

1 GLENN D. POMERANTZ (State Bar No. 112503)
 glenn.pomerantz@mto.com
 2 KELLY M. KLAUS (State Bar No. 161091)
 kelly.klaus@mto.com
 3 ROHIT K. SINGLA (State Bar No. 213057)
 rohit.singla@mto.com
 4 CAROLYN H. LUEDTKE (State Bar No. 207976)
 carolyn.luedtke@mto.com
 5 MUNGER, TOLLES & OLSON LLP
 560 Mission Street
 6 Twenty-Seventh Floor
 San Francisco, California 94105-2907
 7 Telephone: (415) 512-4000
 Facsimile: (415) 512-4077

8 Attorneys for Defendant
 9 National Collegiate Athletic Association

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

EDWARD O'BANNON, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 4:09-CV-3329-CW

**NCAA'S OPPOSITION TO PLAINTIFFS'
 MOTION TO STRIKE THE
 DECLARATION OF DANIEL L.
 RUBINFELD**

Judge: Hon. Claudia Wilken, Chief Judge

1 The NCAA respectfully opposes Plaintiffs’ motion to strike the Declaration of Daniel L.
2 Rubinfeld, dated June 3, 2014 (the “Rubinfeld Declaration”), Dkt. No. 179.

3 **I. INTRODUCTION**

4 The 5-page Rubinfeld Declaration (attached as Exhibit A) does not offer any new opinions
5 regarding competitive balance. Dr. Rubinfeld’s opinions are laid out in detail in his prior report.
6 The Rubinfeld Declaration presents further support for these existing opinions in the form of the
7 kind of statistical analysis that the Court stated in its summary judgment order would be useful.

8 Plaintiffs cannot claim any harm or prejudice from the Rubinfeld Declaration. The NCAA
9 has already offered to make Dr. Rubinfeld available for a deposition this week on competitive
10 balance. Plaintiffs declined and filed this motion instead. But almost three weeks remain before
11 Dr. Rubinfeld is expected to testify. If a deposition is necessary, the time can be found. Notably,
12 Plaintiffs declined last Winter to depose Dr. Rubinfeld — or any of the NCAA’s other economic
13 experts — regarding their rebuttal reports. Dr. Rubinfeld’s rebuttal included extensive testimony
14 regarding competitive balance. So Plaintiffs cannot claim that they have been deprived of the
15 opportunity to depose Dr. Rubinfeld on his opinions.

16 Nor can they claim surprise. Plaintiffs’ trial brief acknowledged that the NCAA would
17 submit further analysis on competitive balance in response to the Court’s summary judgment
18 ruling and explained that Plaintiffs are prepared to respond: “If the NCAA does come forward,
19 finally, with some competent evidence, the APs intend to respond by presenting statistical
20 evidence through Drs. Noll and Rascher.” Dkt. No. 172 at 16. Indeed, the economic consultant
21 who appears to have conducted much of the work supporting Dr. Noll’s opinions has written
22 extensively on the analysis he has been doing on competitive balance.¹

23 Nor can Plaintiffs complain that they have been deprived of a chance to file a *Daubert*
24 motion. Plaintiffs do not explain how they would have argued that *adding* additional support
25

26 _____
27 ¹ See Andy Schwarz, “The Competitive-Balance Argument Against Paying Athletes is Bullshit:
28 Death to the NCAA” (May 15, 2014), <http://regressing.deadspin.com/the-competitive-balance-argument-against-paying-athlete-1576638830>.

1 undermined the reliability Dr. Rubinfeld’s opinions regarding competitive balance when Plaintiffs
2 did not challenge the reliability of those opinions without this additional support.

3 There is also the question of fundamental fairness. Plaintiffs submitted a supplemental
4 report from Dr. Noll just 10 days before he is scheduled to testify. By contrast, Dr. Rubinfeld’s
5 Declaration was disclosed more than *three weeks* before his expected testimony. The NCAA
6 immediately offered a deposition; Plaintiffs have refused to provide one for Dr. Noll. Dr.
7 Rubinfeld’s report, as noted, merely provides additional statistical support for *existing opinions*.
8 Dr. Noll’s supplemental report provides an entirely new opinion based on NCAA governance
9 proposals that have been discussed in the popular press for years. In these circumstances, it would
10 be fundamentally unfair to preclude the new factual support for existing opinions proffered by Dr.
11 Rubinfeld.

12 There is no unfairness here. The NCAA has given Plaintiffs notice and offered a
13 deposition, which is more than Plaintiffs have done with their own supplemental expert report.
14 Competitive balance is one of the NCAA’s more important remaining procompetitive
15 justifications. It is a factor widely recognized by the courts as important in sports cases. The
16 NCAA should have an opportunity to present the Court with a full evidentiary record on this issue,
17 so that the case is decided on the facts. Plaintiffs’ motion should be denied.

18 **II. THERE IS NO HARM TO PLAINTIFFS AND PLAINTIFFS CANNOT CLAIM**
19 **ANY UNFAIRNESS FROM THE RUBINFELD DECLARATION**

20 As Plaintiffs recognize, a party that provides expert disclosures after the deadlines set forth
21 in the Court’s scheduling order is permitted to do so if “substantially justified or is harmless.”
22 Fed. R. Civ. P. 37(c)(1). This standard is met here because Plaintiffs cannot claim any harm from
23 the Rubinfeld Declaration. Nor can Plaintiffs claim any unfairness given their own conduct with
24 respect to Dr. Noll’s supplemental expert report.

25 **A. There is No Harm to Plaintiffs**

26 As this Court has noted, “[n]umerous courts, including the Supreme Court, have
27 recognized that promoting competitive balance among sports teams serves a ‘legitimate’
28 procompetitive purpose and may justify the imposition by sports leagues of certain restraints on

1 competition.” Dkt. No. 1025 at 33 (citing *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010)).
2 Dr. Rubinfeld thus provided an extensive discussion of competitive balance in his opening and
3 rebuttal expert reports. *Keller v. NCAA*, 09-CV-1967 (N.D. Cal.), Dkt. No. 925-8 at ¶¶ 83-102;
4 *id.*, Dkt. No. 925-15 at ¶¶ 218-259; *id.*, Dkt. No. 925-6 at ¶¶ 20-38. The NCAA made Dr.
5 Rubinfeld available for depositions regarding both reports, but Plaintiffs chose not to depose Dr.
6 Rubinfeld regarding his rebuttal report, or any of the NCAA’s economic experts regarding theirs.

7 Nor can Plaintiffs claim that they have lost the opportunity to preclude Dr. Rubinfeld
8 pursuant to a *Daubert* motion. Since Plaintiffs never filed any such motion regarding Dr.
9 Rubinfeld’s opinions with the foundation presented in his prior reports, they cannot claim that they
10 would have filed—or succeeded—in such a motion if Dr. Rubinfeld had provided additional
11 support. In an event, Plaintiffs cannot seriously contend that Dr. Rubinfeld’s statistical analysis is
12 unreliable when Andy Schwarz—a partner of Dr. Rascher’s at the consulting firm OSKR who has
13 assisted both him and Dr. Noll in this litigation—recently conducted an analysis using the very
14 same metric (the Spearman Rank Correlation Coefficient) used by Dr. Rubinfeld. *See supra* n.1.

15 In its summary judgment order, this Court denied Plaintiffs’ motion for summary judgment
16 on this procompetitive justification. Dkt. No. 1025 at 24. However, the Court specifically noted
17 that it would find statistical analyses of competitive balance useful. *See id.* at 34 n.14. The
18 Rubinfeld Declaration provides precisely the kind of analysis the Court identified, based on some
19 of the research literature cited by the Court.

20 Indeed, Plaintiffs anticipated in their trial brief that the NCAA would provide this very
21 analysis and explained that they have responses ready: “If the NCAA does come forward, finally,
22 with some competent evidence, the APs intend to respond by presenting statistical evidence
23 through Drs. Noll and Rascher.” Dkt. No. 172 at 16. Having planned to offer analysis of their
24 own *without disclosing it* to the NCAA, Plaintiffs cannot claim to be outraged that the NCAA has
25 given them several weeks’ notice and made Dr. Rubinfeld available for deposition.

26 **B. Plaintiffs Cannot Claim Unfairness Given the Noll Supplement**

27 Plaintiffs cannot complain about any unfairness when they have refused a deposition of Dr.
28 Noll regarding the Noll Supplement—even though it violates the Court’s recent order.

1 The NCAA moved *in limine* to preclude Plaintiffs from relying on less restrictive
2 alternatives that had not been disclosed by their experts. As the Court’s Order explains, “Plaintiffs
3 represented at the hearing that they will not proffer any less restrictive alternatives at trial that their
4 experts did not discuss in their reports. To the extent that Plaintiffs’ experts intend to rely on any
5 ‘new facts’ to support their proffered less restrictive alternatives, as Plaintiffs indicated at the
6 pretrial conference, they must disclose those facts to the NCAA by 5:00 p.m. on May 30, 2014.”
7 Dkt. No. 166 at 11.² The Court’s order permitted Plaintiffs to offer only “new facts” to support an
8 alternative that their experts had *already* “proffered.” *Id.* As Plaintiffs’ counsel told the Court,
9 “We don’t have any new theories, but there are new facts.” Hr’g Tr., May 28, 2014 at 69:16-17.

10 In the Noll Supplement, however, Dr. Noll offers “new theories” that are not based on any
11 “new facts.” Chiefly, he purports to find an alternative in certain “governance reforms” that
12 would allow five conferences—the ACC, Big Ten, Big 12, Pac-12 and SEC—to adopt rules
13 permitting additional support for student-athletes’ (“SAs”) educational expenses. Setting aside
14 that none of these proposals has anything to do with SAs’ names, images or likenesses (“NIL”),
15 Dr. Noll did not discuss this new purported alternative in any of his four prior expert reports.

16 However, these reform proposals were well documented in public sources years before Dr.
17 Noll submitted those reports. For example, Dr. Noll cites a proposal to “[r]aise the cap of athletic
18 scholarships to full cost of attendance.” For several years prior to Dr. Noll’s previous merits
19 reports in this litigation on September 25 and November 5, 2013, major news outlets reported that
20 the NCAA’s members were debating various forms of this proposal on the cost of attendance:

- 21 • On November 3, 2011, the Associated Press reported that the Division I Board of
22 Directors had recently approved a proposal to provide this assistance.³
- 23 • On December 16, 2011, ESPN reported that the Division I Board of Directors
24 delayed implementation of the proposal because the proposal had not been affirmed
25 by the Division I membership.⁴

26 ² Counsel for the NCAA told the Court: “Our concern is with new theories of less restrictive
alternatives that have not been raised before.” Hr’g Tr., May 28, 2014, at 69:10-12.

27 ³ [http://www.ncaa.com/news/ncaa/article/2011-11-03/stipend-not-%E2%80%98pay-
28 play%E2%80%99-move.](http://www.ncaa.com/news/ncaa/article/2011-11-03/stipend-not-%E2%80%98pay-play%E2%80%99-move)

- On December 6, 2012, the Associated Press reported that NCAA officials expected renewed debate on the proposal in 2013.⁵
- On January 1, 2013, CBS Sports reported that the NCAA planned to submit a proposal regarding this kind of support to the Division I Board of Directors.⁶
- On April 10, 2013, CBS Sports reported on the NCAA Division I membership's continuing debate regarding the proposal.⁷

Dr. Noll also points to proposals to provide these conferences with some autonomy regarding various forms of support for SAs' educational expenses and other costs such as expanded insurance policies. Discussions regarding these "autonomy" proposals were also widely reported on prior to when Dr. Noll submitted his previous reports.⁸ Indeed, last July, the NCAA announced a 2014 convention to discuss the proposals that Dr. Noll relies upon.⁹

Dr. Noll submitted his new opinions on new less restrictive alternatives on May 30, 2014, just ten days before his testimony at trial. Yet Plaintiffs have refused to make Dr. Noll available for a deposition regarding these opinions. In those circumstances, Plaintiffs should not be heard to complain about having several weeks to prepare to respond to the Rubinfeld Declaration that simply provides further statistical support for opinions that Dr. Rubinfeld has already offered.

III. CONCLUSION

Plaintiffs' motion to strike the Rubinfeld Report should be denied.

⁴ http://espn.go.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold.

⁵ <http://www.ncaa.com/news/ncaa/article/2012-12-05/ncaa-president-emmert-fights-student-athletes-right-more-funds>.

⁶ <http://www.cbssports.com/collegefootball/writer/jeremy-fowler/21483211/ncaa-president-mark-emmert-hopes-to-unveil-new-stipend-plan-in-april>;

⁷ <http://www.cbssports.com/collegefootball/eye-on-college-football/22045180/ncaa-official-continuing-opposition-to-2000-stipend>.

⁸ <http://sportsillustrated.cnn.com/college-football/news/20130725/college-sports-braces-for-more-change/>; <http://www.usatoday.com/story/sports/ncaaf/2013/07/22/conference-commissioners-super-division/2576521/>; <http://www.cbssports.com/collegefootball/writer/dennis-dodd/23874003/faculty-athletics-representatives-formally-proposes-division-4-for-ncaa>; <http://www.insidehighered.com/news/2013/08/09/ncaa-restructuring-imminent-pac-12s-larry-scott-muses-why-and-how-it-might-happen#sthash.8tWxLqdy.dpbs>.

⁹ <http://www.usatoday.com/story/sports/college/2013/07/25/ncaa-president-mark-emmert-major-change-on-the-way/2588099/>.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: June 6, 2014

MUNGER, TOLLES & OLSON LLP

By: /s/ Glenn D. Pomerantz
GLENN D. POMERANTZ

Attorneys for Defendant
National Collegiate Athletic Association

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 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/ Glenn D. Pomerantz

MUNGER, TOLLES & OLSON LLP
Attorneys for NCAA