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13 *Plaintiffs' Class Counsel*

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

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

Case No. 4:09-cv-3329 CW

**PLAINTIFFS' REPLY TO DEFENDANT
 NCAA'S OPPOSITION TO THE
 ADMISSION OF SUMMARY EXHIBITS
 PREPARED BY DR. RASCHER**

Judge: The Honorable Claudia Wilken
 Courtroom: 2, 4th Floor
 Trial: June 9-27, 2014

1 The NCAA's objections to the admission of summary exhibits PX 2537-2543,
2 provisionally admitted through Plaintiffs' expert, Daniel Rascher ("Dr. Rascher"), are unfounded
3 and untimely.

4 First, Plaintiffs have not offered these exhibits as a basis for expert opinion, and no expert
5 testimony is required to explain them. *See* Pls.' June 29, 2014 Mot. to Admit Exhibits (Dkt. No.
6 256) at 2 and cases cited therein. As Plaintiffs' counsel represented at trial, "We can have [Dr.
7 Rascher] explain what the data is but not offer any opinions upon it." Tr. 825:2-3. This is
8 precisely the purpose for Dr. Rascher's declaration. In it, Dr. Rascher explained what data each
9 exhibit summarized. Rascher June 15, 2014 Decl. ¶¶ 9-13 (Dkt. No. 214). He offered no opinion
10 about the data. *Id.* Moreover, contrary to the NCAA's contentions, no testimony—expert or
11 otherwise—beyond that which Dr. Rascher set forth in his declaration is required to explain the
12 exhibits. The exhibits present simple summaries of revenues and expenses over time for FBS
13 football and Division I men's basketball programs. *See id.* They do not present, and are not
14 offered to support, opinions. In fact, upon the Court's suggestion that Dr. Rascher's declaration
15 could offer an opinion, counsel for Plaintiffs responded, "They're objecting to the opinion, and so
16 I'm not trying to get into that fight." Tr. 825:6-7. Plaintiffs offered these exhibits as quintessential
17 summary exhibits admissible under FRE 1006.

18 Second, the exhibits are proper FRE 1006 exhibits because, contrary to the NCAA's
19 claims, the data underlying them are admissible. *Amarel v. Connell*, 102 F.3d 1494, 1516 (9th
20 Cir. 1996) (requiring underlying information to be admissible for the admission of a summary
21 exhibit).

22 Moreover, the NCAA waived any objection to the admissibility of the data by failing to
23 object to their inclusion on the Plaintiffs' pre-trial exhibit list. NCAA's Objections to Plaintiffs'
24 Exhibit List, Case No. 09-cv-1967 (Dkt. No. 1070-5) at 138. The NCAA compounded its waiver
25 when, after the Court provisionally admitted the exhibits on June 13, 2014, Tr. 828:12, it lodged
26 no objection to the Plaintiffs' use of two of the exhibits, PX 2542 and 2543, during the
27 examination of Britton Banowsky. Tr. 2341:21-22, 2344: 8-9. The NCAA, in other words, waited
28 to file its objections until seven weeks after the due date for objections to the Plaintiffs' exhibit

1 list, two weeks after the Court’s provisional ruling, and nine days after two of the exhibits were
2 used with an NCAA witness. Because of these multiple waivers, the NCAA’s objections should
3 be overruled.

4 Even absent the NCAA’s waivers, the underlying data are admissible as public records
5 under FRE 803(8). The data are “a record or statement of a public office” that set out “a matter
6 observed while under a legal duty to report,” FRE 803(8)(A), and “neither the source of the
7 information nor other circumstances indicate a lack of trustworthiness.” FRE 803(8)(B). As Dr.
8 Rascher explained, the Equity in Athletics Disclosure Act (“EADA”) requires the Department of
9 Education (“DOE”) to publish data on sport-by-sport revenues and expenditures for all U.S.
10 colleges and universities that operate athletic programs. Rascher June 15, 2014 Decl. ¶ 3 (Dkt.
11 No. 214). The statute provides that the Secretary of the Department of Education “shall compile
12 and publish a report containing the information required under paragraph (1) broken down by—
13 (A) individual institutions of higher education; and (B) athletic conferences recognized by the
14 National Collegiate Athletic Association and the National Association of Intercollegiate
15 Athletics.” 20 U.S.C. § 1092(e)(5) (emphasis added).¹ Thus, college and university athletic
16 departments are under a legal duty to report their financial data to the DOE, and the DOE in turn
17 is under a legal duty to make that data public. The DOE fulfills this duty by publishing the data
18 on its website at <http://ope.ed.gov/athletics/>. This website is the source of the information
19 contained in the challenged exhibits, PX 2537-2543.

20 The exhibits are thus proper summary exhibits under FRE 1006. They are based on
21 admissible evidence and summarize “voluminous writings . . . that cannot be conveniently
22 examined in court.” FRE 1006. Further, the Plaintiffs have made available the underlying EADA
23 data, as Dr. Rascher included it in his backup to his various expert reports, June 15, 2014 Decl. ¶
24 2 (Dkt. No. 214), and Plaintiffs included it on their exhibit list and identified the DOE website
25 from which it was retrieved. *See Choike v. Slippery Rock Univ. of Pennsylvania of State Sys. of*

26 ¹ Paragraph (1), as referenced in the statute, requires the various colleges and universities offering
27 athletics programs to report certain data. *Id.* § 1092(e)(1) (“Each institution of higher education
28 which participates in any program . . . and is attended by students receiving athletically related
student aid shall annually submit a report to the Secretary . . .”).

1 *Higher Educ.*, CIV A. 06-622, 2006 WL 2060576, at *3 (W.D. Pa. July 21, 2006) (admitting
2 summary exhibit of EADA data).

3 For each of the foregoing reasons, the Court should overrule NCAA's objections to
4 exhibits PX 2537-2543.

5 Dated: July 2, 2014

Respectfully submitted,

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7 By: /s/ Swathi Bojedla

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 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.

/s/ Swathi Bojedla
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