

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 EDWARD O'BANNON, et al.

No. C 09-3329 CW

4 Plaintiffs,

ORDER RESOLVING  
MOTIONS IN LIMINE  
(Docket Nos. 1063,  
1069)<sup>1</sup>

5 v.

6 NATIONAL COLLEGIATE ATHLETIC  
7 ASSOCIATION; ELECTRONIC ARTS  
8 INC.; and COLLEGIATE LICENSING  
COMPANY,

9 Defendants.

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11 On May 28, 2014, the Court held a pretrial conference and  
12 heard arguments regarding the parties' motions in limine. After  
13 considering the parties' submissions and oral argument, the Court  
14 resolves the motions in limine as set forth below.

15 I. Plaintiffs' Motions in Limine

16 A. No. 1: Motion to Exclude Non-Expert Live Witnesses from  
17 Testifying in the NCAA's Case Who Were Not Made  
18 Available for Live Testimony in Plaintiffs' Case-in-  
Chief

19 Plaintiffs move to preclude three of the NCAA's witnesses --  
20 Mark Emmert, David Berst, and Wallace Renfro -- from testifying at  
21 trial unless the NCAA makes them available to testify during  
22 Plaintiffs' case-in-chief.

23 This motion is DENIED. As explained at the pretrial  
24 conference, each live witness will only be called to testify once,  
25 at which time each side will conduct both its direct and cross-  
26 examinations. Accordingly, it is not necessary to ensure that the

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28 <sup>1</sup> All citations in this order to docket numbers refer to the docket  
in case no. 09-1967.

1 NCAA's non-expert witnesses be made available to testify during  
2 Plaintiffs' case-in-chief. Plaintiffs will have an opportunity to  
3 question these witnesses fully when the NCAA presents its defense  
4 case. If the NCAA does not intend to call Mr. Renfro or Mr.  
5 Berst, then it shall notify Plaintiffs by 11:00 a.m. on June 4,  
6 2014, as set forth below, and Plaintiffs may use their  
7 depositions.

8 B. No. 2: Motion to Exclude Testimony of Previously  
9 Undisclosed NCAA Witnesses, or Requiring the NCAA to  
10 Produce Them for Deposition Prior to Trial

11 Plaintiffs move to preclude nine of the NCAA's non-party  
12 witnesses from testifying at trial.<sup>2</sup> Plaintiffs contend that the  
13 NCAA failed to disclose these witnesses under Federal Rule of  
14 Evidence 26 and that, as a result, they have not had an  
15 opportunity to depose any of these witnesses.

16 This motion is GRANTED in part and DENIED in part. The NCAA  
17 may call the following six witnesses at trial: Britton Banowsky,  
18 David Brandon, Mary Sue Coleman, Mark Hollis, Bernard Muir, and  
19 Harris Pastides. Plaintiffs have known for several months that  
20 these witnesses might be called to testify at trial because each  
21 of them submitted a declaration in support of the NCAA's motion  
22 for summary judgment in December 2013. As discussed at the  
23 pretrial conference, the NCAA shall make each of these witnesses  
24 available, by video-conference if necessary, for a deposition of  
25 up to four hours no less than seventy-two hours before the witness  
26 is called to testify at trial. These witnesses will only be

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27 <sup>2</sup> Plaintiffs originally moved to preclude twelve of the NCAA's  
28 witnesses from testifying but the NCAA, in its opposition brief,  
withdrew three of those witnesses: Dustin Page, Kendall Spencer, and  
Wendy Walters.

1 permitted to testify on the matters discussed in their summary  
2 judgment declarations and only to the extent permitted by the  
3 ruling on Plaintiffs' motion in limine no. 7.

4 The NCAA may not call Kevin Anderson, Michael Drake, and Rod  
5 McDavis because it did not provide Plaintiffs with adequate notice  
6 that these witnesses might testify at trial.

7 C. No. 3: Motion to Exclude Testimony of John Paul "Sonny"  
8 Vaccaro

9 This motion is GRANTED. The NCAA has proffered no relevant  
10 testimony from Mr. Vaccaro on any disputed issues of fact in this  
11 case.

12 D. No. 4: Motion to Exclude Witnesses, Except for One Party  
13 Representative, from the Courtroom Unless They Are  
14 Testifying

15 This motion is DENIED as moot in light of the NCAA's  
16 representation that only one of its testifying corporate  
17 representatives will be present during the trial.

18 E. No. 5: Motion to Exclude Evidence of Failure to Mitigate  
19 Plaintiffs have withdrawn this motion.

20 F. No. 6: Motion to Preclude Evidence and Argument That  
21 There Is No Restraint on Former College Athletes

22 Plaintiffs have withdrawn this motion.

23 G. No. 7: Motion to Preclude Speculative Testimony From  
24 Conference Commissioners and University Administrators

25 Plaintiffs move to exclude the testimony of Division I  
26 conference commissioners and university administrators regarding  
27 the NCAA's procompetitive justifications of (1) competitive  
28 balance, (2) amateurism, and (3) the integration of academics and  
athletics.

1 This motion is GRANTED in part and DENIED in part. Both the  
2 conference commissioners and university administrators may testify  
3 about amateurism and the integration of academics and athletics.  
4 However, only the conference commissioners may testify about  
5 competitive balance.

6 Federal Rule of Evidence 701 precludes lay witnesses from  
7 offering opinion testimony on matters that are not "rationally  
8 based on the witness's perception." Fed. R. Evid. 701(a). Under  
9 this rule, the university administrators who submitted summary  
10 judgment declarations are not qualified to offer their opinions on  
11 whether the challenged restraint enhances competitive balance  
12 among Division I football or basketball teams. These  
13 administrators -- many of whom do not even work in the athletic  
14 department of their respective universities -- cannot express  
15 probative opinions about the level of competitive balance between  
16 schools based solely on their experience implementing the  
17 challenged NCAA rules or observing how they operate within  
18 individual schools. The conference commissioners, in contrast,  
19 may potentially offer probative testimony on this subject because  
20 their work regularly exposes them to competition between schools.

21 H. No. 8: Motion to Preclude Evidence of Offsets

22 Plaintiffs have withdrawn this motion.

23 I. No. 9: Motion to Preclude Evidence of Aggregate College  
24 Athlete Graduation Rates

25 This motion is DENIED. Plaintiffs' contention that this  
26 evidence is irrelevant and prejudicial does not justify excluding  
27 it at this stage. Concerns about relevance and prejudice are  
28 reduced significantly when, as here, a case is tried to a judge

1 instead of a jury. See EEOC v. Farmer Bros. Co., 31 F.3d 891, 898  
2 (9th Cir. 1994) (“[I]n a bench trial, the risk that a verdict will  
3 be affected unfairly and substantially by the admission of  
4 irrelevant evidence is far less than in a jury trial.”).

5 J. No. 10: Motion to Permit Presentation of National Labor  
6 Relations Board Factual Findings

7 This motion is DENIED. Plaintiffs may not introduce the  
8 factual findings set forth in the recent decision of the Chicago  
9 Regional Director of the National Labor Relation Board (NLRB) in  
10 Northwestern University & College Athletes Players Association,  
11 No. 13-RC-121359, 2014 WL 1246914 (Mar. 26, 2014).

12 K. No. 11: Motion to Preclude Evidence and Argument  
13 Regarding the Promoting-Other-Sports Justification and  
14 Require an Offer of Proof on the Integration-of-  
15 Athletics-and-Education Justification

16 This motion is DENIED. Although the NCAA may not argue that  
17 the challenged restraint helps promote women’s sports or less  
18 prominent men’s sports, it will not be precluded from presenting  
19 evidence merely because it relates to women’s sports or less  
20 prominent men’s sports. This evidence may be relevant to other  
21 disputed issues of fact and, like the evidence discussed above,  
22 carries a minimal risk of prejudice because this case will not be  
23 tried to a jury. The Court may exercise its traditional power to  
24 regulate the admission of evidence at trial to ensure that time is  
25 not wasted on the presentation of irrelevant evidence or  
26 previously rejected arguments concerning women’s sports and less  
27 prominent men’s sports. Accordingly, it is not necessary to  
28 exclude any evidence or arguments on this subject at the present  
stage nor to require an offer of proof on the NCAA’s argument that

1 the integration of academics and athletics is a legitimate  
2 procompetitive justification.

3 L. No. 12: Motion to Preclude Evidence and Argument  
4 Regarding Single Enterprise Defense

5 This motion is DENIED as moot. The NCAA has represented  
6 that it will withdraw its single-enterprise defense and "will not  
7 introduce evidence that it is a single enterprise" at trial. NCAA  
8 Opp. MILs at 21. These representations shall not preclude the  
9 NCAA from presenting evidence or arguing that it operates as a  
10 joint venture.

11 M. No. 13: Motion to Preclude Evidence and Argument  
12 Regarding Affirmative Defense of Consent

13 This motion is DENIED. As explained at the pretrial  
14 conference, motions in limine are not a proper vehicle for  
15 resolving dispositive issues of law.

16 II. NCAA's Motions in Limine

17 A. No. 1: Motion to Exclude Evidence and Argument About  
18 Injuries in College Sports

19 This motion is DENIED. Plaintiffs may present evidence of  
20 injuries suffered by student-athletes to the extent that it is  
21 relevant to their claims in this case. Once again, this evidence  
22 carries a minimal risk of prejudice because this case will be  
23 tried to a judge instead of a jury.

24 B. No. 2: Motion to Exclude Evidence and Arguments about  
25 Licensing Unrelated to Live Broadcasts, Rebroadcasts or  
26 Clips, or Videogames

27 This motion is DENIED. Plaintiffs may present evidence or  
28 arguments concerning licensing unrelated to live broadcasts,  
archival footage, and videogames to the extent that they are  
relevant to their claims in this case.

1 C. No. 3: Motion to Exclude References to the NLRB Decision  
Regarding College Athlete Unionization

2 This is GRANTED. As noted above, Plaintiffs may not  
3 introduce as evidence any of the factual findings or legal  
4 conclusions contained in the NLRB Chicago Regional Director's  
5 decision in Northwestern University, No. 13-RC-121359, 2014 WL  
6 1246914. Plaintiffs may, however, cite this decision, to the  
7 extent that it is relevant, as non-binding legal authority in  
8 their trial brief.

9 D. No. 4: Motion to Exclude Reports of Third-Party  
10 Observers and Media About Collegiate Athletics

11 This motion is GRANTED in part and DENIED in part.  
12 Plaintiffs may not introduce any media reports or reports produced  
13 by third-party groups, such as the Knight Commission,<sup>3</sup> for the  
14 truth of the matter asserted in those reports. Plaintiffs'  
15 experts, however, may refer to certain facts or data contained in  
16 these reports to explain how they formed their opinions. Federal  
17 Rule of Evidence 703 permits an expert witness to rely on  
18 inadmissible facts or data if "experts in the particular field  
19 would reasonably rely on those kinds of facts or data in forming  
20 an opinion on the subject." Here, experts for both parties relied  
21 on facts and data contained in media reports and the Knight  
22 Commission report; accordingly, these experts may refer to  
23 relevant portions of those reports to explain how they formed  
24 their opinions.

25 As noted at the pretrial conference, Plaintiffs may also  
26 introduce statements from the Knight Commission report for

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27 <sup>3</sup> The NCAA also moved to preclude Plaintiffs from introducing any  
28 reports produced by the Drake Group but Plaintiffs, in their opposition,  
indicated that they do not intend to introduce any such reports.

1 impeachment purposes. Those statements, however, may not be  
2 introduced for the truth of the matter asserted therein unless  
3 Plaintiffs can show that they were made "under penalty of  
4 perjury." See Fed. R. Evid. 801(d)(1)(A) (providing that a  
5 declarant's prior statement does not constitute hearsay if it "is  
6 inconsistent with the declarant's testimony and was given under  
7 penalty of perjury at a trial, hearing, or other proceeding or in  
8 a deposition"). The Federal Rules of Evidence make clear that,  
9 while a witness's prior inconsistent statements may always be used  
10 for impeachment purposes, they may only be introduced as  
11 substantive evidence if they were made under oath. See Pope v.  
12 Savings Bank of Puget Sound, 850 F.2d 1345, 1356 (9th Cir. 1988)  
13 (noting that "prior inconsistent statements given in a prior  
14 proceeding under oath may come in as substantive evidence" under  
15 Rule 801(d)(1)(A) (emphasis added)).

16 E. No. 5: Motion to Bar Admission of Walter Byers' Book,  
17 Unsportsmanlike Conduct

18 This motion is GRANTED. Mr. Byers' book constitutes  
19 inadmissible hearsay and, as such, may not be introduced for the  
20 truth of the matter asserted therein. As noted above, however,  
21 under Federal Rule of Evidence 703, Plaintiffs' experts may refer  
22 to any facts or data contained in the book to the extent that they  
23 actually relied on those facts or data in forming their opinions  
24 and experts in their field would have reasonably relied on the  
25 same facts and data.

26 F. No. 6: Motion to Preclude Expert Testimony by Taylor  
27 Branch and Ellen Staurowsky

28 The NCAA moves to preclude two of Plaintiffs' experts, Taylor  
Branch and Ellen Staurowsky, from testifying. First, it moves to



1 preclude Mr. Branch from offering expert opinion testimony under  
2 Federal Rule of Evidence 702 on whether or not amateurism is a  
3 legitimate procompetitive justification for the challenged  
4 restraint. Second, it moves to preclude Dr. Staurowsky from  
5 testifying because it contends that she is merely a conduit for  
6 the admission of hearsay evidence.

7 This motion is GRANTED in part and DENIED in part. Mr.  
8 Branch is precluded from testifying as an expert under Rule 702  
9 because his testimony will not "help the trier of fact to  
10 understand the evidence or to determine a fact in issue." Fed. R.  
11 Evid. 702. Although Mr. Branch is a renowned writer and  
12 historian, his expert report consists mostly of historical facts,  
13 etymological information, and quotations from secondary sources,  
14 none of which appears to be in dispute. The report also contains  
15 information that appears in the reports of Plaintiffs' other  
16 experts. Thus, because Mr. Branch's report will not aid the Court  
17 in understanding any of the evidence or determining any facts in  
18 issue, his testimony cannot satisfy the requirements of Rule 702.  
19 As discussed at the pretrial conference, Plaintiffs may propose a  
20 narrative of historical facts and etymological information to be  
21 included in the parties' statement of undisputed facts. If the  
22 NCAA objects to the inclusion of any of these facts without a  
23 principled basis, the Court will reconsider allowing Mr. Branch to  
24 testify.

25 Unlike with Mr. Branch, the NCAA does not challenge Dr.  
26 Staurowsky's qualifications under Rule 702. Dr. Staurowsky may  
27 therefore testify on any of the subjects discussed in her expert  
28 report. As explained above, she may refer to facts or data

1 contained in media reports or reports produced by third parties  
2 provided that she actually relied on those facts and data to form  
3 her opinion and experts in her field would also reasonably rely on  
4 the same facts and data. See Fed. R. Evid. 703.

5 G. No. 7: Motion to Bar Admission of Walter Byers'  
6 Deposition Testimony from the White v. NCAA Case

7 This motion is GRANTED in part and DENIED in part.

8 Plaintiffs may present portions of Mr. Byers' White deposition  
9 testimony that concern subjects on which the NCAA had a "similar  
10 motive" to cross-examine him as it would have had in the present  
11 case. Fed. R. Evid. 804(b)(1)(B).<sup>4</sup> Plaintiffs may not, however,  
12 introduce any portions of Mr. Byers' deposition testimony  
13 concerning any other subject nor may they use Mr. Byers'  
14 deposition testimony as a conduit for the admission of any  
15 evidence that would otherwise be inadmissible, such as Mr. Byers'  
16 book.

17 H. No. 8: Motion to Bar References to Wealth or Income of  
18 any Defense Witness or NCAA or University Employee

19 This motion is DENIED. Evidence of income or wealth derived  
20 from revenue generated by college athletics is potentially  
21 relevant and carries a minimal risk of prejudice because this case  
22 will proceed as a bench trial.

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23 <sup>4</sup> The NCAA notes that the magistrate judge in this case previously  
24 ruled that Plaintiffs could not rely on Mr. Byers' deposition testimony  
25 from White under Federal Rule of Civil Procedure 32(a)(8) because White  
26 involved different subject matter from the present case. See Fed. R.  
27 Civ. P. 32(a)(8) ("A deposition lawfully taken and, if required, filed  
28 in any federal- or state-court action may be used in a later action  
involving the same subject matter between the same parties"). Even if  
the magistrate judge's decision were binding on this Court, however, it  
would be inapposite here because it was decided under a different legal  
standard before Plaintiffs had fully developed their theory of the  
present case.

1 I. No. 9: Motion to Exclude the Admission of Student-  
2 Athlete Eligibility Forms Authored by Schools or  
3 Conferences

4 This motion is DENIED. Plaintiffs may introduce student-  
5 athlete eligibility forms produced by NCAA Division I schools or  
6 conferences; however, Plaintiffs must present some evidence of a  
7 nexus between these forms and the NCAA.

8 J. No. 10: Motion to Exclude Evidence Concerning  
9 Adjudicated or Alleged Criminal Conduct Unrelated to the  
10 Rules at Issue Here

11 This is GRANTED. Plaintiffs failed to provide a substantive  
12 opposition to this motion and have not identified any instances of  
13 alleged or adjudicated criminal conduct relevant to this case.

14 K. No. 11: Motion to Exclude References to Whether the NCAA  
15 Called any Current or Former Student-Athletes

16 This motion is DENIED as moot. Plaintiffs represented that  
17 the parties have reached an agreement to resolve this motion.

18 L. No. 12: Motion to Preclude Evidence or Argument About  
19 Supposedly Less Restrictive Alternatives That Dr. Roger  
20 Noll Has Not Analyzed

21 This motion is DENIED. Plaintiffs represented at the hearing  
22 that they will not proffer any less restrictive alternatives at  
23 trial that their experts did not discuss in their reports. To the  
24 extent that Plaintiffs' experts intend to rely on any "new facts"  
25 to support their proffered less restrictive alternatives, as  
26 Plaintiffs indicated at the pretrial conference, they must  
27 disclose those facts to the NCAA by 5:00 p.m. on May 30, 2014.

28 M. No. 13: Motion to Exclude Testimony of Mary Willingham  
if the Court Excludes the Testimony of NCAA Witnesses  
not Listed by Name in Rule 26 Disclosures

This motion is DENIED as moot in light of Plaintiffs'  
representation at the hearing that they do not intend to call  
Willingham as a witness.

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CONCLUSION

The parties' motions in limine (Docket Nos. 1063, 1069) are resolved as set forth above.

Before 5:00 p.m. on May 30, 2014, Plaintiffs shall disclose to the NCAA any new facts on which their experts intend to rely to support their proffered less restrictive alternatives. The NCAA shall file a list of every witness it intends to call at trial by 11:00 a.m. on June 4, 2014. Plaintiffs shall file proposed language for the injunction that they are seeking by 4:00 p.m. on June 6, 2014. The parties shall work in good faith to produce a joint statement of undisputed facts -- including any narrative of historical facts -- which they shall submit to the Court no later than June 6, 2014.

The deadline for the NCAA to submit its trial brief is hereby continued to June 5, 2014. The brief shall not exceed twenty-five pages in length.

A bench trial of no more than fifteen days shall commence at 8:30 a.m. on June 9, 2014.

IT IS SO ORDERED.

Dated: 5/30/2014

  
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CLAUDIA WILKEN  
United States District Judge