MICHAEL D. HAUSFELD (*pro hac vice)*
mhausfeld@hausfeldllp.com
HILARY K. SCHERRER (SBN 209451)
hscherrer@hausfeldllp.com
SATHYA S. GOSSELIN (SBN 269171)
sgosselin@hausfeldllp.com
SWATHI BOJEDLA (*pro hac vice)*
sbojedla@hausfeldllp.com
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, D.C. 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201

MICHAEL P. LEHMANN (SBN 77152)
mlehmann@hausfeldllp.com
BRUCE J. WECKER (SBN 78530)
bwecker@hausfeldllp.com
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, California 94104
Telephone: (415) 633-1908
Facsimile: (415) 358-4980

Plaintiffs' Class Counsel with Principal Responsibility for the Antitrust Claims

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No. 4:09-cv-3329 CW

ANTITRUST PLAINTIFFS' OPPOSITION TO DEFENDANT NCAA'S MOTIONS *IN LIMINE*

Judge: The Honorable Claudia Wilken
Courtroom: 2, 4th Floor
Hearing: May 28, 2014
Time: 2:00 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Antitrust Plaintiffs ("Plaintiffs") respectfully request that this Court deny Defendant NCAA's motions *in limine* nos. 1-2, 4-9, and 12 for the reasons discussed herein. Plaintiffs do not oppose motions *in limine* nos. 3 and 11 for the reasons stated herein. Their conditional positions on motions *in limine* nos. 10 and 13 are set forth below.

II. Motion *In Limine* No. 1: To Exclude Evidence and Argument About Injuries in College Sports.

The NCAA's motion to exclude evidence and argument about injuries in college sports should be denied because injuries that Division I college athletes suffer while participating in football and men's basketball are relevant to the Plaintiffs' claims. As an initial matter, the NCAA refers to separate litigation related to concussions college athletes suffered while playing college football. *In re NCAA Student Athlete Concussion Injury Litig.*, MDL No. 2492 (N.D. Ill.). Plaintiffs do not intend to introduce evidence and argument specifically related to that matter. However, to the extent a college athlete suffered an injury playing intercollegiate football or basketball, that injury, and, more importantly, how that injury affected the athlete's college experience, is relevant to Plaintiffs' claims. This is so for several reasons.

First, the NCAA has argued in recent public reports and will argue at trial that college athletes are given the benefit of a paid college education. *See* Dkt. No. 925-8 at ¶110. Up until 2011, member universities only offered a yearly scholarship to such athletes. Four-year scholarships could be offered beginning in that year, but relatively few colleges have availed themselves of that opportunity.[1] As a result, in some instances, an injury may result in an athlete losing not only his place on the team, but also losing his entire scholarship (and therefore his opportunity to attend the college). This situation is relevant to dealing with the NCAA's contentions that it confers a benefit upon Division I men's football and basketball players who receive athletic scholarships.

Second, one of the procompetitive justifications that the NCAA advanced in favor of the challenged restraint is the integration of athletics and education—that is, that by prohibiting

[1] *See* http://college-football.si.com/2013/04/19/ncaa-multiyear-scholarships/.

college athletes from accepting compensation for use of their names, images and likenesses ("NIL"), those athletes are more integrated into the college community. Dkt. No. 926 at 20-21. An injured player must devote time to surgery, rehabilitation, and physical therapy in addition to continuing to attend practices, strategy sessions, and games. Injury rehabilitation limits the amount of time an athlete can devote to his educational experience. The experience of an injured student-athlete is relevant to the case in the same way the experience of a healthy student-athlete is relevant: it tends to make it less likely that men's football and basketball college athletes are integrated into the university because a sizeable amount of their time is spent on strictly controlled athletic activities. Fed. R. Evid. 401.

Third, the named Plaintiffs who testify ought to be able to describe accurately and concisely their experience as college athletes. Several suffered injuries during their college years and in one case (Tyrone Prothro) the injury ended his football career. He should be allowed to so testify, without sensationalizing his injury.

Nor is evidence of injuries so prejudicial as to substantially outweigh the probative value. It is no secret that injuries may result from participating in sports, especially football. *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000). Rule 403 "favors admissibility." The NCAA's concern that the jury will be unduly swayed by injuries is now moot because Plaintiffs are proceeding with a bench trial. Dkt. No. 1071 at 4.[2]

III. Motion *In Limine* No. 2: To Exclude Evidence and Arguments About Licensing Unrelated to Live Broadcasts, Rebroadcasts or Clips, or Videogames.

The NCAA's Motion to exclude evidence and arguments about licensing unrelated to live broadcasts, rebroadcasts or clips, or videogames should be denied because: (1) that evidence is relevant; (2) it goes to credibility; and (3) the motion is premature and overbroad.

First, that evidence is related to the NCAA's procompetitive defense of amateurism and is

[2] The cases cited by the NCAA in support of excluding evidence of injuries under Rule 403 are inapposite . In *Lewis v. City of Chicago*, 563 F. Supp. 2d 905 (N.D. Ill. 2008), evidence that the defendant refused to allow plaintiff surgery was excluded under Rule 403 in a discrimination case. In *Ford v. Nationwide Mut. Fire Ins. Co.*, 214 F. Supp. 2d 11, 14-15 (D. Me. 2002), evidence of severe injuries from a car accident was excluded from an insurance dispute because "the jury was [already] well aware that this was a very serious accident" based on the testimony of several other witnesses.

therefore admissible as relevant under Federal Rules of Evidence 401 and 402. For instance, the NCAA used to sell numbered jerseys on its website that were searchable by the names of college athletes. It has now admitted that this practice was hypocritical. *See* Dkt. No. 957 at 15. The fact that the NCAA sold merchandise effectively bearing the names of college athletes undercuts its assertion that there is any principle of "amateurism" to preserve. Selling merchandise bearing athletes' NILs makes the NCAA's claim that they are to be viewed as amateurs less probable. Evidence of uncompensated commercial uses of the NILs of college athletes that includes photographs, jerseys and other apparel, trading cards, and other memorabilia demonstrates how the NCAA and its member schools and conferences completely commercialize college football and men's basketball.

Second, such evidence also goes to the nature, character, and operation of the conspiracy. It relates to the market for the use of college athletes' NILs, *i.e.*, the group licensing market, even if Plaintiffs do not base the NCAA's liability on the uncompensated use of that particular merchandise.[3] Plaintiffs may present evidence of similar or related illegal acts in addition to those specific acts concerning video games, broadcasts, rebroadcasts, and clips. In the antitrust context, evidence about price-fixing of related products with many of the same companies has been deemed admissible.[4]

Third, some of this evidence is admissible for the purposes of testing credibility. The NCAA admits that its "officials have testified under oath [that] NCAA rules generally prohibit[] NCAA member institutions from selling commercial products that utilize the name, image or

---

[3] The NCAA's arguments as to jury confusion are now moot.

[4] *See, e.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (denying summary judgment and noting that "[t]he charge is of a garden-variety price-fixing conspiracy orchestrated by a firm, ADM, conceded to have fixed prices on related products (lysine and citric acid) during a period overlapping the period of the alleged conspiracy to fix the prices of HFCS."); *United States v. Andreas*, 216 F.3d 645, 665-66 (7th Cir. 2000) ("evidence of the citric-acid conspiracy was relevant . . . and not unfairly prejudicial" because the "lysine and citric-acid conspiracies were closely related parts of a master plan to control prices and product supply through collusion with competitors" and thus, "omit[ting] this evidence would . . . leave an unexplained gap in the narrative of the crime"); "Order on Motions. *in Limine* & For Pre-Trial Preparation" at 9 (Dec. 16, 2010) (Dkt. No. 1206) in *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-01819 CW (N.D. Cal.), Dkt. No. 1206 (denying motion to limit evidence of any of Samsung's conduct related to the DRAM conspiracy).

likeness of a current student-athlete. For example, schools may not sell t-shirts or posters that feature current student-athletes, nor may they sell replica jerseys with the names of current student-athletes." Dkt. No. 1069 at 4. Plaintiffs have evidence that the member institutions violated those rules—and that the NCAA knew about it. This evidence includes statements by the NCAA that it was hypocritical for the NCAA itself to sell jerseys that were searchable by student-athlete names. Dkt. No. 957 at 15. Such evidence is admissible to impeach the NCAA's witnesses. *United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984) (hearsay statements are admissible to impeach a declarant who subsequently testifies at trial).

Finally, this motion is both overbroad and premature. The scope of the evidence "about licensing unrelated to live broadcasts, rebroadcasts or clips, or videogames" that the NCAA seeks to exclude is not clear. "Motions *in limine* that seek exclusion of broad and unspecific categories of evidence . . . are generally disfavored." *Carpenter v. Forest Meadows Owners Ass'n*, No. 1:09-cv-01918-JLT, 2011 U.S. Dist. LEXIS 82295, at *3 (E.D. Cal. July 27, 2011); *see also Lego v. Stratos Int'l, Inc.*, No. C 02-03743 JW, 2004 U.S. Dist. LEXIS 31317, at *2-4 (N.D. Cal. Nov. 4, 2004) (denying motion *in limine* because the "requested relief is vague and overbroad").

In opposing this motion, Plaintiffs should not be required to conjure up every imaginable scenario in which such evidence would be relevant and admissible at trial. Given the NCAA's failure to allege with the "necessary specificity . . . the evidence to be excluded," this Court should deny the NCAA's motion and rule on the admissibility of such evidence based on the specific evidence offered and circumstances as they develop at trial. *First Savs. Bank, FSB v. U.S. Bancorp*, 117 F. Supp. 2d 1078, 1082 (D. Kan. 2000); *see also Memry Corp. v. Ky. Oil Tech., N.V.*, No. C-04-03843 RMW, 2007 U.S. Dist. LEXIS 89645, at *12 (N.D. Cal. Nov. 27, 2007) (deferring ruling on motion "until specific issues arise at trial"). Any alternate approach would be overbroad and could preemptively exclude otherwise relevant and admissible evidence.

IV. Motion *In Limine* No. 3: To Exclude References to the Chicago Regional NLRB Director's Decision Regarding College Athlete Unionization.

Plaintiffs do not oppose this Motion to the extent it seeks exclusion of the report of the National Labor Relations Board's Regional Director in *Northwestern University v. College*

Athletes Players Association (CAPA), No. 13-RC-121359, 2014 NLRB Reg. Dir. Dec. LEXIS 46 (Mar. 26, 2014), They do, however, reserve the right for their experts to refer to the factual findings contained in that report, such as, for example, the time commitments involved in NCAA football and the integration (or lack thereof) of education and athletics.

V. Motion *In Limine* No. 4: To Exclude Reports of Third-Party Observers and Media About Collegiate Athletics.

The NCAA seeks to exclude reports of third party organizations, such as the Drake Group or the Knight Commission on Intercollegiate Athletics ("Knight Commission"). Plaintiffs have no intention of introducing any reports from the former, but have included on their proposed trial exhibit list a number of reports from the latter.

The Knight Commission's website describes its history as follows:

> The Knight Commission on Intercollegiate Athletics was formed by the John S. and James L. Knight Foundation in October 1989 in response to more than a decade of highly visible scandals in college sports. The Commission's initial goal was to recommend a reform agenda that emphasized academic values in an arena where commercialization of college sports often overshadowed the underlying goals of higher education. Since 1989, the Knight Commission on Intercollegiate Athletics has worked to ensure that intercollegiate athletics programs operate within the educational mission of their colleges and universities.

http://www.knightcommission.org/about/about-background. Its members include presidents or chancellors of NCAA member colleges and representatives from Division I conferences. http://www.knightcommission.org/about/members-bios. From 1991 to 2010, it has generated numerous reports on intercollegiate athletics and academic values. http://www.knightcommission.org/about/about-commission-reports.

Moreover, these reports are "reliable authority" regarded as trustworthy and authoritative by experts in the field. Fed. R. Evid. 803(18). Accordingly, the Court should allow portions of the reports to be read into evidence in connection with the testimony of Plaintiffs' experts.

Rule 803(18) is a hearsay exception allowing statements to be read into evidence when the statement "is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice." A text is a

"reliable authority" under this rule if it is generally accepted as authoritative in the relevant professional community. *Burgess v. Premier Corp.*, 727 F.2d 826, 834 (9th Cir. 1984) ("*Burgess*") (admitting books on cattle investment where testifying expert indicated that author was an industry expert and the books were required reading for all cattle investment salespersons); *Bissoon-Dath v. Sony Computer Entm't. Am., Inc.*, 694 F. Supp. 2d 1071, 1080 (N.D. Cal. 2010) (admitting text concerning Greek mythology under Rule 803(18), and judicially noticing its authority as a learned treatise).[5] Such texts are especially admissible when relied on by expert witnesses. *See Finchum v. Ford Motor Co.*, 57 F.3d 526, 531 (7th Cir. 1995) (allowing expert witness to read to jury excerpts from article on occupant protection in rear impact accidents).

Here, *both* parties' experts relied on Knight Commission reports. For example, the NCAA's expert Dr. Daniel Rubinfeld, discussed 2006 and 2010 reports by the Knight Commission in his September 25, 2013 merits report. Dkt. No. 925-8 at ¶¶ 115-117. After noting that many of the Knight Commission's "members are university presidents (or presidents emeriti), and several are former student-athletes," Dr. Rubinfeld addressed the reports' conclusions that collegiate athletics had become more commercialized. Similarly, one of Plaintiffs' experts, Dr. Ellen Staurowsky, cited the Knight Commission's findings that expenditures for athletic facilities rose precipitously between 1994 and 2001. Dkt. No. 898-3 at 20.

Similarly, a court in the Southern District of Ohio relied on the 2001 Knight Commission report to support a factual finding in an antitrust action against the NCAA. *Worldwide Basketball Sports & Tours, Inc. v. NCAA*, No. 2:00-CV-1439, 2002 WL 32137511, at *2 n.2 (S.D. Ohio July 19, 2002) ("*WBST*") ("Unfortunately, these measures have had little effect. The number of men participating in Division I-A basketball who graduate from college is only 32%, the lowest of any college sport. (The Knight Commission, NCAA Report issued September 8, 2001)."). The

[5] This rule allows the admission of texts drafted by private parties, not just government officials. *E.g.*, *Constanino v. Herzog*, 203 F.3d 164, 173 (2d Cir. 2000) (admitting obstetrics video under Rule 803(18), and explaining "the authoritativeness inquiry is a freewheeling one and may be conducted by 'any means'").

WBST court's reliance on the report reflects the weight given to the Knight Commission's reports. Contrary to the NCAA's suggestion, the Knight Commission is a nonpartisan entity producing independent reports, a fact Dr. Rubinfeld acknowledged in his report by explaining that the Knight Commission was founded by an "independent foundation." Dkt. No. 925-8 at ¶ 115. Accordingly, this Motion should be denied, and the parties' experts should be permitted to read to the Court from the Knight Commission reports pursuant to Rule 803(18).

The NCAA's motion also attempts to preclude references to quotations in news articles that are the type of material reasonably relied on by experts in the field, and their probative value substantially outweighs any prejudicial effect. *See* Fed. R. Evid. 703 (providing that experts may base testimony on inadmissible facts "of a type reasonably relied upon by experts in the particular field"). The Ninth Circuit has explained that Rule 703 requires analysis of two questions: (1) whether the facts are of a type reasonably relied on by experts in the particular field; and (2) whether the probative value of the underlying data substantially outweighs its prejudicial effect. *Turner v. Burlington N. Santa Fe RR. Co.*, 338 F.3d 1058, 1061-62 (9th Cir. 2003). *Cf. Nanda v. Ford Motor Co.*, 509 F.2d 213, 222 (7th Cir. 1974) ("Facts or data found in the literature of the profession, even though not themselves admissible in evidence, properly form a part of the basis for an expert's opinion.").

"Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharms., Inc*. 509 U.S. 579, 592 (1993). In fact, experts may rely on a wide array of sources, including reports, books, and news articles.[6] An expert's opinion based on such materials is not hearsay because the expert does not "attest to the truth of the materials on which [she] rel[ies], but rather interpret[s] those materials." *Lang v. Cullen*, 725 F. Supp. 2d 925, 953

[6] *Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998) ("*Scott*") (holding that experts may rely on newspaper articles, pretrial testimony, and conversations with colleagues); *Katt v. City of New York*, 151 F. Supp. 2d 313, 356-57 (S.D.N.Y. 2001) ("*Katt*") (holding that interviews, commission reports, research articles, scholarly journals, books, and newspaper articles are the types of data reasonably relied upon by social science experts); *MHANY Mgmt. Inc. v. Cnty. of Nassau*, 843 F. Supp. 2d 287, 320 (E.D.N.Y. 2012) ("[A]ny argument that [plaintiffs' expert's] testimony should not be considered because he relied upon newspaper articles and/or transcripts depicting events, without having personal knowledge of the events described, is without merit.").

(C.D. Cal. 2010) ("*Lang*").

Here, Dr. Staurowsky is a sports management professor whose report addresses the NCAA's amateurism pro-competitive justification. Dr. Staurowsky relied, in part, on "documents found in the public domain," including articles in periodicals. It is undisputed that NCAA sports, particularly men's basketball and football, are the subject of numerous news stories, books, and movies. Therefore, it is not surprising that a sports management professor would rely on such sources in forming an opinion. *Scott*, 140 F.3d at 1286. Moreover, permitting Dr. Staurowsky to describe the particular periodicals forming the basis of her opinion would cause no prejudice to the NCAA. The NCAA's concern about jury confusion is moot. Accordingly, the Court should deny the NCAA's motion *in limine* to the extent it seeks to bar references to sources upon which Dr. Staurowsky relied in forming her opinion.[7]

VI. Motion *In Limine* No. 5: To Bar Admission of Walter Byers's Book "Unsportsman-Like Conduct."

As discussed above, testifying experts are permitted to describe the materials on which they relied to form the basis of their expert opinions. Fed. R. Evid. 703, 803(18). Just as Dr. Staurowsky relied on periodical publications, she and Plaintiffs' other experts also relied on Walter Byers's book *Unsportsmanlike Conduct*. *See* 898-28 at 20. Mr. Byers was the NCAA's president for 36 years and has intimate knowledge of the organization. His book concerning the NCAA and collegiate sports is certainly the type of material reasonably relied upon by experts when their opinions concern amateurism and collegiate athletics. *Scott*, 140 F.3d at 1286 (experts may rely on newspaper articles, pretrial testimony, and conversations with colleagues); *Katt*, 151 F. Supp. 2d at 356-57 (interviews, commission reports, research articles, scholarly journals, books, and newspaper articles are the types of data reasonably relied upon by social science experts).

Unsportsmanlike Conduct is highly probative because it was written by a former NCAA

[7] The Court should note in this regard that the NCAA's expert, Dr. Daniel Rubinfeld, also relies extensively on news articles and similar sources in his expert report. Dkt. No. 925-8 at 27 nn.88-89; 28 n.91-94 & 96; 30 nn.99-100; 31 n.104; 32 n.107; 34 nn.116 & 118; 35 n.25; 36 nn.126 & 128-29; 37 nn.130-38; 42 n.159; 68 n.270.

president who possessed direct first-hand knowledge of the subjects of his book. Moreover, no prejudice would result because the publication contains significant indicia of reliability due to Mr. Byers's 36 years with the NCAA.[8] Accordingly, the Court should permit Plaintiffs' experts to read excerpts from *Unsportsmanlike Conduct* into evidence. Fed. R. Evid. 803(18); *Burgess*, 727 F.2d at 834 (applying learned treatise rule to books written by industry experts relied on by expert). Even if the Court determined that Mr. Byers's book itself is not admissible, Plaintiffs' experts may discuss it because it directly relates to the subject of the expert opinions, rendering it highly probative, and no prejudice would result. Fed. R. Evid. 703.

VII. Motion *In Limine* No. 6: To Preclude Expert Testimony by Taylor Branch and Ellen Staurowsky.

The NCAA's motion to preclude expert testimony by Taylor Branch and Dr. Staurowsky should be denied because both satisfy the expert qualifications set forth in Federal Rule of Evidence 702.

A. Both Experts Are Entitled to Rely on Otherwise Inadmissible Evidence in Forming Their Opinions.

The definition of an expert under Rule 702 is broadly defined. *See Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269-70 (9th Cir. 1994); *see also Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 & n.12 (9th Cir. 2004) ("*Hangarter*") (Rule 702 qualification requires "minimal foundation" of knowledge, skill, and experience). In addition, under Rule 703 experts are entitled to rely on otherwise inadmissible evidence in support of their opinions, including out-of-court hearsay statements appearing in articles, books, and reports, so long as the evidence is of the type that "experts in the particular field would reasonably rely on . . . in forming an opinion." Fed. R. Evid. 703. Expert reports from social scientists and historians like Dr. Staurowsky and Mr. Branch, whose opinions may rely on hearsay, are therefore admissible.[9]

[8] Moreover, Mr.Byers confirmed the accuracy of the statements in his book at his June 1, 2012 deposition by written question in this case.

[9] *See Scott*, 140 F.3d at 1286 (affirming admission of expert opinion based on newspaper articles, certain pretrial testimony and conversations with colleagues); *Southland Sod Farms v. Stover*

Footnote continued on next page

Faced with the low hurdle of admissibility for expert witnesses (and the fact that Rule 703 allows experts to rely on hearsay statements), the NCAA claims that Dr. Staurowsky's and Mr. Branch's reports must nevertheless be excluded because they are merely "end run conduits" for inadmissible hearsay. Dkt. No. 1069 at 11. This is untrue: like other social scientists and historians, Dr. Staurowsky and Mr. Branch compiled and analyzed data from a variety of sources, summarized that information in a way that is helpful to the Court, and relied on it to form conclusions about amateurism in college athletics. For example, Dr. Staurowsky is a professor in sports management whose scholarly interests include college athlete rights and college sports reform. Dkt. No. 898-28 at 1. Dr. Staurowsky assembled and analyzed a broad spectrum of information—including data on revenue generation in NCAA men's basketball and football, money spent on athletic facilities and coaching salaries, and empirical analysis (including from the NCAA itself) of the time commitment, scholarships, and graduation rates for student-athletes participating in football and men's basketball—and concluded that revenue-generating sports such as men's football and basketball are inconsistent with the NCAA's claim of amateurism and that prohibiting compensation to college athletes for use of their NILs is not essential to preserving amateurism in the NCAA. *Id*. That is what she intends to testify about, notwithstanding the NCAA's caricature of her testimony.

As the Ninth Circuit recognized in *Scott*, because social scientists rely on the same information Dr. Staurowsky analyzed in this case, their expert opinions are admissible even if the underlying information is not. 140 F.3d at 1286 (affirming admission of expert professor of sociology whose opinion was based on newspaper articles, certain pretrial testimony and conversations with colleagues). Furthermore, like the expert in *Scott*, Dr. Staurowsky relied in part on her own extensive studies and her collaboration with other academics as the basis for her

---

Footnote continued from previous page
Seed Co., 108 F.3d 1134, 1141-42 (9th Cir. 1997) (affirming admission of expert whose opinions were based on data collected by others); *Safeco Ins. Co. of Am. v. Cnty. of San Bernardino*, 347 F. App'x 315, 317 (9th Cir. 2009) (affirming admission of expert whose report relied on inadmissible data because the expert had "extensive knowledge of the underlying facts supporting his testimony, and his conclusions were based on project records and consistent with evidence admitted at trial") *Lang*, 725 F. Supp. 2d at 953 ("It is settled that an expert can rely on extra-judicial statements in forming an opinion.").

opinion. Dkt. No. 898-28 at 4, 8, 17 n.4; *see Scott*, 140 F.3d at 1286 ("Shupe's citations to his extensive studies and to his collaboration with other academics as the basis for his opinions suffice to merit admission of his testimony.").

The same is true for Mr. Branch's report, which provides a historical description of the definition of amateurism throughout United States history, especially in the context of college athletics. Contrary to the NCAA's protests, Mr. Branch is entitled to rely on the statements of former college presidents and coaches in order to prepare a comprehensive history of amateurism in college athletics. Dkt. No. 898-28 at 9-10;[10] *see also Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 135-36 (2d Cir. 2013) (detailing the ways that a historian's specialized knowledge might aid the jury, including "offer[ing] background knowledge or context that illuminates or places in perspective past events.").

The NCAA's cases do not hold otherwise: unlike Dr. Staurowsky's and Mr. Branch's reports, the expert reports excluded in those cases did not provide any additional expertise or comment on the hearsay statements. *See, e.g.*, *Marvel Characters*, 726 F.3d 119 (excluding expert report that consisted entirely of hearsay that speculated as to the motivations and intentions of certain parties on the basis of those statements); *Jinro Am. Inc. v. Secure Invs., Inc*., 266 F.3d 993 (9th Cir. 2001) (excluding purported expert testimony of individual with no legal, business or financial expertise under Rule 702, not because the purported expert relied in part on hearsay statements of others).[11] In fact, while the court in *Marvel Characters* ultimately excluded an expert report, it first acknowledged that "a historian's 'specialized knowledge' could potentially aid a trier of fact in some cases," including by "interpret[ing] evidence that would otherwise elude, mislead, or remain opaque to a layperson," "helpfully synthesiz[ing] dense or voluminous historical texts," or "offer[ing] background knowledge or context that illuminates or places in perspective past events." 726 F.3d at 135-36. Demonstrating their expertise at work, Dr.

[10] As the NCAA notes, several of these statements come from "three quarters of a century ago," and so witnesses that can speak to these events are unlikely to be available to testify. (Mot. at 12.)

[11] *Factory Mut. Ins. Co. v. Alon USA L.P.*, 705 F.3d 518, 524 (5th Cir. 2013), also cited by the NCAA for the proposition that experts may not use Rule 703 to avoid the hearsay rule, affirmed the district court's *admission* of expert testimony.

Staurowsky's and Mr. Branch's reports gather relevant information, synthesize it for the Court, and offer it as background on the issues in this case—specifically, whether the NCAA's amateurism justification is tenable. Their testimony is admissible under Rules 702 and 703.

The NCAA's challenges go to the weight, not the admissibility, of Plaintiffs' expert testimony. The appropriate way for the NCAA to challenge Plaintiffs' expert testimony is through cross-examination at trial. *Hangarter*, 373 F.3d at 1017 n.14 ("The factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.").

B. Mr. Branch Is a Historian Who Qualifies as an Expert Under Rule 702.

The NCAA's motion to exclude Mr. Branch's testimony on the ground that he is not qualified to testify as an expert witness should similarly be rejected. As noted above, Rule 702 "contemplates a broad conception of expert qualifications," requiring only that an expert be qualified by "knowledge, skill, experience, training, or education." *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994) (citing Fed. R. Evid. 702); *see also SEC v. Leslie*, No. C 07-3444, 2010 U.S. Dist. LEXIS 76826, at *29 (N.D. Cal. July 29, 2010) ("The standard qualification as an expert witness under Rule 702 is not particularly high.").

Mr. Branch easily clears this low hurdle. Mr. Branch, who is a historian, has devoted his professional career to researching and writing books concerning United States history, including the civil rights movement and, more recently, a history of the NCAA and college athletics. Mr. Branch has given speeches on a variety of historical topics and taught college history courses at several universities. He is the winner of the 1989 Pulitzer Prize for History. Mr. Branch's breadth of knowledge and research concerning U.S. history, including the history of the NCAA, qualifies him as an expert under Rule 702. Indeed, historians are regularly admitted as qualified experts.[12]

[12] *See, e.g.*, *United States v. Herrera*, 704 F.3d 480 (7th Cir. 2013) (suggesting that expert testimony of an art historian would be admissible in a forgery case); *Bd. of Cnty. Comm'rs of the Cnty. of Kay v. Freeport-McMoran Copper & Gold, Inc.*, No. CIV-12-601-C, 2013 U.S. Dist. LEXIS 185758, at *3-7 (W.D. Okla. Sept. 9, 2013) (admitting expert testimony from historian who "uses his experience as an environmental historian to place relevant historical information into context, in order to allow the jury to analyze Defendants' behavior."); *United States v. Newmont USA Ltd.*, No. CV-05-020-JLQ, 2007 U.S. Dist. LEXIS 96264, at *6-9 (E.D. Wash.

Footnote continued on next page

As one example, in *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 949-51 (N.D. Ill. 2010), the court rejected defendant's challenge to a historian's expert testimony about the relationship between the Chicago Police Department and the African-American community in Chicago during the 1950s. The proposed expert was "a researcher and doctoral candidate in history" who the court held "ha[d] the background to find, evaluate, and synthesize historical documents pertinent to the issue of Chicago Police Department policies and practices in 1952" and could "provide a unique perspective" on the historical context surrounding the events at issue. *Id*. The same is true of Mr. Branch's testimony—his extensive background as a historian of U.S. history allows him to provide valuable context to the NCAA's argument that its restraints are necessary to promote amateurism. Moreover, the *Walden* court held that Rule 702 did not bar the historian's testimony even though his research was not entirely focused on the subject matter of the proposed testimony. *Id*. at 950-51.

Mr. Branch's experience and expertise spans certain portions of United States history and has more recently focused on the development of the concept of amateurism in sports. In researching and writing about college athletics, Mr. Branch has brought to bear the same methods and rigor that have earned him accolades and widespread recognition for decades. This is sufficient to admit Mr. Branch as an expert under Rule 702.

In addition, Mr. Branch's testimony should be admitted because it provides important context to the Court of one of the NCAA's primary alleged procompetitive benefit—amateurism. The history of how an alleged restraint developed, and the reasons for that restraint, is relevant in antitrust cases, especially those evaluated under the Rule of Reason analysis. *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 89-91 (1984) ("*BoR*") (reviewing the history of televised college football games, evidence of which was offered in part by media experts); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606-07 (1972) ("An analysis of the reasonableness of

---

Footnote continued from previous page
Nov. 16, 2007) (admitting testimony of historian in the area of organization of mining enterprises, even where he was not an expert in the specific area of "corporate organization," because "his background appears to provide sufficient expertise upon which his opinions, as a general matter, are based."); *United States v. Kantengwa*, No. 08-10385-RGS, 2012 U.S. Dist. LEXIS 142712, at *11-14 (D. Mass. Oct. 3, 2012) (expert testimony from historian that relied on accounts from other researchers was admissible).

particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."). Mr. Branch's expert testimony regarding the history of the NCAA and development of its definition of amateurism may also be admitted to educate the Court regarding "general principles." Fed. R. Evid. 702 advisory committee's notes (2000).

Because of the liberal parameters for experts under Rule 702, the NCAA attempts to reduce Mr. Branch's nearly 40 years as a historian and published writer specializing in United States history to an "investigative journalist." *See* Dkt. No. 1069 at 15-16. But the cases the NCAA cites dealing with the propriety of admitting "investigative journalists" are misplaced because they address exclusion of purported experts that lacked any research or educational experience in the relevant field and who sought to provide "impressionistic generalizations" based on their own observations.[13]

The NCAA's reliance on *Jinro Am. v. Secure Invs., Inc.*, 266 F.3d 993 (9th Cir. 2001) ("*Jinro*"), is especially misleading. The proposed expert in *Jinro* was a "general manager of the Pinkerton Detective Agency's office in Korea" and testified as an expert "about Korean law and the business practices of Korean companies," based solely on his purported familiarity with Korean companies from his business and because it was a "a hobby of his." *Id*. at 1001. The Ninth Circuit held that these qualifications were "glaringly inadequate" because the expert did not have legal, business or financial expertise to evaluate the transaction, nor education or training as a cultural expert generally or as to Korean culture specifically. *Id*. at 1005-06. None of the cases the NCAA cites suggest that a professor and United States historian (with a degree in that field) who writes about, gives speeches about, and lectures about United States history is not properly

[13] *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 946 (N.D. Cal. 2010) (rejecting expert testimony from a purported expert on "marriage, fatherhood and family structure" whose publications were not subject to the traditional peer-review process, he did not have a degree in sociology, psychology or anthropology despite the importance of those fields to the subject of his testimony, and based his opinion on "reading articles and having conversations with people, and trying to be an informed person about it") (quotations omitted); *Recreational Devs. of Phoenix, Inc. v. City of Phoenix*, 220 F. Supp. 2d 1054, 1062 (D. Ariz. 2002) (rejecting the proposed expert testimony of an investigative journalist concerning the swinger lifestyle because he had no relevant expertise and relied solely on his sociological observations, which the court deemed "impressionistic generalizations" about the swinger lifestyle").

qualified as an expert under Rule 702. The NCAA's motion to exclude Mr. Branch should be denied.

VIII. Motion *In Limine* No. 7: To Bar Admission of Walter Byers's Deposition Testimony from *White v. NCAA*.

The deposition testimony of former NCAA President Walter Byers in *White v. NCAA*, Civ. No. 06-0999 VBF (MANx) (C.D. Cal.) ("*White*") is admissible under Rule 804(b)(1) because he is unavailable to testify at trial, and because the NCAA's counsel were present at his deposition and cross-examined him. *Hangarter*, 373 F.3d at 1019 (Rule 804(b)(1) satisfied where defendant "had ample opportunity to cross-examine" witness in similar case).

Rule 804(b)(1) provides that "[t]estimony given . . . in a deposition . . . [is admissible where] the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Hangarter*, 373 F.3d at 1019. Mr. Byers is unavailable because he lives in Kansas, outside of subpoena range. *Murray v. Toyota Motor Distribs., Inc.*, 664 F.2d 1377, 1380 (9th Cir. 1982) ("Garrett resided in California, beyond the reach of a subpoena from the district court in Montana, and was therefore "unavailable" within the meaning of Fed. R. Evid. 804(a)."). The NCAA does not dispute unavailability.

The NCAA's counsel (Gregory Curtner is counsel in both *White* and in this case) attended the deposition and had ample opportunity to question Mr. Byers. Dkt. Nos. 352-1; 352-2; 352-3. Indeed, Mr. Curtner's questioning was nearly twice as long as the *White* plaintiffs' examination. *Id*. The NCAA argues that its motives for cross-examination were not the same in the *White* case. Under Rule 804(b)(1), however, "'[s]imilar motive' does not mean 'identical motive'" *United States v. Geiger*, 263 F.3d 1034, 1038 (9th Cir. 2001) ("*Geiger*") (quoting *United States v. Salerno*, 505 U.S. 317, 326 (1992) (Blackmun, J., concurring)); *see also Culver v. Asbestos Defendants (BP)*, No. C 10–03484 SI, 2010 WL 5094698, at *4 (N.D. Cal. Dec. 8, 2010) (admitting deposition testimony from another case where defendant's predecessor had a similar motive to develop testimony); *August v. Provident Life & Accident Ins., Co.*, No. CV 09–01951 DMG (SHx), 2011 WL 6152349, at *7 (C.D. Cal. Nov. 15, 2011) ("*August*"); *Televisa*,

S.A. de C.V. v. Univision Commc'ns, Inc., 635 F. Supp. 2d 1106, 1109 (C.D. Cal. 2009) (deposition testimony admitted when party's counsel was present and had "a full and fair opportunity to cross-examine him").

The NCAA had a very similar motive to develop Mr. Byers's testimony in *White*, which involved issues strikingly similar to those here. Both *White* and this case were brought on behalf of college athletes who have participated in the "Football Bowl Subdivision and NCAA Division I men's basketball." Both cases allege a horizontal conspiracy to limit compensation to these college athletes by the colleges who compete to recruit them. The NCAA asserted substantially the same procompetitive justifications in *White*, including amateurism and competitive balance, as it asserts here. Mr. Byers testified, and was cross-examined by the NCAA about amateurism and competitive balance, as well as the NCAA rules restricting compensation to college athletes. The NCAA also attempted to undermine Mr. Byers's credibility during its cross-examination.

The NCAA had ample opportunity to cross-examine Mr. Byers about all his deposition testimony in *White* and fails to explain how its motives would have differed had it known that the testimony would be used in this case. *See Dykes v. Raymark Indus., Inc.*, 801 F.2d 810, 817 (6th Cir. 1986) (objecting party must "explain as clearly as possible to the judge precisely why the motive and opportunity of the [party] in the first case was not adequate to develop the cross-examination which the instant [party] would have presented to the witness"). Moreover, since the NCAA had similar motives in defending these closely related antitrust cases, the Court should reject any argument that it did not fully examine Mr. Byers for tactical reasons. *Geiger*, 263 F.3d at 1039 ("Any failure to cross-examine Churchill resulted not from lack of opportunity but from the defense attorney's utilization of that opportunity."); *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1148 (N.D. Cal. 1982) ("We refuse to exclude highly relevant testimony because Johns-Manville's failure to avail itself of an ample opportunity to cross-examine Dr. Smith turns out, in retrospect, to have been a tactical error"); *August*, 2011 WL 6152349, at *7.

The fact that Mr. Byers was not questioned regarding the NCAA rules specifically governing NILs does not preclude admission under Rule 804(b)(1). Both cases arise from related restraints on college athlete compensation and the NCAA had the same motive to cross-examine

him regarding the same amateurism and competitive balance defenses present in both cases.

The NCAA's argument that the testimony should be excluded because the Magistrate Judge denied Plaintiffs' motion under Federal Rule of Civil Procedure 32(a)(8) is also not persuasive. Dkt. No. 1069 at 17. Rule 32(a)(8) permits the use for any purpose of a deposition taken in an earlier action "in a later action involving the *same subject matter*," while Rule 804(b)(1) instead requires "*an opportunity and similar motive* to develop [the testimony] by direct, cross, or redirect examination." (Emphases added). Indeed, the Magistrate Judge denied the motion because he was "unconvinced that the two cases involve the **same subject matter.**" Dkt. No. 374 at 4 (emphases added).

Moreover, the NCAA's primary argument in opposing the Rule 32(a)(8) motion was that "plaintiffs do not appear to claim that this conspiracy is achieved by promulgation or enforcement of any NCAA rules that pertain to *current student-athletes.*" Dkt. No. 357 at 2 (emphases added).) This case, however, now includes claims on behalf of current student athletes, as in *White*.

IX. Motion *In Limine* No. 8: To Bar References to Wealth or Income of Any Defense Witness or NCAA or University Employee.

Plaintiffs allege that the NCAA's restraint benefits everyone (including NCAA executives, conference commissioners, athletic directors and university presidents) except for the players. The NCAA is calling a number of such people to testify at trial. *See* Dkt. No. 1070-2. Accordingly, information about such witness's generous compensation is directly relevant to show bias.

"The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (quotation marks omitted); *see also United States v. Abel*, 469 U.S. 45, 51 (1984) ("A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony."). Courts have held that a witness's financial interest in the litigation provides a basis to cross-examine the witness for bias. *Crowe v. Bolduc*, 334 F.3d 124, 132 (1st Cir. 2003)

(holding that witness's "financial incentives" in the litigation was "classic evidence of bias, which is routinely permitted on cross-examination"); *United States v. Dees*, 34 F.3d 838, 844 (9th Cir. 1994) (holding that whether witness had a financial interest in the trial "was critical to the jury's determination of [the witness's] credibility").

For example, in *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031 (9th Cir. 2011) ("*Alameda Books*"), several adult businesses challenged a municipal ordinance prohibiting the operation of adult bookstores within a certain radius of adult video arcades. In granting summary judgment for the adult businesses, the district court relied on declarations from two executives in the adult retail industry who were "closely associated" with two of the parties in the litigation. The Ninth Circuit reversed, holding that the district court "did not address the obvious bias of these witnesses relating to their close association and apparent financial interest." *Id.* at 1040. The Ninth Circuit explained that the declarations had "obvious and important shortcomings" such as the declarants' "facial bias." *Id.* at 1042. The Ninth Circuit concluded that the "district court's failure to take into account as part of its explicit analysis the bias of the plaintiffs' witnesses was a significant oversight." *Id.*

Here, the NCAA's witnesses including NCAA executives, athletic directors, conference commissioners, and university presidents all benefit from the restraint, which affects players but not these witnesses. As in *Alameda Books*, the defense witnesses' "close association" with the entities affected by the restraint demonstrates their "obvious bias" in supporting the restraint. Evidence of the witness's generous compensation is highly probative of this bias. As the Ninth Circuit held in *Alameda Books*, failure to take into account this "facial bias" would be a "significant oversight." *Id.*

Moreover, no prejudice or privacy violations would result because incomes of highly paid executives of non-profit organizations such as the NCAA are public information. For example, the NCAA's 2011 tax return states that president Mark Emmert received $1,700,000.[14] Similarly, *USA Today* published on its website the 2013 salaries of university athletic directors, including

[14] http://www.usatoday.com/story/sports/college/2013/07/10/ncaa-mark-emmert-salary-million-tax-return/2505667/.

disclosed witnesses Dave Brandon (Univ. of Michigan - $900,000), Kevin Anderson (Univ. of Maryland - $499,490), and Mark Hollis (Michigan State - $700,000).[15] Salaries of conference commissioners such as the Big Ten's James Delany ($2,800,000) are also publicly available.[16] Additionally, the incomes of university presidents such as disclosed witness Michael Drake's $1,000,000 salary are public and widely reported.[17]

Accordingly, the NCAA's motion to exclude reference to defense witness's incomes should be denied because the information is highly probative to show bias. No prejudice or privacy violations would result because the information is already public.

Additionally, some of this evidence—*e.g*., coaches' salaries—typifies the inefficient expenditures on inputs to the production of intercollegiate sports, about which Dr. Noll intends to testify. *See* Dkt No. 898-15. Dr. Noll writes in his expert report on liability:

> The NCAA's rules regarding scholarships and the use of the images, likenesses and names of student athletes, including the prohibition against sharing licensing revenue with student-athletes, cause two types of inefficient substitution. The first consists of costly, imperfect ways to "work around" the NCAA's restrictions on licensing the use of the images and names of student-athletes. The second is increased expenditures on other inputs to intercollegiate athletics, including other facets of recruiting athletes.

Id. at 103. In short, "colleges compete for elite athletes by spending more on recruiting, coaches, and facilities than the amount that would be spent if greater payments to student-athletes were allowed." *Id*. at 106. The gargantuan salaries that course throughout Division I football and basketball administration are relevant in this respect.

X. Motion *In Limine* No. 9: To Exclude the Admission of College Athlete Eligibility Forms Authored by Schools or Conferences.

College athlete eligibility forms are admissible because they are an aspect of the alleged restraint at issue—that the NCAA and its members effect their conspiracy with respect to the labor input of student-athletes through the operation of the NCAA's bylaws and as manifest in the

[15] http://www.usatoday.com/story/sports/college/2013/03/06/athletic-director-salary-database-methodology/1968783/.

[16] http://www.usatoday.com/story/sports/ncaaf/2013/05/19/pac-12-commissioner-compensation/2324799/.

[17] http://www.cleveland.com/metro/index.ssf/2014/02/ohio_state_university_presiden_1.html.

student-athlete eligibility forms. Plaintiffs allege that the NCAA's rules require that college athletes allow the NCAA and its member conferences and universities to use their NILs for commercial purposes while at the same time prohibiting the student-athletes from deriving any monetary benefit from that commercial use. The college athlete eligibility forms authored by member schools or conferences constitute evidence that makes this restraint more probable and therefore admissible under Federal Rules of Evidence 401 and 402.

The NCAA itself relied on those forms in its motion for summary judgment. *See, e.g.*, Dkt. Nos. 921-9 (declaration of Jim Delany, Commissioner of the Big Ten Conference, attaching that conference's release form); 921-6 (declaration of Christine Plonsky of the University of Texas at Austin, attaching that school's release form). Both are slated to testify at trial during the NCAA's case-in-defense on the subject matter of their respective declarations. Dkt. No. 1070-2 at 5. Because the NCAA itself is relying on those forms, its argument that "[t]here is no evidence that the NCAA was aware of the contents of any such forms" (Dkt. No. 1069 at 19) is disingenuous. The NCAA is in no position to contest admissibility of such eligibility forms when it put the same evidence into the record on summary judgment and plans to do the same at trial. *United States v. Sepulveda*, 15 F.3d 1161, 1189 (1st Cir. 1993) ("The ancient adage applies: what is sauce for the [defendant's] goose often may prove to be sauce for the [plaintiffs'] gander.").

Finally, its argument that the NCAA may not have required NCAA member institutions to use forms or that only some institutions used their own forms goes to the *weight*, not the admissibility of the evidence. *See, e.g.*, *Agha v. Sec'y of Army*, No. C-85-20693(SW), 1992 U.S. Dist. LEXIS 18936, at *19 (N.D. Cal. Oct. 19, 1992) ("Plaintiff's attack on the reliability of the documents goes to the weight, not the admissibility, of the evidence.").

XI. Motion *In Limine* No. 10: To Exclude Evidence Concerning Adjudicated or Alleged Criminal Conduct Unrelated to the Rules at Issue Here.

Plaintiffs oppose this motion as worded. They were willing to enter into a stipulation resolving this motion, but only if: (a) the prohibition is applied mutually and (b) if an NCAA witness opens the door in direct examination with respect to some adjudicated or alleged criminal conduct, Plaintiffs ought to be entitled to cross-examine him or her about it. Plaintiffs offered to

so stipulate, but the NCAA refused.

XII. Motion *In Limine* No. 11: To Exclude References to Whether the NCAA Called Any Current or Former Student-Athletes.

The parties are negotiating a stipulation to resolve this motion.

XIII. Motion *In Limine* No. 12: To Preclude Evidence or Argument About Supposedly Less Restrictive Alternatives That Dr. Noll Has Not Analyzed.

The NCAA advances a standard for admissibility of less restrictive alternatives that does not exist. Indeed, the NCAA fails to cite any cases that prohibited antitrust plaintiffs from presenting evidence or argument about less restrictive alternatives at trial.[18] There is no requirement that every less restrictive alternative presented be supported or analyzed by an expert. The treatise by Professor Philip Areeda, on which the NCAA relies, only contrasts less restrictive alternatives that are based merely on speculation with less restrictive alternatives that can be presented to the Court, including those alternatives that are (1) "based on actual experience in analogous situations elsewhere" or (2) "fairly obvious." 11 Phillip E. Areeda, *Antitrust Law* ¶ 1913b, at 374-75 (2011) ("Areeda"). However, Professor Areeda *never* says that less restrictive alternatives must be supported by expert analysis.

In fact, he cites *Wilk v. American Medical Ass'n*, 671 F. Supp. 1465 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1990) ("*Wilk*"), a case involving a boycott and conspiracy designed to contain and eliminate the chiropractic profession. In *Wilk*, the court found, following a bench trial, that the defendant failed to present evidence that "a public education approach or any other less restrictive approach was beyond the ability or resources of the American Medical Association or had been tried and failed." *Id.* at 1483. There is nothing in *Wilk* that shows that the less

[18] The NCAA's citations do not address what types of less restrictive alternatives should be admitted at trial, and instead are distinguishable or consistent with the theory of and supporting evidence for Plaintiffs' case. *See BoR*, 468 U.S. at 120 ("consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role" (emphasis in original)); *Cnty. of Tuolumne v. Sonory Cmty. Hosp.*, 236 F.3d 1148, 1159-60 (9th Cir. 2001) (proposed less restrictive means seemed implausible); *M&H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 987 (1st Cir. 1984) (proposed alternatives were "impossible"); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248-50 (3d Cir. 1975) (only stating that it was not necessary for the defendant to employ the least restrictive alternative possible). The NCAA's other concerns about "juror speculation" (Dkt. No. 1069 at 23) are now moot.

restrictive alternative had been specifically analyzed by an expert. *See also Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) ("*Sullivan*") (possible changes to NFL's ownership policy should be admitted for consideration at trial).

Here, the less restrictive alternatives that the NCAA seeks to exclude fall precisely within the categories of less restrictive alternative that are admissible at trial—those alternatives that have been adopted by similar athletic organizations. The analysis of less restrictive alternatives by Plaintiffs' expert, Dr. Roger Noll, includes looking to "the definitions of amateurism that have been adopted by other organizations," which he found "tend to have the following features":

> First, amateurs cannot receive performance-based pay, such as prizes based on the results of a competition or an individually negotiated salary. Second, amateurs can receive appearance money. Third, amateurs are permitted to earn income from licensing the commercial use of their NILs, although in some cases the approval or cooperation of the governing body of the sport is required.

Dkt. No. 999-2 at 134. From these policies that are used in analogous situations, Dr. Noll reasoned that the following less restrictive alternatives were available:

> Performance-based individually negotiated salaries could be banned, but a student-athlete would be permitted to be paid for individual licenses, perhaps only with the approval or cooperation of the college. Revenues from licensing the bundle of the intellectual property of a college and the NILs of its team members would be divided between a college and its team members in accordance with common practices in other markets, and then the team share would be divided among team members in equal shares, again in accordance with common market practices. This procedure avoids individually negotiated, performance-based pay, but is less restrictive than fixing the price for the commercial use of the NILs of student-athletes at zero.

Id. This proposed less restrictive alternative is both (1) "based on actual experience in analogous situations elsewhere" and (2) "fairly obvious"—two characteristics of less restrictive alternatives that are admissible at trial. Areeda, ¶ 1913b, at 374-75.

That Dr. Noll looked to "practices in professional sports" to determine what "common market practices" exist for distributing licensing revenue *strengthens* the weight of his proposed alternative as a viable method for distributing licensing revenue.[19] Dkt. No. 999-2 at 88-89.

[19] The NCAA's attack on Dr. Rascher in its Motion is moot because the NCAA's citations to his report deal with damages, which will not be tried at this time. Dkt. No. 1071 at 4.

Looking to the practices of other sport organizations is a well-accepted way to identify less restrictive alternatives to anticompetitive restraints. For instance, in *Smith v. Pro Football*, 593 F.2d 1173, 1187-88 (D.C. Cir. 1978), although the National Football League claimed that its draft system was justified by the procompetitive benefit of "competitive balance," the court found that there were "significantly less anticompetitive alternatives," including using the selection system adopted by the National Basketball Association. Moreover, this Court has expressly approved of the use of alternative compensation models in professional sports as presenting a possible less restrictive alternative. *See re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2014 WL 1410451, at *14 (N.D. Cal. Apr. 11, 2014) ("Nor has the NCAA explained why it could not use less restrictive means of maintaining competitive balance, such as those used by professional sports leagues."). If the NCAA wishes to attack Dr. Noll's reliance on licensing revenue distribution practices in professional sports, that attack again goes to the weight, not admissibility of Dr. Noll's proposed less restrictive alternative. *Hangarter*, 373 F.3d at 1017 n.14 ("The factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.").

Moreover, it is unclear why the NCAA calls these options alternatives "that Dr. Noll has not analyzed." Dkt. No. 1069 at 21. As stated in his report, he analyzed the practices of other amateur sports organizations and the group licensing practices of professional sports organizations in order to suggest less restrictive alternatives. Dkt. No. 999-2 at 134. The NCAA's objections to Plaintiffs' proposed less restrictive alternatives go to the weight, not the admissibility, of such alternatives. Whether a less restrictive alternative is merely speculative or realistic is a question for the finder of fact. *Sullivan*, 34 F.3d at 1105-06 (whether expert testimony supported a finding of causation was for the fact finder).

XIV. Motion *In Limine* No. 13: To Exclude Testimony of Mary Willingham if the Court Excludes the Testimony of NCAA Witnesses not Listed by Name in Rule 26 Disclosures.

Finally, the NCAA asks to exclude the testimony of Mary Willingham if the Court decides that the testimony of its undisclosed witnesses should be excluded or, in the alternative, asks that

she be deposed before she testifies at trial. Plaintiffs have not yet decided whether they will call Ms. Willingham as a witness, given that a bench trial may be of shorter duration than a jury trial. If the Court grants the exclusion motion as to the NCAA's undisclosed witnesses, she will not be called. If the Court denies the exclusion motion and she is called, Plaintiffs are willing to make her available for a deposition before she testifies.

XV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant NCAA's motions *in limine* that are opposed.

Dated: May 23, 2014

Respectfully submitted,

By: */s/ Michael P. Lehmann*

Michael P. Lehmann (Cal. Bar No. 77152)
Bruce J. Wecker (Cal. Bar No. 78530)
HAUSFELD LLP
44 Montgomery St., 34th Floor
San Francisco, CA 94104
Telephone: (415) 633-1908
Facsimile: (415) 358-4980
E-mail: mlehmann@hausfeldllp.com
abailey@hausfeldllp.com

Michael D. Hausfeld (*pro hac vice*)
Hilary K. Scherrer (Cal. Bar No. 209451)
Sathya S. Gosselin (Cal. Bar No. 269171)
Swathi Bojedla (*pro hac vice*)
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201
E-mail: mhausfeld@hausfeldllp.com
hscherrer@hausfeldllp.com
sgosselin@hausfeldllp.com

Plaintiffs' Class Counsel with Principal Responsibility for the Antitrust Claims

By: */s/ Eric B. Fastiff*

Eric B. Fastiff (Cal. Bar No. 182260)
Brendan P. Glackin (Cal. Bar No. 199643)
Lin Y. Chan (Cal. Bar No. 255027)
Katherine C. Lubin (Cal. Bar No. 259826)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008
Email: efastiff@lchb.com
bglackin@lchb.com
klubin@lchb.com

By: */s/ Allan Steyer*

Allan Steyer
D. Scott Macrae
Lucas E. Gilmore
STEYER LOWENTHAL BOODROOKAS ALVAREZ & SMITH LLP
One California Street, Third Floor
San Francisco, CA 94111
Tel: (415) 421-3400
Fax: (415) 421-2234
Email: asteyer@steyerlaw.com
smacrae@steyerlaw.com
lgilmore@steyerlaw.com

Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to the e-mail addresses registered.

By: */s/ Sathya S. Gosselin*

Plaintiffs' Co-Lead Class Counsel with
Principal Responsibility for Antitrust Claims
HAUSFELD LLP
1700 K St. NW, Suite 650
Washington, DC 20006