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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

REPLY IN FURTHER SUPPORT OF 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

Plaintiffs' opposition (ECF No. 1130) to Defendants' motion to strike (ECF No. 1125) misses the mark. Plaintiffs neither provide any justification for citing their experts' testimony in support of facts outside the trial record nor identify any record evidence to support the factual assertions identified in Exhibit A to Defendants' motion. As that motion and its accompanying exhibit explain, Plaintiffs' Closing Argument makes factual assertions *thirty-five different times* that are not supported by evidence that was admitted for its truth. Rather, Plaintiffs impermissibly support those assertions with the testimony of their economic experts about supposed facts on which those experts relied—sometimes based on hearsay or other inadmissible evidence and sometimes without citing any evidence at all—to form their economic opinions. While Plaintiffs' experts may rely on inadmissible evidence to form their opinions, they are not percipient witnesses, and their recitation of supposed facts on which they relied cannot be used by Plaintiffs (or the Court) to establish the truth of those facts. Plaintiffs' reliance on their experts' testimony for that purpose violates both the Federal Rules of Evidence and relevant case law, and the relevant assertions in Plaintiffs' Closing Argument should be stricken. (Mot. at 2-4.)

Plaintiffs' three responses are meritless. First, Plaintiffs say that Defendants have not clearly identified which evidence is inadmissible for its truth. In reality, Defendants specified the factual assertions of Plaintiffs' experts (and the hearsay and other inadmissible evidence on which the experts relied to form their opinions) that Plaintiffs' Closing Argument now cites for the truth of those assertions. Second, Plaintiffs contend that their experts may rely on hearsay and other inadmissible evidence as the basis for their opinions. That contention misses the point because Defendants are not challenging that reliance. Defendants instead object to Plaintiffs' reliance on their experts' recitation of purported facts, based on that evidence, for the truth of those purported facts. Third, Plaintiffs argue that Defendants' motion is untimely. But Plaintiffs did not impermissibly rely on hearsay and other inadmissible evidence for its truth until their Closing Argument, so Defendants could not have filed this motion until now.

ARGUMENT

I. Defendants Disclosed Which Evidence Is Inadmissible for Its Truth

Plaintiffs' first argument—that Defendants' motion does not identify any evidence cited by Plaintiffs that is inadmissible for the truth of the matter asserted (Opp. at 2)—is plainly wrong. The motion and Exhibit A accompanying it identify the specific statements by Drs. Rascher and Noll that may not be admitted for their truth. (*See* Mot. at 2-3; Ex. A to Lent Decl.)

In many cases, Plaintiffs cite *exclusively* to their experts' testimony for their factual assertions. For example, as the motion pointed out (Mot. at 3), Plaintiffs cite only Dr. Rascher's testimony for their factual assertion that, "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." (Pls' Closing. at 28 n.188 (citing Rascher Decl. ¶ 50).) No admitted evidence supports that proposition, and the fact that Dr. Rascher relied on the proposition is not evidence of its truth. Likewise, Plaintiffs cite only Dr. Rascher's testimony for their factual assertions that "[u]niversities *tout* the fact that their housing and athletic facilities permit Class Members to *avoid* interacting with non-athletes," and that "a Clemson University athletic department spokesman explained that Clemson's football complex '[will] be their home on campus, when they are not in class.'" (*Id.* at 21 & n.134 (citing Rascher Decl. ¶ 138).) Again, Dr. Rascher's reliance on those purported facts is not appropriate evidence of their truth. Plaintiffs made no attempt to respond to these examples, and for good reason: No admitted evidence supports those purported facts.

Even where Plaintiffs cite some evidence in addition to the testimony of Drs. Rascher and Noll, the asserted fact is not supported by the record. For example, Plaintiffs cite the deposition testimony of Brad Hostetter in addition to the testimony of Drs. Rascher and Noll to claim that Plaintiffs "have demonstrated that this cash [the difference between a student-athlete's cost of attendance stipend and their actual costs] is often spent in ways that have nothing to do with being a student, e.g., buying videogames and pets, investing, sending money to family." (Pls. Closing at 25, n.160 (citing Rascher Decl. ¶ 88; Noll Decl. ¶¶ 61-63; Hostetter Tr. 90:5-20, 94:18-23, 96:18-97:5).) But Mr. Hostetter testified only that student-athletes may keep the difference between their cost of attendance stipend (as calculated for all students by the financial aid office) and their actual

costs if their actual costs are less than the stipend—he never testified as to how student-athletes "often" spend that money. (Hostetter Tr. 90:5-20, 94:18-23, 96:18-97:5.) That purported fact is found only in the testimony of Drs. Rascher and Noll, meaning that it is not admissible for its truth in this case. Similarly, Plaintiffs cite trial exhibits P0104 and P0105 in addition to Dr. Rascher's testimony to assert that "[i]n 2015-16, six Ohio State athletes received payments for loss-of-value insurance, ranging from $7,324 to $31,296 ($101,906 in total) while another five received payments for disability insurance, ranging from $3,300 to $10,387.50 ($32,729 in total)." (Pls. Closing at 26, n.165 (citing Rascher Decl. ¶ 80; P0104-P0105).) Those exhibits show only the total amount of benefits above cost of attendance that student-athletes at The Ohio State University received from athletic awards and the Student Assistance Fund—they do not contain any facts from which to discern how any funds were used. (P0104-P0105.) Those supposed facts come only from the testimony of Dr. Rascher, which, again, is not admissible evidence of the truth of those assertions.

Finally, even Plaintiffs' citation of other evidence in support of their arguments does not make it appropriate for Plaintiffs to rely on, or for the Court to admit, the experts' statements of fact as evidence of the truth asserted. Thus, for example, Plaintiffs' citation of fact witness testimony as the basis for their statement that "NCAA rules do not regulate how students use these cash payments," (*see* Opp. at 2 (referring to testimony from Lennon and Hostetter)) does not change the fact that Dr. Noll's reliance on that testimony cannot itself be an evidentiary basis for the truth of that statement.

It is no answer to complain, as Plaintiffs do, that Defendants have failed to "identify any evidence cited by those experts in their declarations or at trial that allegedly is inadmissible for the truth of the matter asserted." (Opp. at 3.) The reasons are twofold. First, for each of the statements listed on Exhibit A to Defendants' motion, Plaintiffs' experts did not cite any admissible evidence, if they cited any evidence at all. Second, the "evidence" that Plaintiffs cite in their Closing Argument is *not* "evidence cited by those experts," but the experts' statements themselves. These statements are not admissible for the truth of the propositions the experts recited.

Because Defendants' motion identifies the numerous instances in which Plaintiffs improperly cite their experts' testimony as the basis for factual propositions on which Plaintiffs rely in their Closing Argument (*see* Mot. at 2-4; Ex. A to Lent Decl.), Plaintiffs' attempt (Opp. at 3) to distinguish *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984), and *In re James Wilson Associates*, 965 F.2d 160 (7th Cir. 1992), is misplaced. Like the movants in those cases, Defendants here have specifically objected to Plaintiffs' use of hearsay and other inadmissible evidence. These cases are therefore directly on point.[1] Plaintiffs and this Court may not rely on such hearsay and other inadmissible evidence for the truth of the matter asserted in that evidence.

II. Defendants Object to Plaintiffs' Attempt to Use Hearsay and Other Inadmissible Evidence for Its Truth, Not Plaintiffs' Experts' Reliance on Such Evidence

Plaintiffs next argue that the hearsay and other inadmissible evidence on which Drs. Rascher and Noll rely—and which Plaintiffs cite for its truth in their Closing Argument—should be considered by the Court for the limited purpose of explaining the basis of their expert opinions. This argument completely misses the point of Defendants' motion. Defendants do not object in this motion to Plaintiffs' experts' reliance on hearsay or inadmissible evidence as a basis for their opinions. Instead, Defendants object to Plaintiffs' effort to cite their experts' recitation of purported facts on which they relied *for the truth* of those purported facts. (Mot. at 3.) Although Plaintiffs' experts may rely on hearsay and other inadmissible facts as the basis for their opinions, that reliance cannot, under Rule 703 and relevant case law, be used as evidence of the truth of those facts. (Mot. at 2-3.) As the advisory committee's note to the 2000 Amendment to Rule 703 put it, "Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible

[1] *See also International Custom Prods., Inc. v. United States*, 878 F. Supp. 2d 1329, 1350 (Ct. Int'l Trade 2012) (granting defendant's motion to strike portions of plaintiff's post-trial brief on the ground that the "purported facts were not in evidence and [could] not be considered by the Court"), *aff'd*, 748 F.3d 1182 (Fed. Cir. 2014); *In re Midway Airlines, Inc.*, 221 B.R. 411, 419 (Bankr. N.D. Ill. 1998) (granting debtor's motion to strike portions of bankruptcy trustee's post-trial brief exhibit because the portions in question included notations and calculations that "were never identified on the . . . exhibit list, were not authenticated by any witness, and were not offered or admitted into evidence"); *United Stars Indus. v. Plastech Engineered Prods.*, No. 06-C-0349-C, 2007 WL 1655113, at *1 (W.D. Wis. June 5, 2007) (striking a section of a post-trial brief which relied on matters that were never adduced at trial or allowed into the record); *Kothmann Enters., Inc. v. Trinity Indus., Inc.*, 455 F. Supp. 2d 608, 615 n.6 (S.D. Tex. 2006) (granting defendant's motion to strike plaintiffs' post-trial brief references to documents and evidence that were expressly excluded by the court during trial).

information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted."[2]

For example, Plaintiffs cite paragraphs 30 through 35 of Dr. Noll's declaration—in which Dr. Noll recites his understanding of the history of the NCAA—as the evidence to support their factual assertion 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." (Opp. at 5.) But Dr. Noll was not proffered as an expert in the history of the NCAA and he certainly did not perceive the purported facts that he recites in those paragraphs. Although he may rely on his understanding of that history—presumably based on hearsay or other evidence not admitted at trial—to support his economic opinions, his recitation of the factual history of the NCAA in paragraphs 30 through 35 of his declaration is not evidence of the history. As such, it cannot be used to establish the truth of the matters asserted in those paragraphs. To do so would contravene Rule 703.

III. Defendants' Motion to Strike is Timely

Finally, Plaintiffs' argument that Defendants' motion should be denied as untimely because either Defendants waived their objections or such objections have been previously overruled (Opp. at 6) is meritless. To begin with, there has been no waiver for a simple reason: Plaintiffs have only now, for the first time, offered Plaintiffs' experts' recitation of putative facts for the truth of the matters asserted therein. Plaintiffs cry "ambush" (Opp. at 6), but in reality, it is Plaintiffs who are ambushing Defendants by attempting—again, for the first time in their Closing Argument—to smuggle in evidence not in the record.[3]

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[2] *See also James Wilson Assocs.*, 965 F. 2d at 172-73 ("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."); *Paddack*, 745 F.2d at 1261-62 (audit reports, inadmissible but relied on by the experts, were not admissible "to establish the truth of what they assert"); *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") (quoting *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728-29 (6th Cir. 1994)).

[3] Plaintiffs' only authority purportedly supporting their theory that an objection to their improper use of unadmitted evidence had to come before such use ever occurred is *United States v. Beltran*

(cont'd)

Plaintiffs repeatedly claim that they could have presented alternative evidence to establish factual matters for which they rely on the testimony of Drs. Rascher and Noll, and they would have done so if they had known that Defendants were going to object to their rules violation. (Opp. at 6.) If so, they should have done so initially, instead of trying to use their experts as a conduit to short-circuit the Rules of Evidence. Their attempt to do so now, such as by citing a hypothetical University of Florida business record (*id.*), comes far too late and should be disregarded.

Lastly, this Court has not already rejected Defendants' objection to Plaintiffs' proffer of factual assertions by Drs. Rascher and Noll for their truth. This Court did overrule certain objections to Plaintiffs' expert testimony on the fourth day of trial (Trial Tr. 833:17-834:25), but those objections went to the propriety of the reliance of Drs. Rascher and Noll on certain inadmissible evidence to support their opinions. The Court found that (i) Defendants' objections were untimely and should have been raised during *Daubert* briefing (Trial Tr. 833:20-834:3), and (ii) the information to which Defendants objected was "the type of information that is relied upon and is sufficiently reliable and nonprejudicial and helpful to meet the test of Rule 702" (*id.* 834:11-15).[4] The Court did not, however, hold that such information was admissible for its truth. And the Court's rulings do not dispose of Defendants' current objection to Plaintiffs' efforts to transform their experts' reliance on purported facts into evidence of the truth of those purported facts. In short, the Court has never addressed the objections in this motion.

CONCLUSION

For the foregoing reasons, Defendants' motion to strike should be granted.

(cont'd from previous page)
Rios, 878 F.2d 1208 (9th Cir. 1989). (*See* Opp. at 7.) That case is inapposite. There, a criminal defendant argued that a prosecution's expert alleged reliance on hearsay violated the Confrontation Clause. 878 F.2d at 1213. The Ninth Circuit rejected that argument, concluding that the information in the expert's testimony was reasonably relied upon by experts in forming expert opinions, and that the appellant had "ample opportunity" to cross examine the expert regarding his opinion and the information upon which it was based at trial. *Id.* at 1213 & n.3. The Court did not hold, however, that the alleged hearsay contained in the expert's testimony would be admitted for the truth of the matter asserted.

[4] The Court also overruled Defendants' pre-trial objections regarding Plaintiffs' experts' legal conclusions (Trial Tr. 834:4-10) and statements beyond the scope of their expertise (*id.* 834:16-25), but neither ruling relates to this present Motion.

Dated: November 30, 2018

Respectfully submitted,

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FILER'S ATTESTATION

I, Karen Hoffman Lent, am the ECF user whose identification and password are being used to file the Reply in Further Support of 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 Hoffman Lent