No. 16-15803

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD O'BANNON, JR.,
ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

and

ELECTRONIC ARTS, INC. AND COLLEGIATE LICENSING COMPANY, AKA CLC,
Defendants.

Appeal from the United States District Court for the Northern District of California, Oakland No. 4:09-cv-03329-CW (Wilken, J.)

REPLY BRIEF FOR APPELLANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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Plaintiffs' response avoids the issues presented. Rather than respond to the NCAA's arguments, plaintiffs have punted by merely reciting the district court's (ultimately narrow) finding of antitrust liability. But that gets the plaintiffs nowhere, because a liability determination merely raises the ***possibility*** of a fees award; it cannot justify an award. Plaintiffs' limited success was not substantially prevailing and does not justify any fee award, let alone the massive $42 million award approved below.

The injunction that survived this court's decision provided no direct, tangible benefit to the class. Plaintiffs mildly respond by claiming that they "paved the way" for future challenges to the NCAA's amateur rules, but the opposite is true. This Court's partial reversal of the district court injunction – and, in particular, its ***reaffirmation*** of the long-standing rule that NCAA rules which tether financial aid to educational expenses do not violate the Sherman Act – means that this case did not make any significant change in the law.[1] Plaintiffs' minor victory fell far short of their goals, and certainly did not warrant rewarding the efforts of a syndicate of some 300 lawyers from 34 law firms.

[1] *See* Joe Nocera, *O'Bannon's Hollow Victory Over the N.C.A.A.*, N.Y. Times (Oct. 2, 2015), https://www.nytimes.com/2015/10/03/opinion/joe-nocera-obannons-hollow-victory.html?_r=0 ("And yet here we are, with the dust settling on that appeals court decision, and the N.C.A.A. not only is still standing but has barely been dented.").

The NCAA also showed in its opening brief that even if plaintiffs are entitled to ***some*** fees, they are not entitled to the massive fee award made by the district court. Plaintiffs cannot dispute that the district court erroneously treated the fee award as an all-or-nothing question, giving the plaintiffs everything they asked for even though plaintiffs sought (and received) millions of dollars for work on unrelated and unsuccessful claims. Plaintiffs' attempt to justify the district court's error by claiming that their claims were, somehow, always about amateurism, and that their successful and unsuccessful claims are therefore related, is belied by even a cursory review of the record, and in particular plaintiffs' own frequent assertions in the early years of this litigation that they were not challenging amateurism.

I. PLAINTIFFS ARE NOT SUBSTANTIALLY PREVAILING

Plaintiffs fail to demonstrate that they "substantially prevailed"[2] under the Clayton Act. 15 U.S.C. § 26. "A plaintiff is a prevailing party only when (1) it

[2] This Court earlier applied the minimum "prevailing party" standard developed under section 42 U.S.C. § 1988 to awards under the Clayton Act's "substantially prevailing" requirement. *Southwest Marine, Inc. v. Campbell Indus.*, 732 F.2d 744, 747 (9th Cir. 1984). But it has not squarely addressed the question of whether or not the word "substantially" modifies "prevailed" in a way that requires a fee claimant to show ***more than*** that it simply "prevailed." More recent cases indicate that "substantially" prevailing entails a more exacting standard. *See, e.g., Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 455–56 (D.C. Cir. 2002) ("One might say this plaintiff was a prevailing party, but nevertheless not say that the plaintiff substantially prevailed."); *Fed. Trade Comm'n v. Staples, Inc.*, No. CV 15-2115 (EGS), 2017 WL 782877, at *2 (D.D.C.

wins on the merits of its claim, (2) the relief received materially alters the legal relationship between the parties by modifying the defendant's behavior, and (3) that relief directly benefits the plaintiff." *Martinez v. Wilson*, 32 F.3d 1415, 1422 (9th Cir. 1994). Although a party who obtains injunctive relief "may recover a fee award," *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.11 (1983), that is not enough. This Court has held "[t]he entry of judgment in a party's favor does not automatically render that party a 'prevailing party.'" *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1197 (9th Cir. 2007). *See also Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1036 (9th Cir. 2006) ("if success is insignificant, then a court may find that a party that succeeds on some claims is nonetheless not a prevailing party.").

While plaintiffs did prove narrow antitrust liability, they did so on behalf of only part of their class (which did not include ***any*** of the original named plaintiffs), and they have not demonstrated that the relief actually obtained directly benefited the class on whose behalf liability was established. No class member who had already graduated when the district court entered its order will ever benefit from that order, as plaintiffs readily concede. Pl.Br. at 24 ("some of the initial class members will not benefit directly from class-wide injunctive relief"). *See also Rhodes v. Stewart*, 488 U.S. 1, 4 (1998) (plaintiffs not prevailing parties because

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Feb. 28, 2017) ("Here, Moving Plaintiffs did not prevail, much less 'substantially prevail,' under the Clayton Act.").

judgment could never affect the behavior of the defendant towards them). And no current student-athlete has or will ever benefit directly from the district court's injunction, either. The record is empty of any such showing.

As the NCAA showed in its opening brief, and as this Court observed, long prior to the district court's decision, the NCAA already permitted current student-athletes to receive total financial aid up to cost of attendance ("COA"). *E.g.*, NCAA Br. at 22; ER91. That portion of the district court's order affirmed by this Court merely permitted what NCAA rules already allowed – a fact that was important to this Court's reasoning. ER91. The fact that Division I rules already permitted aid up to COA, and had since at least 2004, means that plaintiffs have not – indeed cannot – demonstrate that whatever benefits student-athletes might enjoy as a result of aid up to COA are the result of ***this litigation***.

Martinez is instructive. There, several cities sued California seeking injunctive relief prohibiting the use of certain factors in distributing funds under the Older Americans Act. 32 F.3d at 1418. The district court entered a preliminary injunction prohibiting the use of four challenged factors, California then proposed a new formula omitting the factors, and the district court thereafter entered a permanent injunction enjoining the original factors. *Id*. at 1419.

The *Martinez* Court found that "as a result of [the cities'] suit," the plaintiffs were not better off than they were before the suit. *Id*. at 1422 (observing that the

cities would actually receive less OAA money than they did from the prior formula). Because of that, this Court held that the cities "obtained no direct benefit from their suit" and therefore did "not qualify as prevailing parties," despite winning a permanent injunction that caused California to change its OAA formula. *Id*. *See also UFO Chuting*, 508 F.3d at 1191 (permanent injunction which did not go into effect before intervening change in the law took place did not render plaintiff prevailing party). In other words, it is not sufficient, as plaintiffs argue, to claim prevailing status merely because the plaintiff wins "an enforceable judgment." Pl.Br. at 23. Plaintiffs here suffer from the same problem as the *Martinez* plaintiffs – they have not demonstrated that their "enforceable judgment" actually benefits anyone. Despite plaintiffs' claims to the contrary, Pl.Br. at 29, this is clearly their burden.

Plaintiffs argue that the Supreme Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001), somehow overruled cases – including cases that plaintiffs cited below – requiring that plaintiffs demonstrate a causal link between litigation and some benefit. Plaintiffs misread *Buckhannon*, which speaks only to cases in which no judicial relief was ordered. 532 U.S. at 600 (a prevailing party does not "include[] a party that has failed to secure a judgment on the merits . . . but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in

the defendant's conduct."). *Buckhannon* holds only that a judgment on the merits is ***necessary*** to qualify as a prevailing party, not that it is ***sufficient*** to do so.

Put differently, *Buckhannon* does not relieve plaintiffs of their burden to prove that the relief resulted in a direct benefit. *See Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715 (9th Cir. 2013) ("A plaintiff 'prevails' . . . 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'"). *See also, e.g., Am. Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981) (prevailing party status requires "some sort of clear, causal relationship between the litigation brought and the practical outcome realized."); *Southwest Marine*, 732 F.2d at 747; *Braafladt v. Bd. Of Governors of Oregon State Bar Ass'n*, 778 F.2d 1442, 1444 (9th Cir. 1985).

Counsel next strain to argue that the post-appeal injunction somehow "substantially increases athletic scholarships" and prevents "backsliding" by the NCAA. Pl.Br. at 31-33. Neither argument withstands scrutiny. Plaintiffs' argument that the litigation "induced the NCAA to change its rules" finds no support in the record. After appeal, the injunctive relief only prohibited rules that precluded NCAA members from offering FBS football or Division I men's basketball student-athletes a limited share of the revenues generated from the supposed use of

their names, images, and likenesses ("NILs") in addition to a full grant-in-aid. ER253. The NCAA's independent rule change went far beyond that.

First, the district court's injunction applies only to Division I football and men's basketball players, while the NCAA's independent rule change, in contrast, applies to ***all*** Division I athletes, regardless of sport or gender. Second, the injunction only required that NCAA member schools be allowed to offer student-athletes limited shares of revenues from the use of their NILs. The NCAA's actual rule change is far broader, however, allowing athletic-related financial aid up to COA with no limitation that the aid come from NIL licensing. Plaintiffs' claim that "the new rule substantially overlapped with the injunctive relief" therefore lacks credibility.

Plaintiffs and the district court relied exclusively on the chronology of events to infer causation. *See* Pl.Br. at 37 ("the fact that the NCAA's rule-change was not voted in until months after the injunction issues . . . is alone sufficient to allow the District Court to draw the inference of causation."). But that chronology, without more, is not sufficient, and it was error by the district court to so conclude. *Munro*, 650 F.2d at 188 (While the chronology is "a factor to consider," it is "clearly not definitive."). *See also Cady v. City of Chicago*, 43 F.3d 326, 328 (7th Cir. 1994).

Finally, plaintiffs claim that the evidence they submitted to the district court to demonstrate causation was "compelling," Pl.Br. at 36. But that inadmissible hearsay "evidence" was no evidence at all, and legally insufficient to carry plaintiffs' burden of proving causation. *See* NCAA Br. at 26-28. Plaintiffs relied on nothing in the record before the district court, and rely on no record evidence here.[3] Instead, they refer this Court back to the handful of hearsay excerpts from online news articles which they claim "resolved any question about the causal relationship between the litigation and the practical outcome here." Dkt.469 at 6. But those inadmissible sources only serve to cast additional doubts on plaintiffs' "compelling" theory of causation, and certainly do not demonstrate the "clear, causal" relationship this Court requires. *See* NCAA Br. at 27.[4]

[3] Plaintiffs do rely, for the first time, on the trial testimony of the NCAA's expert, Dan Rubenfeld, which does not support plaintiffs' position that the NCAA's broad rule change was caused by the issuance of the district court's narrow injunction. Pl.Br. at 36. They simultaneously implore this Court to ignore the NCAA's record support demonstrating the lack of causation. But the NCAA properly raised the causation issue in the district court, Dkt. 466 at 5, and offered ample record support of its position here. Fed. R. App. P. 10(a). Moreover, the NCAA sought a reply brief in order to address new material in plaintiffs' supplemental brief, but the district court denied the NCAA's request. Dkt. 449; ER34. The NCAA preserved its position that the plaintiffs' record was barren.

[4] Despite its ruling that the NCAA "failed to rebut the inference that Plaintiffs' lawsuit and this Court's order were factors in its decision to change the rules," the district court did not make a proper evidentiary record supporting that finding. Moreover, the district court accepted plaintiffs' extraneous-record evidence, all based upon dubious hearsay statements, without allowing the NCAA an opportunity to respond. Plaintiffs invited the error of letting the district court find

In sum, plaintiffs fail to show that they meet the "substantially prevailing" standard, because they have failed to show that the injunction which remains in this case brings any type of direct benefit to anyone. Plaintiffs won a liability declaration and an injunction made wholly superfluous by a prior, independent NCAA rule change. This cannot support prevailing (much less substantially prevailing) party status, or the syndicate of lawyers' bloated fee request.

II. THE REQUESTED FEES ARE UNREASONABLE UNDER HENSLEY

A plaintiff who "substantially prevails" in the litigation merely establishes his eligibility for, and not his entitlement to, an award of fees. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Hensley*, 461 U.S. at 433. Even if plaintiffs "substantially prevailed," they must next demonstrate that their lawyers' requested fee was reasonable. They have failed to do so.

A. The successful claim and the unsuccessful claims are not factually related

This Court has held that "the [relatedness] test is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted." *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 903 (9th Cir. 1995), *accord Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1279 (7th Cir.

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causation without any evidence of causation, and should not now be given another chance to convince this Court otherwise.

1983). "Thus, the focus is to be on whether the unsuccessful and successful claims arose out of the same 'course of conduct.' If they didn't, they are unrelated under *Hensley*" and fees may not be awarded for that work. *Schwarz*, 73 F.3d at 903.

Plaintiffs assert, but do not show, that they were always challenging "a single course of conduct." Pl.Br. at 48. As the NCAA explained in its opening brief – and which plaintiffs make no real attempt to answer – that is simply not true. The 2009 plaintiffs alleged that a conspiracy between the NCAA, EA Sports, and CLC foreclosed them from the post-collegiate licensing market. Indeed, the 2009 plaintiffs argued that the NCAA could not use amateurism as a defense to their Sherman Act claims precisely because their claims involved restraints in a market in which the plaintiffs were no longer subject to NCAA rules. ER880, 883, ¶¶492, 506. *See also, e.g.*, Dkt.107 at 3 ("this case does not involve questions of the protection of amateur sports, the student athlete experience, or other goals."); ER849-50 ("[w]e don't claim rights to be compensated for appearing in live broadcasts or playing on the field, the amateur principles that have been so hallowed."). The district court ***repeatedly*** relied on these representations. *See, e.g.*, ER 796-97; *SAL* Dkt.624 at 17-19 (collecting examples).

Plaintiffs did not reveal their inconsistent theory that the NCAA's member schools were conspiring with each other (not with EA or CLC) to foreclose competition in a college education market (not the post-collegiate licensing

market) until late 2012, when they filed their motion for class certification. *SAL* Dkt.530. Plaintiffs' new theory challenged a fundamentally different course of conduct – the allegedly anticompetitive effect that NCAA amateurism rules have on the ability of ***current*** student-athletes to earn compensation in a supposed college education market – than the theory they pursued during the first four years of the case, which focused on an alleged conspiracy to exclude ***former*** student-athletes from participation in a post-graduation NIL licensing market.

Perhaps most tellingly, the district court found that plaintiffs' new "college education" claims required ***new plaintiffs*** to join the case a year before trial to confer jurisdiction over the new claims. ER807-08. It is hard to think of a more concrete demonstration that the plaintiffs' new and old claims should have been "treated as if they had been raised in separate lawsuits." *Hensley*, 461 U.S. at 435. Without the last-minute addition of new plaintiffs, a new lawsuit would have been ***required*** in connection with plaintiffs' only partially successful claim. Relatedness cannot be found in this situation. *See Uviedo v. Steves Sash & Door Co.*, 753 F.2d 369, 370–71 (5th Cir.1985) ("a plaintiff's claims which are unrelated to each other, though formally and properly joined in a single suit against a single defendant, are nevertheless to be considered for attorneys' fees purposes as if each were brought in a separate suit").

Recognizing the disparity of their claims, plaintiffs bemoan the NCAA's "slicing and dicing of claims and arguments," cautioning that this was "exactly what the Supreme Court warned against in *Hensley*." Pl.Br. at 44. But *Hensley* is to the contrary. The Court expressly recognized "a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim." *Hensley*, 461 U.S. at 434–35.

Plaintiffs next argue their claims were related because they all sought to "eliminate NCAA restraints that precluded them from sharing in revenues generated by the commercial use of their NILs." Pl.Br. at 41. But this formulation undertakes a superficial analysis which would allow a plaintiff to show relatedness simply by describing their unsuccessful and successful claims at a higher degree of generality. The test of relatedness requires more. *See, e.g.*, *Schwarz*, 73 F.3d at 902-03 (distinct course of conduct and relief sought for claims against employer); *Mary Beth*, 723 F.2d at 1279-80 (finding plaintiff's constitutional claims for false arrest and excessive force unrelated to her claim of unconstitutional strip search); *Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270, 278–79 (1st Cir. 2000) (facts necessary to prove one claim were "wholly different" than the facts necessary to prove the other); *Jackson v. Illinois Prisoner Review Bd.*, 856 F.2d 890, 891 (7th

Cir. 1988) (due process claim and claim of violation of *ex post facto* clause of Article I of the Constitution unrelated).

Plaintiffs' remaining relatedness explanations all similarly fall short. They argue the claims were related because two of the original named plaintiffs testified at trial. Pl.Br. at 41. But both of the named plaintiffs who testified – Tyrone Prothro and Ed O'Bannon – did so regarding the alleged restraints in the post-collegiate licensing market. FER16; FER5. In fact, Prothro testified that college athletes should not be paid for playing while in school, FER17-18, and O'Bannon was impeached with his deposition testimony in which he testified that he was not suing on behalf of current student-athletes and did not know if current student-athletes should be paid for NIL rights while in school. FER6-10.[5]

Plaintiffs also argue that the injunctive class definitions were "consistent." Pl.Br. at 42. On the contrary, they were starkly different. Compare plaintiffs' initial class definition:

> All current and former student-athletes . . . whose images, likenesses and/or names ***may be, or have been, licensed or sold by Defendants,***

[5] Equally worthless in aiding the relatedness inquiry is plaintiffs' specious argument that the two cases were related because plaintiffs' trial exhibits were developed during the earlier stages of the litigation. Plaintiffs offer no support for this argument, but it proves next to nothing in any event, not least because the failed claims regarding the post-collegiate licensing restraints also went to trial and would also have drawn their exhibits from the earlier period, and because discovery in this matter was extremely broad and involved the exchange of hundreds of thousands of documents.

> ***their co-conspirators, or their licensees after the conclusion of the athlete's participation in intercollegiate athletics***.

ER869 ¶268 (emphasis added), with the class that actually proceeded to trial:

> All current and former student-athletes . . . whose images, likenesses and/or names ***may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.***

ER158 (emphasis added). The initial class definition dealt specifically with the supposed license or sale of NILs after plaintiffs left school. The second class definition dealt with in-school appearances, a change so drastically different that it required the support of new named plaintiffs to maintain. ER284,796-97,800.[6]

Most indicative of counsels' opportunism, however, is their ahistorical claim that this case was always about eliminating restraints that "arose, in part, from NCAA rules and the principles of amateurism." Pl.Br. at 42. As the NCAA detailed in its opening brief, for the original 2009 plaintiffs, this case was ***never about amateurism***. Counsel repeatedly represented this position to the lower courts and to other courts across the country. *See* NCAA Br. at 7-9. It was not until late 2012 that they first alleged that the NCAA's amateurism rules were anticompetitive. Indeed, after the sudden shift in their factual allegations, a

[6] Plaintiffs' mischaracterization of their untimely addition of new named plaintiffs and amended complaint as "run-of-the-mill" is belied by the record. They were required to add new named plaintiffs by the district court because none of their original named plaintiffs had standing to pursue their new claims. ER 807 ("do you have any class representative who could make this injunctive relief claim on behalf of current students?").

member of plaintiffs' legal team even boasted to ESPN about it. *See SAL* Dkt.639 at 2 ("I'm sure the NCAA will go ballistic over this . . . [t]his is their worst nightmare, this issue coming front and center this deep into the case.").

This Court has articulated a test for determining whether claims are related for purposes of awarding attorneys' fees. Plaintiffs failed to satisfy this test, and their alternate reading of that test would reduce it to nothing more than a requirement that claims share the same caption. That is not the law. The unsuccessful and successful claims should have been treated as if they had been raised in separate lawsuits. *Hensley*, 461 U.S. at 435.

B. Plaintiffs achieved limited success

The 2013 plaintiffs' lone successful claim was not related to the 2009 plaintiffs' unsuccessful claims, and the district court abused its discretion in finding otherwise. But even setting that aside, the fee award ***still*** requires a significant reduction to reflect plaintiffs' limited success.

Plaintiffs cling to the district court's "excellent results" finding. But that finding was error because the record reveals that this was not an "excellent results" case. The *Hensley* Court described two types of litigations: one in which a plaintiff "obtained excellent results" and the other in which the "plaintiff has achieved only partial or limited success." *Hensley*, 461 U.S. at 435-36. In the former case, assuming the plaintiff presents adequate billing records, the plaintiff usually

"should recover a fully compensatory fee." *Id.* In the latter case, however, the lodestar calculation "may be an excessive amount." *Id*. The key inquiry here is whether the fee requested is reasonable in light of the benefits the litigation conferred ***to plaintiffs***. *Id*. at 435; *Ibrahim v. U.S. Dep't of Homeland Sec.*, 835 F.3d 1048, 1061 (9th Cir. 2016) ("Here, 'a district court should focus on the significance of the overall relief obtained by the plaintiff'") (internal citation omitted); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("Foremost among these considerations, however, is the benefit obtained for the class."). The *Hensley* Court explained that if the plaintiff there had "prevailed on only one of their six general claims . . . a fee award based on the claimed hours ***clearly would have been excessive***." 461 U.S. at 436 (emphasis added). *See also Costco Wholesale Corp. v. Hoen*, 538 F.3d 1128, 1132 (9th Cir. 2008) (remanding on the issue of the proper amount of attorneys' fees to award after partial reversal of plaintiffs' antitrust claims).

The finding of "excellent results" in this case by the magistrate and the district court was fatally flawed from the beginning, because it was impermissibly focused on the success of plaintiffs' ***lawyers***, not on plaintiffs themselves. The magistrate believed excellent results obtained from attaining "unprecedented success in the antitrust field" by "defeating a behemoth like the NCAA" in an "adventurous, risky suit." ER122-23. Likewise, the district court justified its

finding of "excellent results" by observing that "the decision obtained by Plaintiffs 'is the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws,'" ER9-10, even though that ruling came before this Court reversed the district court's decision in significant part. Plaintiffs make the same error. Pl.Br. at 50.

It may very well be that plaintiffs' lawyers set out to attain "unprecedented success in the antitrust field," but that was never a form of relief sought by plaintiffs themselves. "[W]hen evaluating a plaintiff's overall success, we must compare the form and extent of the relief sought to the relief the plaintiff actually obtained." *Project Vote/Voting for Am., Inc. v. Dickerson*, 444 F. App'x 660, 662 (4th Cir. 2011). What, then, did ***plaintiffs*** actually obtain as a result of this litigation? They sought hundreds of millions of dollars in class-wide damages, as well as individual damages for the named plaintiffs. They failed to certify a damages class, abandoned their individual damages claims and their claims for unjust enrichment and accounting, and recovered nothing. NCAA Br. at 45. And after presenting their post-collegiate group licensing claims at trial – the only claim remaining from the 2009 plaintiffs' case – the district court ruled against them, finding no harm to competition. ER226-30.

And the novel portion of the injunctive relief ordered by the district court – which would have allowed student-athletes to be paid cash sums beyond their

educational expenses – was reversed by this Court. ER91. That leaves a decision awarding only a narrow, ineffectual injunction, which confers no tangible benefit on the class, and which reaffirms the long-standing principle "that the NCAA's amateurism rule has procompetitive benefits." ER92. Plaintiffs did not obtain "excellent results" here; rather, the NCAA cemented further its legitimate commitment to amateurism. By any objective measure, their success was significantly limited, particularly when compared to the litigation as a whole. *See Farrar*, 506 U.S. at 120–21 (when "'the net result achieved is so far from the position originally propounded ... it would be stretching the imagination to consider the result a 'victory' in the sense of vindicating the rights of the fee claimants'") (O'Connor, J., concurring).

Plaintiffs misread this Court's precedent in arguing that the "inquiry is not based on relief a plaintiff *did not* obtain, but rather on an evaluation of the result the plaintiff *did obtain*." Pl.Br. at 51 (emphasis in original).[7] On the contrary, this Court has held that the inquiry indeed largely depends on comparing what the

[7] Similarly, plaintiffs cite *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 784 (1989) for the faulty proposition that "the Supreme Court has rejected the suggestion that a fee award depends on whether the plaintiffs succeeded on a 'central' rather than a collateral issue at trial." Pl.Br. at 57. Plaintiffs mix apples and oranges, as the issue in *Texas State Teachers Ass'n* was not whether the plaintiff's fees were reasonable in light of the degree of success achieved, but whether plaintiff could be considered prevailing party at all. *Id*. at 784 ("We must decide today the proper standard for determining whether a party has "prevailed" in an action brought under certain civil rights statutes.").

plaintiff sought but failed to obtain. *Klein v. City of Laguna Beach*, 810 F.3d 693, 700 (9th Cir. 2016) ("This comparative analysis matters because, as discussed above, 'the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.'" (internal citations omitted). "This makes good sense," this Court explained, because "[a] plaintiff who 'asked for a bundle and got a pittance' has not achieved success in that he did not reach the goal sought." *Id*. (internal citations omitted). Counsel here sought a revolution, but instead succeeded only in reaffirming the legality of amateurism.

Unable to demonstrate a degree of success meriting a full fee award, plaintiffs attempt to justify their fees by engaging in the fantastical and wholly speculative exercise of quantifying the extraneous benefits of the injunction. Citing Justice O'Connor's concurrence in *Farrar*, plaintiffs argue that consideration of additional factors including "significance of the legal issue" and "accomplish[ment of] some public goal" weigh in favor of a full fee award.

Plaintiffs are mistaken. This Court applies the O'Connor factors in only very limited circumstances: *i.e.*, litigation (generally in the civil rights context) in which the plaintiff seeks significant monetary relief but wins only nominal damages. *See, e.g.*, *Klein*, 810 F.3d at 698–99 ("the Supreme Court has created a narrow exception to the standard *Hensley* procedure" for cases where "a plaintiff 'seeks compensatory damages but receives no more than nominal damages'"); *Mahach-*

Watkins v. Depee, 593 F.3d 1054, 1059 (9th Cir. 2010) ("We have approved of the consideration of these factors in nominal damages cases."). *See also Gray ex rel. Alexander v. Bostic*, 720 F.3d 887, 894 (11th Cir. 2013) ("Other factors . . . go into determining whether a plaintiff's victory is substantial enough to make it one of those *unusual* nominal damages cases where the defendant is required to pay the plaintiff's attorney's fees."). Indeed, the three cases cited by plaintiffs in support of this position all involved the award of nominal damages in civil rights litigation. *See* Pl.Br. at 53. The district court did not weigh these factors, and plaintiffs provide no legal basis why this Court should deviate from the standard *Hensley* analysis now.

Even if this Court were inclined to consider the additional O'Connor factors, however, they do not support awarding plaintiffs' requested fees. Plaintiffs significantly overstate the importance of the legal issue involved and profoundly misinterpret the purported public benefits their "victory" brought.

Plaintiffs first argue that they are entitled to a full fee essentially because their case demonstrated that the NCAA's amateur rules were subject to antitrust scrutiny. This is hardly a novel concept, however; the NCAA has been engaged in near-continuous litigation over the legality of its amateurism rules since *Board of*

Regents.[8] Because the limited NIL result here was different than all past cases does not in any way reflect on the "importance of the legal issue." *See, e.g., Benton v. Oregon Student Assistance Comm'n*, 421 F.3d 901, 907–08 (9th Cir. 2005) (district court's conclusion finding of a constitutional violation did not "justify the imposition of fees"); *Maul v. Constan*, 23 F.3d 143, 146–47 (7th Cir. 1994) ("The public purpose prong of *Farrar* is, in other words, not satisfied simply because plaintiff successfully establishes that his constitutional rights have been violated. Something more is needed."). If anything, plaintiffs' case proved just the opposite of what they are arguing. As many – indeed all – courts before it had done, this Court recognized that "amateurism is likely to be procompetitive," ER42, and held that the NCAA could continue to set the limits of student-athlete financial aid at where it had always set it – legitimate educational expenses. ER91-92.

Plaintiffs also seek to take credit for the recent *GIA* settlement, making the entirely unsupported claim that it was their trial victory that "paved the way" for

[8] 468 U.S. 85 (1984). *See also, e.g., In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005); *White v. Nat'l Collegiate Athletic Ass'n*, No. CV 06-999-RGK MANX (C.D. Cal.); *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 112CV01019TWPDKL, 2016 WL 1270087 (S.D. Ind. Mar. 31, 2016); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2012); *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815 (M.D. Tenn. 2015) *affirmed by Marshall v. ESPN*, No. 15-5753, 2016 WL 4400358 (6th Cir. Aug. 17, 2016); *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig* ("*GIA*"), No. 14-MD-2541 (N.D. Cal.); *Deppe v. Nat'l Collegiate Athletic Ass'n*, No., 1:16-cv-00528-TWP-DKL (S.D. Ind.); *Pugh v. Nat'l Collegiate Athletic Ass'n*, No. 1:15-cv-1747-TWP-DKL (S.D. Ind.); *Vassar v. Nat'l Collegiate Athletic Ass'n*, No. 1:16-CV-10590 (S.D. Ind.).

the damages settlement in that case, Pl.Br. at 55, something the *GIA* plaintiffs would likely be surprised to learn. As the motion for preliminary approval of the *GIA* settlement indicates, not only was the *GIA* litigation filed 5 months before the district court even issued its opinion in this case, but the *GIA* plaintiffs, ***not plaintiffs here***, "litigated extensively to develop facts, economic theories, and damages modeling in support of their claims"[9] and negotiated the settlement for which ***they*** will seek fees.

Plaintiffs also inaccurately claim this litigation "opened doors for further antitrust scrutiny of the NCAA's practices in federal court." Pl.Br. at 54. Here again, plaintiffs offer nothing but unsupported speculation. *Cf. Maul*, 23 F.3d at 146 ("his claim here that his victory deterred future violations by the defendants or others is conjectural."). Indeed, cases filed after the district court ruled indicate that the opposite is true. For example, a mere two months after the district court's decision here, a group of current and former student-athletes in Tennessee, emboldened by the district court's ruling, sued several NCAA conferences and broadcast networks, challenging the NCAA's amateurism rules and alleging that defendants unlawfully conspired to fix the amount student-athletes are paid for NIL rights "at zero or, at most, their 'cost of attendance.'" *Marshall*, 111 F. Supp. 3d at 821. The Tennessee district court emphatically rejected their claims,

[9] *GIA* Dkt.560 at 1.

however, dismissing the entirety of their complaint and again reaffirming the legality of the NCAA's commitment to amateurism. *Id*. at 833-34, *affirmed by Marshall*, No. 15-5753, 2016 WL 4400358, at *1.

Also after this Court issued its mandate in this case, defendants in *GIA* moved for judgment on the pleadings. *GIA* Dkt.245. Although the district court denied that motion, it reaffirmed that this Court's holding essentially "forecloses one type of relief [cash compensation untethered to educational expenses] Plaintiffs previously sought." *Id*. at 5. In other words, this Court's opinion all but assures that future antitrust challenges to the NCAA's amateur rules prohibiting pay-for-play will not likely succeed.

Plaintiffs also claim their fees are reasonable because the "record reveals five years of intense litigation." Pl.Br. at 58. But plaintiffs cannot convert an otherwise unreasonable fee request simply by claiming their opponent litigated vigorously. The lodestar method properly accounts for a prevailing party's fees, but ***only after*** the plaintiff demonstrates their claims are related and the degree of success merits a full fee award. *Schwarz*, 73 F.3d at 901.

Finally, plaintiffs ignore what is likely the clearest indicator of the district court's error: the fact that both the magistrate and the district court adopted an all-or-nothing approach in determining plaintiff's eligibility for fees. *See* ER123 (seeking attorneys' fees is like "'play[ing] the game of thrones, you win or you die.

There is no middle ground.'") (internal citation omitted). The magistrate and the district court appear to have reduced the reasonableness inquiry under *Hensley* to a simple, binary choice: win and get everything; lose and get nothing. That was error. *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805, 810 (9th Cir. 1994) ("It is an abuse of discretion for the district court to award attorneys' fees without considering the relationship between the 'extent of success' and the amount of the fee award."); *Fox v. Vice*, 563 U.S. 826, 835 (2011) ("Fee-shifting . . . is not all-or-nothing . . ."). *Hensley* demands that district courts determine whether plaintiffs attained a degree of success warranting the award of fees. The district court's analysis, however, all but skipped this requirement, essentially rendering *Hensley* a dead letter. Plaintiffs clearly did not attain the results they sought, and their lack of results demands a significant fee reduction.

III. INADEQUATE DE NOVO REVIEW

Throughout this litigation, and here again, plaintiffs cite *Hensley's* statement that fee disputes "should not result in a second major litigation." Pl.Br. at 61, citing *Hensley*, 461 U.S. at 437. But "unsurprisingly, they sometimes do, and the instant case is one such example." *Ibrahim*, 835 F.3d at 1052. The prolonging of this dispute is largely of plaintiffs' own making, in large part because their billing records fall far short of providing the detail necessary to justify their grossly inflated fee request. And while the NCAA understands that the district court is not

obligated to "set forth an hour-by-hour analysis of the fee request," *Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992), its findings still "must go beyond the conclusory." *Gracie v. Gracie*, 217 F.3d 1060, 1070 (9th Cir. 2015). As the Supreme Court observed, "litigation is messy, and courts must deal with this untidiness in awarding fees." *Fox*, 563 U.S. at 834. The district court has not adequately dealt with the "untidiness" of plaintiffs' request, and that was error which requires reversal.[10]

Plaintiffs suggest that they are relieved of their obligation to prove the reasonableness of their requested fees. *See* Pl.Br. at 65, citing *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) ("plaintiffs are not required to 'record in great detail how each minute of . . . time was expended) and *Fox*, 563 U.S. at 838 ("trial courts need not, and indeed should not, become green-eyeshade accountants"). The NCAA does not demand minute by minute time records, nor does it expect the district court to become a "green eye-shade accountant." But plaintiffs must "document[] appropriate hours expend[ed] in the litigation," *Welch v. Metro Life Ins. Co.*, 480 F.3d 942, 948 (9th. Cir. 2007), and "[w]here the documentation of hours is inadequate, the district court may reduce the award

[10] Plaintiffs begin with the assertion that the NCAA "did not even attempt to show that any of the District Court's findings are illogical, implausible, or without support in the record." Pl.Br. at 65. This makes no sense. Not only did the NCAA identify specific instances of the district court's erroneous findings, *see* NCAA Br. at 53, the NCAA argues that the district court's findings of reasonableness were conclusory and unsupported by plaintiffs' submitted billing records.

accordingly." *Hensley*, 461 U.S. at 433. Plaintiffs' records are inadequate because they are largely block-billed and/or vague, or reveal that they seek fees they are not entitled to, and the district court made no reductions to reflect the plainly insufficient evidence submitted by plaintiffs.

Plaintiffs' block-billing presents one of the most troubling aspects of their fee request, not least because there were approximately 13,000 block-billed entries accounting for nearly $23 million in requested fees. The district court's finding that every single one of these 13,000 entries contained "enough specificity as to individual tasks to ascertain whether the amount of time spent performing them was reasonable" is implausible. ER14. This is particularly true given that the very example cited by the district court in support of its finding contained insufficient detail. ER14-15. As noted in the NCAA's opening brief, the deficiency in plaintiffs' block-billed entries, like the one discussed by the district court, lies not in the description of the tasks, or even the tasks themselves. Rather, because of the block-billing, there is no way to determine whether ***the individual amounts of time*** devoted to each one of those tasks was a reasonable amount of time for that particular task. See NCAA Br. at 53.[11]

[11] Plaintiffs state that they are unable to locate any cases "where this Court reversed a district court solely because it declined to reduce block-billed fees." Pl.Br. at 67. In fact, this Court did so recently. *See Family PAC v. Ferguson*, 564 F. App'x 341, 342 (9th Cir. 2014) ("The district court erred, however, by awarding fees [for bills containing] a flat 10 hours for each of three days" and finding this

This Court discussed a closely analogous problem in *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614 (9th Cir. 1993). There, the Court set aside the award of attorneys' fees after the district court "awarded the fees without elaboration." *Id*. at 623. The Court further explained the principle problem arises when "the requesting party submits mere summaries of hours worked." *Id*. Much like plaintiffs' block-billed entries here, these billing summaries "made it very difficult to ascertain whether the time devoted to particular tasks was reasonable and whether there was improper overlapping of hours." *Id*.

Plaintiffs must prove their fees are reasonable. But they block-billed half their entries, submitted vague records, and requested fees (such as media-related activities and fees for plaintiff solicitation) that they are not entitled to. Despite this, the district court awarded practically all of their fees. That was error which requires reversal.

CONCLUSION

Congress allows fee-shifting to compensate "substantially prevailing" parties, not to reward lawyers for obtaining no meaningful relief for anyone while simultaneously reaffirming the NCAA's commitment to amateurism and aid tethered to educational need. It was "never intended to 'produce windfalls to

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scheme troubling because "First, it would seem to allow for recovery of 10 hours of work even on days in which lawyers actually worked or traveled fewer than 10 hours. Second, ***it is lacking in specificity as to what tasks were performed (or travel occurred) during what periods of time***.") (emphasis added).

attorneys.'" *Farrar*, 506 U.S. at 115. The NCAA respectfully requests that the Court determine that plaintiffs are not substantially prevailing parties and are therefore not entitled to any attorneys' fees or costs. In the alternative, the NCAA respectfully requests that the Court significantly reduce plaintiffs' requested fees and costs to account for their lack of success, for failed unrelated claims, and for lack of adequate documentation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) and Ninth Cir. R. 32-1(b) in that, according to the word-count feature of the word processing system in which the brief was prepared (Microsoft Word), the brief contains 6,989 words, excluding the portions exempted by Rule 32(a)(7)(B). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification to the email addresses registered.

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