court will not consider the handwritten calculations of the Trustee's agents or attorneys as these notations were never identified on the Trustee's exhibit list, were not authenticated by any witness, and were not offered or admitted into evidence.").

an expert properly relies, to be admitted to explain the basis of the expert's opinion." *Id.* at 1262.[3] Similarly here, even if Defendants had identified specific evidence that is inadmissible for the truth of the matter asserted, there still would be no basis to grant the Motion to Strike. Instead, the evidence relied on by Plaintiffs' experts would be admissible to explain the basis of their opinions and could be cited in Plaintiffs' closing argument for that purpose. *See Williams v. Illinois*, 567 U.S. 50, 70 (2012) ("When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.").

For example, Defendants erroneously ask this Court to strike Plaintiffs' contention in their closing argument that "from 1906-1956, the NCAA permitted individual conferences to determine compensation rules and college sports grew in popularity, with no evidence of harm to consumer demand." *See* Ex. A to Lent Decl. (quoting Plaintiffs' closing argument at p. 31 n.200). In support of that passage in their closing argument, Plaintiffs cite (in part) to paragraphs 30-36 of the Noll Declaration. After describing that NCAA history in paragraphs 30 to 35 of his Declaration, Dr. Noll proffered the opinion that the "significance of this history of the NCAA is that the NCAA did not enforce restrictions on the compensation of college athletes for the first fifty years of its existence. Yet during this period, college football and basketball as organized by the same colleges that now are members of Division I became immensely popular." Noll Decl. ¶ 36. Defendants do not explain why paragraphs 30 to 35 allegedly are inadmissible for the truth of the matter asserted. But even if those paragraphs are not admissible for the truth, they are still admissible to explain Dr. Noll's opinions about conferences' ability to regulate compensation, including his opinion as set forth in paragraph 36, which this Court admitted. So the passage from Plaintiffs' closing argument challenged by Defendants accurately reflects Dr. Noll's opinion, which this Court admitted and which is supported by the factual assertions in paragraphs 30 to 35 of his Declaration, regardless of whether they are admissible for the truth of the matter asserted.

[3] *Paddack* was decided before the 2000 amendment to Rule 703, but the amended version still allows a court in a bench trial to admit evidence for the limited purpose of explaining an expert's testimony, even if that evidence is not otherwise admissible.

**C. Defendants either waived objections to the evidence cited by Plaintiffs in their closing argument or the Court already rejected Defendants' objections.**

The Motion to Strike should be denied for the independent reason that—to the extent Plaintiffs or the Court can even discern what evidence Defendants challenge—Defendants have either waived their objection or it has already been overruled.

Defendants do not establish that they successfully objected to the admission of any relevant evidence for the truth of the matter asserted. As a result, Defendants have waived such objections. If Defendants had made a timely objection on that ground as to any particular evidence and the Court had sustained it, Plaintiffs could have responded by presenting supporting evidence that is admissible for the truth of the matter asserted. For example, Defendants challenge the statement in Plaintiffs' closing argument that "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." Ex. A to Lent Decl. (quoting closing argument at 26 n.167). In support of that passage, Plaintiffs cite paragraph 66 of the Rascher Declaration, *see id*., in which Dr. Rascher set forth details from Exhibit 167(j), entitled "University of Florida Men's Basketball Financial Aid (2015-16)." If Defendants had objected to that testimony as inadmissible for the truth of the matter asserted, Plaintiffs could have offered the exhibit as a business record of the University of Florida. But by waiting until after trial to claim that evidence is inadmissible for the truth of the matter asserted, Defendants preclude Plaintiffs from offering alternative evidence.

Defendants' belated objections to the historical evidence of conference autonomy up until 1957 is especially prejudicial and not well taken. For starters, the underlying facts are non-controversial—indeed, indisputable—facts about the NCAA's own history, many of which the NCAA *stipulated* to in *O'Bannon*. *See* Stip. Regarding Undisputed Facts, *O'Bannon v. NCAA*, 09-cv-3329-CW (N.D. Cal. June 6, 2014) (ECF No. 189). Moreover, the Ninth Circuit and this Court detailed the history of the NCAA's amateurism rules—and the lack of enforcement thereof—in their *O'Bannon* decisions. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1054 (9th Cir. 2015); *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 974 (N.D. Cal. 2014). It is nothing short of ambush for Defendants to first challenge evidence concerning

the NCAA's history—which Plaintiffs had no reason to believe was in dispute—until after trial, when Plaintiffs no longer have the ability to supplement the record.

Moreover, Defendants had every opportunity to file timely objections to the written direct and rebuttal testimony of Dr. Noll and Dr. Rascher, and to make objections while they were providing live testimony. And Defendants had every opportunity to cross-examine Plaintiffs' experts as to the basis of their testimony, particularly as to whether it was based on allegedly inadmissible hearsay or other inadmissible evidence. *See United States v. Beltran-Rios*, 878 F.2d 1208, 1213 (9th Cir. 1989) ("Defense counsel unquestionably had ample opportunity to cross-examine Nava about his expert opinion, and the sources of information upon which that opinion was based.").

Defendants *did* previously object to *some* of the evidence put at issue in the Motion to Strike, and the Court overruled those objections. Trial Tr. 833:17-834:25 ("on the written sort of morning-of-trial objections to Rascher and Noll, I'm going to overrule all of those for a number of reasons"). The following examples are illustrative:

| Location in Pls.' Closing | Citation for Statement Sought to be Stricken | Overruled Obis. to Expert Decls. | Defs' Originally-Stated Reason for Objection |
|---|---|---|---|
| p. 3, fn 15 | Noll Decl. ¶¶ 113-23; Rascher Decl. ¶¶ 223-34; Trial Tr. (Rascher) 21:5-22; id. (Noll) 290:23-292:2, 294:24-298:18; P0123; P0139-0001 | Noll Decl. ¶¶ 113-116, 118, 120-121 | "Disclosure of inadmissible facts relied upon by expert" and "Legal conclusion." |
| pp. 3-4, fn 20 | Trial Tr. (Noll) 297:17-299:14; Rascher Decl. ¶ 178; Noll Decl. ¶¶ 30-31 | Noll Decl. ¶¶ 30-31 | "Disclosure of inadmissible facts relied upon by expert" and "Opinion outside area of expertise." |
| p. 15, fn 87 | *See, e.g.*, Noll Decl. ¶¶ 52-56, 69-71, 73-77, 86-92; Rascher Decl. ¶¶ 30-91 (same); Trial Tr. (Elzinga) 403:6-404:4 405:25-406:14 Holzman Tr. 132:9-134:2 | Noll Decl. ¶¶ 88-89, 91-92<br><br>Rascher Decl. ¶¶ 31, 36, 48-50, 71-74, 84-88 | "Disclosure of inadmissible facts relied upon by expert" and "Legal conclusion"<br><br>"Disclosure of inadmissible facts relied upon by expert" and "Opinion outside area of expertise." |
| p. 21, fn 130 | *See, e.g.*, Rascher Decl. ¶ 138(c) | Rascher Decl. ¶ 138(c) | "Disclosure of inadmissible facts relied upon by expert." |

| Location in Pls.' Closing | Citation for Statement Sought to be Stricken | Overruled Objs. to Expert Decls. | Defs' Originally-Stated Reason for Objection |
|---|---|---|---|
| p. 21, fn 134 | Rascher Decl. ¶ 138 | Rascher Decl. ¶ 138 | "Disclosure of inadmissible facts relied upon by expert." |
| p. 21, fn 135 | Rascher Decl. ¶ 141 | Rascher Decl. ¶ 141 | "Disclosure of inadmissible facts relied upon by expert" and "Opinion outside area of expertise." |
| p. 25, fn 160 | Rascher Decl. ¶ 88; Noll Decl ¶ 61-63; Hostetter Tr. 90:5-20; 94:18-23; 96:18-97:5 | Rascher Decl. ¶ 88 | "Disclosure of inadmissible facts relied upon by expert." |
| p. 27, fn 171 | Rascher Decl. ¶ 72; Hostetter Tr. 226:7-227:6 | Rascher Decl. ¶ 72 | "Disclosure of inadmissible facts relied upon by expert." |
| p. 28, fn 183 | Rascher Decl. ¶ 49 | Rascher Decl. ¶ 49 | "Disclosure of inadmissible facts relied upon by expert." |
| p. 28, fn 187 | Rascher Decl. ¶ 50 | Rascher Decl. ¶ 50 | "Disclosure of inadmissible facts relied upon by expert." |
| p. 28, fn 188 | Rascher Decl ¶ 50 | Rascher Decl. ¶ 50 | "Disclosure of inadmissible facts relied upon by expert." |
| p. 31, fn 200 | Noll Decl. ¶¶ 30-36; Rascher Decl. ¶ 175 | Noll Decl. ¶¶ 30-36 | "Disclosure of inadmissible facts relied upon by expert" and "Opinion outside area of expertise." |
| p. 41, fn 270 | Rascher Decl. ¶ 206 Trial Tr. (Rascher) 19:17-20:1 | Rascher Decl. ¶ 206 | "Disclosure of inadmissible facts relied upon by expert" and "Opinion outside area of expertise." |

Indeed, *each* of Defendants' regurgitated objections has already been overruled by the Court,[4] and none were renewed when Drs. Rascher and Noll took the stand. As such, all of Defendants' arguments are either a rehash of a rejected objection or waived. For these reasons too, the Motion to Strike should be denied.

[4] *Compare* Ex. A to Lent Decl. *with* Defs. Objs. to Direct and Rebuttal Testimony of Dr. Daniel A. Rascher *and* Defs. Objs. to Direct and Rebuttal Testimony of Roger G. Noll; *see also* Trial Tr. 833:17-834:25.

## III. CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Motion to Strike, which is based on untimely and previously unsuccessful objections to the expert testimony of Dr. Noll and Dr. Rascher.

DATED: November 20, 2018

Respectfully submitted,

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Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatories above.

By: */s/ Steve W. Berman*