

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

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

13 *Plaintiffs' Class Counsel*

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

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

20 Plaintiffs,

21 v.

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

24 Defendants.
25
26
27
28

Case No. 4:09-cv-3329 CW

**PLAINTIFFS' BENCH MEMORANDUM
REGARDING EXPERT WITNESS
REBUTTAL TESTIMONY**

Judge: The Honorable Claudia Wilken
Courtroom: 2, 4th Floor
Trial: June 9, 2014

1 The Antitrust Plaintiffs (“APs”) hereby submit this bench memorandum concerning
2 certain objections that the National Collegiate Athletic Association (“NCAA”) has lodged against
3 demonstrative aids that APs intend to present during the testimony of Dr. Daniel Rascher on
4 Thursday or Friday of this week.

5 I. FACTUAL BACKGROUND

6 As APs set forth in their motion to strike Dr. Daniel L. Rubinfeld’s supplemental
7 declaration (“Declaration”), Case No. 09-cv-3329, Dkt. No. 179 (hereinafter “Dkt. No. ___”), the
8 NCAA served Dr. Rubinfeld’s Declaration on June 3, 2014. This Declaration contained entirely
9 new statistical work and was served three business days before trial and six weeks after the Court
10 expressed a desire for statistical support for Dr. Rubinfeld’s opinions regarding competitive
11 balance. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, C 09-1967 CW,
12 2014 WL 1410451, at *14 (N.D. Cal. Apr. 11, 2014).

13 The Court denied APs’ motion to strike on June 6, 2014. Dkt. No. 191. The next day,
14 APs served on the NCAA and the Court the summary exhibits and demonstrative aids that APs
15 intend to use with Dr. Rascher. *See* Ex. A to Decl. of Martha Goodman (June 7 email) (hereafter
16 “Ex. ___”). Included in this set were thirteen demonstrative aids responsive to Dr. Rubinfeld’s
17 new analyses. Of these thirteen slides, six were replicas of exhibits in Dr. Rubinfeld’s
18 Declaration, and seven were responsive to Dr. Rubinfeld’s exhibits.

19 On Sunday, June 8, APs served on the NCAA the backup to the thirteen demonstratives to
20 be used with Dr. Rascher, as well as one additional slide in response to the Declaration (and its
21 accompanying backup). *See* Ex. B (June 8 emails). Those responsive demonstratives are
22 attached hereto as Ex. C.

23 Although the NCAA initially expressed a concern about Dr. Rascher’s demonstratives, the
24 NCAA waited until tonight at 7:00 p.m.—*after Dr. Rascher had begun his testimony*—to object
25 to the use thereof on the grounds that the NCAA has been denied a report or deposition.

26 II. MEMORANDUM OF POINTS AND AUTHORITIES

27 Dr. Rascher’s testimony and use of these demonstratives is proper rebuttal evidence to
28 that which the NCAA intends to present during Dr. Rubinfeld’s testimony. Therefore, the NCAA

1 has no valid objection to the use of these demonstratives. The Court made clear during the May
2 28 pretrial conference that it would not entertain any rebuttal testimony that could have been
3 presented during that witness's direct testimony. The Court stated, "Rebuttal is only true rebuttal,
4 things that you did not anticipate that they were going to say. So if you know what they are going
5 to say, you need to anticipate it in your case, not hold somebody back for rebuttal." May 28,
6 2014 Transcript ("Tr.") 25:15-18. Here, APs can anticipate what Dr. Rubinfeld will testify to
7 regarding competitive balance in light of the Declaration and wish to rebut that testimony with
8 Dr. Rascher's testimony now—rather than in two weeks' time. In order to mitigate the need to
9 recall Dr. Rascher in APs' rebuttal case, consistent with the Court's guidance during the pretrial
10 conference, APs should be allowed to use the demonstratives in response to the Declaration
11 during their direct examination of Dr. Rascher.

12 Moreover, APs made clear to the NCAA that they intended to rebut the Declaration
13 through Dr. Rascher's testimony by disclosing the summary exhibits and demonstrative aids well
14 in advance of his taking the stand. No additional report or discovery is required where the
15 expert's "supplemental opinions were made known to the Defendant" in advance of such
16 testimony at trial. *Hess v. Ameristep*, 06-3267, 2008 WL 4936726, at * 3 (C.D. Ill. Nov. 17,
17 2008).

18 Finally, in light of the Court's denial of APs' motion to strike the Declaration, APs should
19 be permitted to respond to the Declaration without any additional discovery. In *Mead Johnson &*
20 *Co. v. Barr Labs., Inc.*, 38 F. Supp. 2d 289, 297 (S.D.N.Y. 1999), the court denied a motion to
21 strike expert testimony that was "in rebuttal to the assertions of plaintiff's counsel, which [the
22 defendant] did not anticipate at the time of its expert's report and deposition." Because the Court
23 is allowing Dr. Rubinfeld to testify to the matters set forth in the Declaration, *Mead Johnson*
24 counsels that APs be allowed the opportunity to rebut the Declaration.

25 For these reasons, APs respectfully request that the Court overrule any objection the
26 NCAA lodges to the demonstrative aids set forth in Ex. C.

1 Dated: June 11, 2014

Respectfully submitted,

2 By: /s/ Sathya Gosselin

3 Michael D. Hausfeld (*pro hac vice*)
4 Hilary K. Scherrer (Cal. Bar No. 209451)
5 Sathya S. Gosselin (Cal. Bar. No. 269171)
6 Swathi Bojedla (*pro hac vice*)
7 HAUSFELD LLP
8 1700 K Street, NW, Suite 650
9 Washington, DC 20006
10 Telephone: (202) 540-7200
11 Facsimile: (202) 540-7201
12 E-mail: mhausfeld@hausfeldllp.com
13 hscherrer@hausfeldllp.com
14 sgosselin@hausfeldllp.com
15 sbojedla@hausfeldllp.com

16 Michael P. Lehmann (Cal. Bar No. 77152)
17 Arthur N. Bailey, Jr. (Cal. Bar No. 248460)
18 HAUSFELD LLP
19 44 Montgomery St., 34th Floor
20 San Francisco, CA 94104
21 Telephone: (415) 633-1908
22 Facsimile: (415) 358-4980
23 E-mail: mlehmann@hausfeldllp.com
24 abailey@hausfeldllp.com

25 *Plaintiffs' Class Counsel*

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 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' Class Counsel
HAUSFELD LLP
1700 K St. NW, Suite 650
Washington, DC 20006