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Plaintiffs' Class Counsel

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 (NMC)

PLAINTIFFS' OPPOSITION TO DEFENDANT NCAA'S MOTION FOR LIMITED DISCOVERY ON PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

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

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I. Introduction

The NCAA seeks discovery relating to Plaintiffs' motion for attorney fees in the form of (a) the deposition of Jon King, a former partner at Hausfeld LLP who ceased working on this matter in 2012, and (b) production of time entries excluded from Plaintiffs' fee request. Although it has styled its motion as a request for "limited discovery" (Dkt. No. 328, hereinafter "NCAA Mot."), the NCAA's latest salvo is actually an attempt to obtain sweeping *additional* discovery that is totally unnecessary in light of Plaintiffs' production of "voluminous" and detailed billing records, *id*. at 4—which Plaintiffs voluntarily produced to the NCAA in order to prevent precisely this type of dispute.

Remarkably, the NCAA ignores an extensive body of case law that prohibits attorney depositions regarding fees, disfavors post-trial discovery concerning fees, and permits fee-related discovery only where the prevailing party's supporting documentation is found to be wanting.[1] The NCAA has not even attempted to argue that Plaintiffs' documentation is somehow inadequate,[2] nor can it do so credibly: Plaintiffs' time details are exhaustive (and far superior to any piecemeal discovery). Given (1) the NCAA's request for far more time to evaluate the information *it already has* (Dkt. No. 326); (2) the Court's ability to evaluate the reasonableness of Plaintiffs' efforts in prevailing at trial and securing a permanent injunction with the exhaustive time detail already provided (and informed by the Court's familiarity with this litigation); and (3) the considerable burden to Plaintiffs posed by the NCAA's proposals, the Court should deny in full the NCAA's motion for additional discovery.

II. Legal Standard

The Supreme Court has admonished litigants and courts that fee proceedings should not "result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)

[1] The NCAA has not identified a single case granting the relief it now seeks.

[2] Indeed, the NCAA argues elsewhere (Dkt. No. 326) that it needs three and a half months to assimilate the information it has already received, which is fundamentally at odds with its request here for *more* information. The Court has granted that extension, Dkt. No. 336, but that extra time should not be directed to another purpose.

("*Hensley*"); *see City of Burlington v. Dague*, 505 U.S. 557, 566 (1992) ("*Dague*") (courts have an interest "in avoiding burdensome satellite litigation" relating to fee petitions). And the Ninth Circuit and courts in this District have heeded this guidance for decades. *See Crawford v. Astrue*, 586 F.3d 1142, 1152 (9th Cir. 2009) ("'satellite litigation' over attorneys' fees should not be encouraged") (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002)); *Recouvreur v. Carreon*, 940 F. Supp. 2d 1063, 1069 (N.D. Cal. 2013), *appeal dismissed* (9th Cir. Case No. 13-15967) (Sept. 18, 2013) ("The Ninth Circuit discourages major litigation with respect to attorney fees."); *Muniz v. United Parcel Serv., Inc.*, No. C-09-01987-CW (DMR), 2011 WL 311374, at *3 (N.D. Cal. Jan. 28, 2011) ("*Muniz*") ("'The sound administration of justice requires a balanced, informed approach to fee awards accomplished in a reasonable time without turning such matters into a full trial.'") (quoting *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1329 (D.C. Cir. 1982)); *Golden Gate Audobon Soc., Inc. v. U.S. Army Corps of Eng'rs*, 732 F. Supp. 1014, 1022 n.12 (N.D. Cal. 1989) ("Unnecessarily protracted and extensive litigation over fees is uniformly discouraged by the courts."). The Supreme Court recently reaffirmed this principle in *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) ("*Fox*"):

> The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet "the burden of establishing entitlement to an award." *Ibid*. But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.

Consistent with the Supreme Court's guidance, discovery pertaining to fee petitions is appropriate only on "rare occasion[s]." Fed. R. Civ. P. 54, Advisory Comm. Note; *see also In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 303 (1st Cir. 1995) ("*Dupont*") ("unlimited adversarial discovery is not a necessary—or even a usual—concomitant of fee disputes. . . . The Due Process Clause does not require freewheeling adversarial discovery as standard equipment in fee contests."); MANUAL FOR

COMPLEX LITIGATION (FOURTH) § 14.224 (2013) ("Discovery in connection with fee motions should rarely be permitted . . . ."). This Court is "well within its discretion to deny discovery in fee disputes that would lead to wasteful and time-consuming satellite litigation." *Muniz*, 2011 WL 311374, at *3 (internal quotations omitted).

Courts in the Ninth Circuit have refused to permit fee discovery unless it will be of "substantial assistance" to the court in evaluating the reasonableness of fees. *E.E.O.C. v. Harris Farms, Inc.*, No. Civ. F 02-6199 AWI LJO, 2006 WL 1028755, at *24-25 (E.D. Cal. Mar. 1, 2006) (denying losing defendant's request for fee-related discovery after trial because additional discovery would not be of "substantial assistance" where prevailing plaintiff submitted declarations and detailed billing records). The District of Oregon has noted that it is "not aware of any authority that provides for discovery regarding attorneys' fees *where the supporting documentation is not inadequate*." *Prison Legal News v. Umatilla County*, No. 2:12-cv-1101-SU, 2013 WL 2156471, at *4 (D. Or. May 16, 2013) (emphasis added) (citing *Sablan v. Dep't of Fin. Of the Commonwealth of N. Mariana Islands*, 856 F.2d 1317, 1321-22 (9th Cir. 1988) (reasoning that evidentiary hearings in fee proceedings are unnecessary "if the record and supporting affidavits are sufficiently detailed to provide an adequate basis for calculating an award")).

Furthermore, on the rare occasion that a court does award fee-related discovery, it typically compels production of detailed billing entries—*discovery that Plaintiffs have already supplied to the NCAA, at its request. See, e.g., Entertainment Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1231 (9th Cir. 1997) (where only time summaries were provided, trial court's failure to grant discovery of detailed time records was abuse of discretion); *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622-23 (9th Cir. 1993); *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1575 (11th Cir. 1985).

The NCAA ignores this black-letter law and instead cites irrelevant authority concerning supplemental discovery *before trial*, which is not the applicable standard. *Compare Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 751 (9th Cir.

2013), *cert. denied sub nom, Gordon v. United States*, 134 S. Ct. 117 (2013) (case cited by NCAA addressing supplemental pre-trial discovery) *with Muniz*, 2011 WL 311374, at *3 ("discovery in the context of post-trial fee disputes should not involve 'the type of searching discovery that is typical' in resolving the merits of a case") (quoting *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1329 (D.C. Cir. 1982)). In the same paragraph where it purports to advise the Court of the appropriate legal standard, the NCAA also identifies *Alvarado v. FedEx Corp*., Nos. C 04-0098 SI, 04-0099 SI, 2009 WL 2969474, at *2 (N.D. Cal. Sept. 11, 2009), which cannot help the NCAA's cause. In that case, the district court *denied* a losing defendant's request for records beyond detailed billing information pertaining to litigation against that defendant—again, the very same "discovery" the NCAA already possesses here.

III. The NCAA's Proposed Deposition of Jon King is Cumulative, Unnecessary, and Intended to Invade Attorney-Client Privilege and Work-Product Protections.

In pursuit of its deposition of Jon King, the NCAA repeats Mr. King's baseless allegations of two years ago, taken from his wrongful termination complaint against Hausfeld LLP. The NCAA has not informed the Court, however, of a subsequent agreed consent judgment in which an arbitrator held:

> 3. Having considered the discovery record, the Parties now agree, and I hold, that the separation of attorney King from [Hausfeld LLP ("HLLP")] in October 2012 was consistent with the terms of HLLP's operative partnership agreement ("Partnership Agreement") and otherwise lawful.
>
> 4. The Parties now agree, and I hold, that King breached his obligations of confidentiality under the Partnership Agreement by, inter alia, filing his Complaint publicly and not under seal, circulating his Complaint to members of the media and other third parties prior to its becoming publicly available through the court, and drawing press attention to the dispute between the parties.
>
> 5. King agrees to, and is ordered to, specifically perform and abide by his confidentiality obligations under the Partnership Agreement in the future, and he acknowledges that his failure to do so shall be a violation of that agreement and this judgment. . . .

> 6. King represents and acknowledges that, *having reviewed the discovery record, he now understands that the claims previously asserted against HLLP and [Michael D. Hausfeld ("MDH")] were incorrect and King acknowledges that he has apologized to MDH and HLLP and each of its partners for having asserted incorrect claims against them.*

See Agreed Consent Judgment, attached as Exhibit A to the Declaration of Swathi Bojedla ("Bojedla Decl.") (emphasis added).[3] Nevertheless, the NCAA insists that it is entitled to depose Mr. King to "inquire into his knowledge of the billing practices of class counsel as they relate to this litigation." NCAA Mot. at 3. Yet the billing practices of Class Counsel Hausfeld LLP are already well known to the NCAA: it has the detailed billing records of Class Counsel and every other law firm that prosecuted this action, inventorying every six minutes that an attorney or a paralegal spent litigating this case to victory over the course of five years. *Cf. Dupont*, 56 F.3d at 303 ("When the written record affords an adequate basis for a reasoned determination of the fee dispute, the court in its discretion may forgo an evidentiary hearing. Here, it is pellucid that the litigants' extensive written submissions comprised an effective substitute for such a hearing—particularly since the judge had lived with the litigation from the start and had an encyclopedic knowledge of it.").

Putting to one side the redundancy of the NCAA's request, there are numerous other reasons to deny a deposition of a former opposing counsel at this late stage, chief among them the general prohibition on deposing attorneys regarding fee motions. Courts are generally reluctant to authorize attorney depositions "because of the negative impact that deposing a party's attorney can have on the litigation process." *Riverbank Holding Co. v. New*

[3] Mr. King filed his complaint in federal court, in the Northern District of California, in January 2013. Three months later, Judge Chen dismissed the complaint with prejudice and compelled arbitration under the terms of the firm's partnership agreement. *King v. Hausfeld*, No. C-13-0237 EMC, 2013 WL 1435288, at *18-19 (N.D. Cal. Apr. 9, 2013). The consent judgment resolved the arbitration and has been published in court filings and news articles. *See A&S Liquidating, Inc. v. AB&I Foundry*, No. 13-cv-04568-EMC, Dkt. No. 29-10 (Nov. 7, 2014); *Timeline: Ed O'Bannon vs. NCAA*, CBS Sports.com (June 6, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24581878/timeline-ed-obannon-v-ncaa.

Hampshire Ins. Co., No. 2:11-cv-02681-WBS-GGH, 2012 WL 4748047, at *2 (E.D. Cal. Oct. 3, 2012) ("*Riverbank*"). During *pre*-trial discovery, an attorney deposition is warranted only if a party demonstrates that: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. *Shelton v. Am. Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986); *see Villaflor v. Equifax Info.*, No. C-09-00329 MMC (EDL), 2010 WL 2891627, at *2 (N.D. Cal. July 22, 2010) ("Although the Ninth Circuit has not formally adopted *Shelton*, district courts have used it when analyzing whether to permit the deposition of counsel.") (quotation marks omitted). None of those requirements are met here, even if they were the appropriate criteria to evaluate a *post*-trial request for an attorney deposition in response to a fee petition.

The NCAA has not even attempted to address this demanding test despite its mistaken adherence to *pre*-trial discovery standards. As to the first criterion, the detailed time records in the NCAA's possession furnish the very information it is seeking. Furthermore, questions about Plaintiffs' billing practices, strategic decisions, meetings, and communications with clients—questions that expand on the detailed time records already supplied—are protected by attorney-client privilege and work product protections. *See generally In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982); *Riker v. Distillery*, No. 2:08-cv-0450 MCE JFM, 2009 WL 2486196, at *1-2 (E.D. Cal. Aug. 12, 2009). The NCAA admits as much through it silence, and its failure to explain how the proposed deposition would not invade privilege is significant.

Finally, the deposition is by no means "crucial" to the NCAA's ability to contest the reasonableness of particular time entries submitted in support of Plaintiffs' fee motion. If it truly believes that Plaintiffs' efforts were duplicative, or that the litigation was staffed inefficiently, it is entirely capable of making those arguments with the records it has already received and without deposition testimony. The NCAA advances only a perfunctory argument that it will be prejudiced absent the requested discovery, but it cannot explain what specific

prejudice will result, much less why this deposition is "crucial" to the Court's evaluation of Plaintiffs' fee motion. It is not.

Here, as well, the NCAA's refusal to cite *any* law is telling. To date, Plaintiffs have uncovered five cases that considered a request for an attorney deposition over billing records—and all but one roundly rejected the request for reasons that are applicable here. In *In re First Peoples Bank Shareholders Litig.*, 121 F.R.D. 219 (D.N.J. 1988) ("*First Peoples Bank*"), the court considered a request by two objectors to depose a handful of attorneys who had successfully prosecuted shareholder derivative litigation to settlement. At the outset, the court noted Professor Newberg's "general rule": "'Depositions of petitioning attorneys should be largely prohibited and interrogatory, document or admission requests should only be sparingly granted and narrowly focused on material relevant facts to avoid harassment of petitioners, undue prolongation of the proceedings, and undue expense.'" *Id.* at 223 (quoting H. NEWBERG, ATTORNEY FEE AWARDS § 2.22 (1986)). Ultimately, the court rejected the request as duplicative of detailed billing records that were to be supplied to the objectors:

> This request will be denied because there has been no showing that these depositions of counsel are necessary in light of the rather plenary documentary discovery which counsel are being required to provide. ***The documents should speak for themselves, and deposition discovery presently appears to be too cumbersome, time-consuming and annoying to be permitted as a matter of routine***. If there were serious ambiguity or incompleteness in the record, a limited amount of deposition discovery could be permitted by request for follow-up discovery.

First Peoples Bank, 121 F.R.D. at 227 (emphasis added); *see also Commerce & Indus. Ins. Co. v. Site-Blauvelt Eng'rs, Inc.*, Civil Action No. 05-2287 (NLH), 2008 WL 4692278, at *4 n.10 (D.N.J. Oct. 22, 2008) (recognizing "the general rule not to permit deposition discovery of attorneys regarding their fees" and adopting the reasoning of *First Peoples Bank* to preclude attorney depositions regarding fees while retaining discretion in the event of a serious ambiguity or incompleteness in the record).

Likewise, in *Riverbank*, 2012 WL 4748047, at *2, the defendant sought a deposition of opposing counsel to determine the nature of the work performed by opposing counsel (so

as to ascertain which tasks fell within the scope of defendant's duty to defend). The *Riverbank* court also declined the request in light of the superior written records already provided to the requesting defendant:

> Invoices of the legal fees at issue have already been produced to defendants and they include detailed descriptions of the work performed as it relates to the specific claims at issue.[2] Further, defendant's interrogatories addressed the breakdown of legal fees by claim and plaintiff provided detailed answers pointing defendant to specific documents containing the requested information or explaining why it did not exist. It is hard to see what more counsel for Riverbank could provide in a deposition. That counsel *might* be able to explain, in greater detail, the breakdown between work on the Borman as opposed to the Pearl claim is purely speculative and counsel has provided a sworn statement that he cannot. Dkt. 37–1. This is no reason to allow a deposition of Riverbank's counsel.
>
> FN2 Examples of such descriptions include: "Conference call with Kip Skidmore and Joe Barkett re Pearl response letter, analysis and recommendations and handling plan", "Continue analysis of Borman lease matter and legal arguments asserted by counsel for assignees Pearl", and; "Review Riverbank records and remove privileged documents". Dkt. 36–15. For those descriptions which do not clearly delineate between work on the two claims, it is hard to see how deposing counsel on his two-year-old billing invoices would provide any more illuminating information.

Riverbank, 2012 WL 4748047, at *5, *5 n.2 (emphasis in original).

In *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 722 (6th Cir. 1996), the Sixth Circuit similarly affirmed a district court's decision to deny a deposition of opposing counsel in light of superior written records:

> With regard to the protective order, the Crowleys argue that the district court erred in granting Rolex a protective order regarding the deposition of Rolex's counsel, John Mulrooney. The Crowleys argue that Rolex failed to bear its burden under Fed. R. Civ. P. Rule 26(c) of showing good cause to preclude a deposition of Mulrooney. The Crowleys claim they were entitled to depose Mulrooney because his affidavit in support of Rolex's attorney's fees claim was overbroad; the Crowleys were not permitted to file countervailing affidavits; and the attorney's fees sought were excessive. We find no error in the district court's decision to grant a protective order prohibiting Mulrooney's deposition. The district court had Mulrooney's affidavit before it; the court was familiar with the proceedings in the case; and the court had the affidavit of an experienced practitioner stating that the fees and expenses request was reasonable. Any additional discovery would have been unnecessary, expensive,

> and inefficient. The district court did not abuse its discretion in prohibiting the discovery deposition.

Id. at 722.[4]

The NCAA has no answer to these cases, which prohibit attorney depositions concerning fees absent serious ambiguities or incompleteness in the written materials furnished to the unsuccessful party. The detailed billing records Plaintiffs provided to the Court and the NCAA "speak for themselves," *First Peoples Bank*, 121 F.R.D. at 227, and the NCAA has not identified a single deficiency in those records that might warrant a deposition.

If that were not enough, there are additional procedural hurdles to the NCAA's request that the NCAA neglects to mention. Even if the Court were inclined to permit a deposition of Mr. King, the NCAA would first need to subpoena Mr. King, who is now a third party (litigating against the NCAA in another matter, with a new law firm) and who may well seek to quash the subpoena,[5] igniting yet another round of briefing. This "satellite litigation" (*Dague*, 505 U.S. at 566) would serve no one, and it would burden the Court, the parties, and a third party unnecessarily.

IV. The Court Should Deny the NCAA's Request for a Detailed Accounting of Time that the NCAA Is Not Being Asked to Pay For.

Without offering a single citation to support its unprecedented request, the NCAA insists that it is entitled to a detailed accounting of time that Plaintiffs excised from their submission through a painstaking audit of each firm's time, over the course of many

[4] The lone exception to this string of cases is *Roe v. Operation Rescue*, CIV.A. No. 88-5157, 1989 WL 35440 (E.D. Pa. Apr. 10, 1989), which references in passing an earlier court order permitting "defendants to depose plaintiffs' counsel with regard to the fee petition." *Id.* at *2. That earlier unpublished court order is not available via Lexis or Westlaw, underscoring its inapplicability beyond the particular facts presented in support of that motion. What is more, the Court's final resolution of the fee application, *id*. at *1-7, does not cite a shred of resulting deposition testimony, strongly suggesting that the deposition did not provide substantial assistance to the Court in its ultimate task.

[5] Among the many reasons for this likelihood are, e.g., (1) the need to preserve attorney-client privilege and (2) Mr. King's ongoing duty of confidentiality under the partnership agreement, as affirmed in the consent judgment. *See* Bojedla Decl., Ex. A.

iterations—*time for which Plaintiffs are not requesting compensation*.[6] That reconstruction effort would require the efforts of dozens of attorneys and paralegals and would take weeks or even longer, posing a substantial burden to Plaintiffs while yielding no benefit whatsoever to the Court.

In its fee motion, Plaintiffs noted that they had "excised from this application, to the extent separable":

> time concerning damages claims; the pursuit of a damages class under Rule 23(b)(3); draft jury instructions, voir dire, and questionnaires; time spent preparing this fees application; and even most time related to press releases, interviews, and the like, even though the Northern District of California recognizes that time as compensable. . . . As with the decision to forego current rates in favor of historical rates, these time reductions again reflect the conservative nature of this fees application.

Dkt. No. 319, at 12-13 ("Fee Motion"). The NCAA would now punish Plaintiffs for their diligence (*see Hensley*, 461 U.S. at 434), all in the hopes of finding something interesting—what the NCAA will not say—in the time records for which Plaintiffs are *not* seeking reimbursement.

This exercise would be extraordinarily burdensome for Plaintiffs. *See generally* Bojedla Decl. As Plaintiffs have explained to the NCAA, each of the 33 firms that prosecuted this litigation excised certain time entries over the course of two months, through various rounds of review and often after seeking input from Class Counsel. *Id.* ¶ 4. At no point in this iterative process did Plaintiffs' counsel endeavor to create complementary records of time entries ultimately removed from the fee application. And for good reason: no court has ever

[6] As a substitute for supporting legal authority, the NCAA proposes that Plaintiffs' detailed billing records are "incomplete," as contemplated by the Fed. R. Civ. P. 23(h)(2) advisory committee note. That novel and unprecedented interpretation turns the Federal Rules on its head. The advisory committee note actually states: "One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides *thorough information*, the burden should be on the objector to justify discovery to obtain further information." *Id*. (emphasis added).

even suggested the practice, at least to Plaintiffs' knowledge (and the NCAA apparently agrees).

Because these excised time records do not exist, standing alone, Plaintiffs would have to create this documentation from scratch, which would take weeks or even months and require the attention and coordination of dozens of paralegals and attorneys. *Id.* ¶ 5. As an initial matter, each firm would have to manually compare its finalized time submission against its internal timekeeping system. *Id.* ¶ 7. Next, each firm would have to create a new spreadsheet of all excised time and review it again to cull time in compliance with its ethical duties (e.g., entries in error belonging to another matter, incomplete entries lacking detail that were removed for that reason, etc.). *Id.* ¶ 8; *see Hensley*, 461 U.S. at 434 ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission."). Finally, each firm would have to review these new spreadsheets for potentially privileged information or information protected by work-product protections, consistent with the parties' earlier scheduling stipulation that was entered by the Court, Dkt. No. 311 (Plaintiffs to provide daily time reports to NCAA "with any necessary redactions for privilege or work product") and Plaintiffs' earlier practice. Bojedla Decl. ¶ 9. Those materials would then need to be served on the NCAA and filed with the Court, joined by yet another sealing motion.

All of this would likely require hundreds of hours. And to what end? The NCAA has made no effort to explain why it needs this information to advise the Court on the reasonableness of the fees actually sought, which are supported by detailed time records that amply explain the nature of the work performed. The NCAA's only proffered justification for this project is its desire to "test for duplication, redundancy, and the continued presence of similar entries and time." Dkt. No. 328, at 4. But that investigation—whatever its intention—would be a waste of the parties' and the Court's time. Plaintiffs have noted for the Court that a significant portion of time excised from their fee motion is nonetheless compensable; its

exclusion is a mark of conservatism. The presence of a handful of similar tasks in both sets of time would hardly be a revelation. As Plaintiffs noted, their exclusions were made only "to the extent separable." Fee Motion, Dkt. No. 319, at 12. In any event, the NCAA is quite capable of reviewing the time details it already possesses for the presence of any time it wishes to challenge as non-compensable. It hardly needs more information to begin that task. And its elaborate proposal is at odds with the Supreme Court's prohibition on "green-eyeshade account[ing]" forays. *See Fox*, 131 S. Ct. at 2216.

Elsewhere in its brief, the NCAA likens itself to an invoiced client. *See* NCAA Mot. at 5. But what client would demand a detailed accounting of time *for which it is not being charged*—and require further that this weeks-long accounting exercise come free of charge? Not surprisingly, the NCAA has not furnished a single authority that supports this particular request. It should be denied.

V. Plaintiffs Reserve the Right to Supplement Their Fee Petition and Seek Reciprocal Discovery if the NCAA's Motion is Granted.

The NCAA's motion for additional burdensome discovery is all the more audacious given the NCAA's refusal to provide even the slightest information about *its* legal expenditures over the course of nearly six years of litigation and its loss at trial. As noted in Plaintiffs' Fee Motion, Plaintiffs have twice requested a summary of the NCAA's expenditures in litigating this case, including counsel's hourly rates, total expenses, total hours, and total attorney fees paid to date. Dkt. No. 319, at 7. Should the Court grant either of the NCAA's requests for additional discovery, Plaintiffs may wish to seek reciprocal written discovery from the NCAA, mindful of the Supreme Court's admonitions. *See, e.g., Riker*, 2009 WL 2486196, * 2 (requiring losing defendant to provide "an itemized statement of the number of hours billed, the parties' fee arrangement, costs and total fees paid, without including the nature of services rendered"); *Real v. Continental Grp., Inc.*, 116 F.R.D. 211, 213 (N.D. Cal. 1986) ("I conclude that the hours expended by the defendant on matters pertaining to this case, counsel's hourly rates, as well as total billings and costs, are at least

minimally relevant to the plaintiff's fees and costs petition."). Some reciprocity is in order given the NCAA's enthusiasm for one-sided discovery. And those totals could substantially assist the Court in evaluating the amount of time and resources required to, e.g., extinguish anticompetitive behavior; illustrate the NCAA's shifting definition of "amateurism." *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. C 09-3329 CW, 2014 WL 3899815, at *973-78 (N.D. Cal. Aug. 8, 2014); and uncover what one NCAA executive referred to as the "great hypocrisy of intercollegiate athletics," Plaintiffs' Trial Exhibit (PX) 424-2 to -3.

Similarly, in the event that the Court grants either of the NCAA's requests for additional discovery, Plaintiffs will likely seek to supplement their fee petition to reflect the hours expended litigating this fee petition. Just last week, the NCAA filed three motions, one opposition brief, and numerous supporting materials, requiring the attention of various attorneys and paralegals. The NCAA's desire to convert this post-trial fee proceeding into an odyssey of "satellite litigation" is inappropriate for all the reasons set forth above. To the extent that Plaintiffs are required to respond further to the NCAA's motions and participate in additional discovery, the NCAA ought to be prepared to compensate Plaintiffs for the time expended in response.

VI. Conclusion

For all of the foregoing reasons, Plaintiffs respectfully submit that the Court should deny the NCAA's motion for additional discovery.

Dated: November 13, 2014

Respectfully submitted,

/s/ Michael Hausfeld

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CERTIFICATE OF SERVICE

I, Sathya S. Gosselin, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am a partner with the law firm of HAUSFELD LLP, and my office is located at 1700 K. Street NW, Suite 650, Washington, DC 20006.

On November 13, 2014, I caused to be filed the following

PLAINTIFFS' OPPOSITION TO DEFENDANT NCAA'S MOTION FOR LIMITED DISCOVERY ON PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

with the Clerk of Court using the Official Court Electronic Document Filing System, which served copies on all interested parties registered for electronic filing.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Sathya Gosselin
Sathya Gosselin