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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL

NATIONAL STRENGTH AND CONDITIONING ASSOCIATION, Plaintiff, v. GREG GLASSMAN; RUSSELL BERGER; RUSS GREENE; CROSSFIT, INC. a Delaware Corporation; and DOES 1 through 20, inclusive, Defendants.	Case No. 37-2016-00014339-CU-DF-CTL **OBJECTION TO DISCOVERY REFEREE'S ORDER NO. 6 RULING RE: DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS PURSUANT TO C.C.P. § 643(c); MEMORANDUM OF POINTS AND AUTHORITIES** The Hon. Joel R. Wohlfeil Complaint Filed: May 2, 2016 Trial Date: June 1, 2018

TO DEFENDANTS AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on Plaintiff NATIONAL STRENGTH AND CONDITIONING ASSOCIATION ("NSCA") will and hereby does state its objections to the Discovery Referee's Order No. 6 Ruling Re: Discoverability of Identity of Peer Reviewers Pursuant to *Code of Civil Procedure*, § 643, subdivision (c).

Pursuant to *Code of Civil Procedure*, § 644(b), the Court must independently consider the

Discovery Referee's findings, the following objections, and any responses thereto:

1. In balancing Defendants GREG GLASSMAN; RUSSELL BERGER; RUSS GREENE; and CROSSFIT, INC.'s (collectively, "CrossFit") right to discover the identity of peer reviewers, the Discovery Referee failed to take into account the severe intrusion of the peer reviewers' First Amendment rights, which weigh heavily against disclosing their identities. *See Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163 (N.Y.E.D. 1988) (balancing not only litigant's need for discovery, but also the fundamental impact upon first amendment rights of freedom of third party academics);*Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1988) (same); *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1987) (same); *see also Humane Society of U.S. v. Superior Court*, 214 Cal.App.4th 1233, 1264 (2013) ("Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses.") (quotation omitted).

2. In determining that the balancing of interests weighed in favor of disclosure of the identities of the peer reviewers, the Discovery Referee made erroneous factual findings as to "credible evidence of fraud." The Discovery Referee's conclusions were based in part on improper reliance on an order issued by Judge Sammartino of United States District Court for the Southern District in the separate federal matter, in which the district court ordered "issue sanctions," and in part on Defendants mere speculation that the peer reviewer's *identities* are relevant and necessary to CrossFit's defense. Defendants have already discovered the peer review *process* for the Devor Article and have shown no legitimate or compelling need for the *identities* so as to infringe upon the peer reviewers' First Amendment rights.

3. Given the great intrusion to the peer reviewers' First Amendment rights if disclosure is nonetheless ordered, the Court should not adopt the Discovery Referee's ruling that "[t]he information is to be produced under the protective order but not under any designation such as 'for attorney's eyes only'." (Order at p. 10, fn.3.) Less intrusive means of disclosure are available to safeguard the peer reviewers' identities given that the parties can designate this information as "attorney's eyes only" so as to prevent any dissemination of the identities and maintain confidentiality.

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This Objection is based on the attached Memorandum of Points and Authorities, the Declaration of Kenneth S. Kawabata filed concurrently herewith, all of the pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to its ruling.

DATED: December 15, 2017

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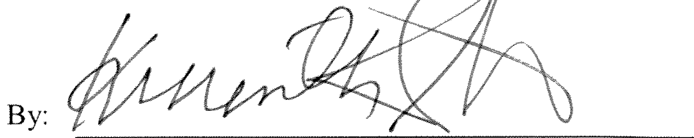

By: ______________________
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 5, 2017, Discovery Referee, the Honorable William McCurine, Jr., issued Order No. 6 Ruling Re: Discoverability of Identity of Peer Reviewers (hereinafter, the "Order"). In that Order, the Discovery Referee compels Plaintiff NATIONAL STRENGTH AND CONDITIONING ASSOCIATION (hereinafter, "NSCA") to disclose the identities of the peer reviewers of the Devor Article, the subject of this lawsuit, without having considered of the substantial fundamental rights at issue. (See Ex. A [Order No. 6].) Disclosure of the identities of the peer reviewers, however, will greatly invade important First Amendment rights and cripple the ability of NSCA to publish future scholarly articles. Further, the Order is based on erroneous factual conclusions, as Defendants GREG GLASSMAN; RUSSELL BERGER; RUSS GREENE; and CROSSFIT, INC.'s (collectively, "CrossFit") have not and cannot make a showing that their need to discover the *identities* outweigh the fundamental rights at issue here; CrossFit has already discovered the peer review *process* and there simply is no need for the identities of the individual peer reviewers. Finally, if the Court is nonetheless inclined to order disclosure of the identities, the Discovery Referee's limit on protection is erroneous, as there are legitimate concerns necessitating "Attorney's Eyes Only" designation at this juncture of the litigation.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties' Lawsuits

On May 12, 2014, CrossFit filed suit against the NSCA in the United States District Court, Southern District of California (the "Federal Action"). CrossFit's operative complaint alleges violations under the federal Lanham Act and asserted various state law claims, including violation of the Unfair Competition Law and trade libel, based on the NSCA's publication of the Devor Article. The claims in the Federal Action arise from an article published in The Journal of Strength and Conditioning Research ("JSCR"), which is a publication owned by the NSCA. The subject article was written by Dr. Steve Devor, a professor at Ohio State University, and his team of graduate students. The scholarship piece was the result of a study performed by the graduate students at a CrossFit gym in Columbus, Ohio. The study tracked the efficacy of a ten week

CrossFit regiment. The article (referred to as the "Devor Article") was submitted by the Devor group to the JSCR in June of 2012 for potential publication. Before publishing articles, such as the Devor Article, the JSCR conducts peer review and, after a rigorous double-blind peer review by academics and scholars, the JSCR published the Devor Article. After publication (and after CrossFit filed suit), it came to light that there had been an issue as to a limited aspect of the data gathered by the Devor group in conducting the study. The NSCA thereafter issued an erratum addressing this minor aspect of the study.

Prior to and after the Federal Action was filed, CrossFit attacked (and continues to attack) NSCA on social media, making certain statements that essentially accused the NSCA of committing fraud and spreading lies about CrossFit in relation to the Devor Article, among other accusations. Based on this conduct, the NSCA filed this separate action in the San Diego Superior Court against CrossFit and certain individuals for defamation and trade libel (the "State Action").[1] The parties stipulated to have a Discovery Referee pursuant to *Code of Civil Procedure*, § 638 and elected to have the Honorable William McCurine, Jr. preside over discovery matters. In so stipulating, the parties maintained their right to object to the Discovery Referee's rulings and/or findings of fact.

B. CrossFit's Motion to Compel Discovery Regarding The Peer Review Process and the Selection of the Peer Reviewers

CrossFit moved the Discovery Referee to compel NSCA's discovery responses to various requests, including the identities of the peer reviewers, at issue here. CrossFit argued that such information was relevant and necessary to their defense that CrossFit did not defame NSCA in various ways and on various social media outlets because, CrossFit claims,"[a]t the center of these and nearly all of the other allegedly defamatory statements (as well as the Federal Case) is the process used by the NSCA to coerce and inject false injury data about CrossFit training into the so-called Devor Article." (Ex. B [CrossFit's Letter Brief, dated October 20, 2017], at p. 4.)

[1] The briefing and supporting materials are extensive encompassing over a thousand pages. NSCA proposes providing the court with the relevant portions for review.

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CrossFit relied much on the Federal Action, including pointing to two orders issued in that action: (1) the district court's grant of CrossFit's motion for partial summary judgment in which that court found *only* that the injury data of the Devor Article was false, not that *anyone knew* of the falsity; and (2) the sanctions order entered against NSCA, in which the district court imposed "issue" and "adverse inference" sanctions. (Ex. B, at pp. ; see *id.* at p. 13["Here, the Federal court's Summary Judgment Order on falsity and the Sanctions Order surpasses mere allegations of fraud or misconduct."]; Ex. D [CrossFit's Letter Brief, dated November 3, 2017], at pp. 3, 12-13.) But these orders in no way made factual determinations that the peer review process was fraudulent, which would open the door to the discovery CrossFit now seeks. In contending disclosure was appropriate, CrossFit argued that there is no peer review privilege and, without stating any basis, that "there is no legitimate confidentiality concern that justifies withholding the requested information." (Ex. B at pp. 11-12.)

In its opposition, while NSCA agreed there is no legally established "peer review privilege," NSCA directed the Discovery Referee that it must apply a balancing test that is separate and apart from a privilege analysis. Citing several analogous and instructive decisions, NSCA contended that the balancing of the interests of the parties and, specifically, the third-party academics outside of the litigation, weigh in favor of maintaining confidentiality because, at a minimum, confidentiality is required to prevent any "chilling effect" on candid peer review. (Ex. C [NSCA's Letter Brief in Opposition, dated October 27, 2017], at pp. 4-6.) Indeed, as the courts concluded in the cited cases, in such situations, seeking to invade "academic freedom" may seriously implicate first amendment rights. *See Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163 (N.Y.E.D. 1988). NSCA therefore contended that to the extent there is *any* relevance as to the peer reviewers' *identities* in this case (which NSCA contends there is not), NSCA's compelling interest to maintain confidentiality of its peer reviewers' identities outweighs any need for CrossFit to obtain that information, especially because CrossFit has already discovered the peer review process. There is simply no need to disclose the identities. Less intrusive means are available. (Ex. C, at p. 6-7.)

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C. **The Discovery Referee's Order No. 6 Ruling Re: Discoverability of Identity of Peer Reviewers**

After hearing oral argument on November 15, 2017, the Discovery Referee took the "peer review" issue under submission. On December 5, 2017, the Discovery Referee issued its order compelling NSCA to disclose the identity and contact information of the peer reviewers of the Devor study and that "[t]he information is to be produced under the protective order but not under any designation such as 'for attorney's eyes only'." (Ex. A, at pp. 9-10.) In coming to its order, the Discovery Referee found there was "a credible allegation of fraud" relevant to this case based in large part on the federal district court's sanctions order which issued certain issue and adverse inference sanctions against NSCA in the Federal Action, which deemed certain facts as established, and based on the unsupported view that "CrossFit has produced evidence that the NSCA wrongly influenced the Devor study in a way that compromised the integrity of the peer review process." (Ex. A, at p. 5-7.) Based on the conclusion of "a credible allegation of fraud," the Discovery Referee incorrectly relied upon *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), and concluded "the fact that the claim of fraud is 'credible' is sufficient for balancing regarding the discovery issue." (Ex. A, at p. 6-7.) Absent from the Order is any meaningful consideration of the severe intrusion of First Amendment rights, which weigh heavily against disclosing the identities of the peer reviewers.

III. ARGUMENT

A. **Under *Code of Civil Procedure*, Section 644, Subdivision (b), the Court is to Independently Consider the Discovery Referee's Findings Ruling**

The Court may not "abdicate[] its judicial responsibility by simply entering an order on the referee's report as though it were a binding decision of the court itself." *Rockwell Internat. Corp. v. Superior Court*, 26 Cal.App.4th 1255, 1270 (1994) (citing *Aetna Life Ins. Co. v. Superior Court*, 182 Cal.App.3d 431, 435-436 (1986)). "The referee's factual findings are advisory recommendations only; they are not binding unless the trial court adopts them." *Lopez v. Watchtower Bible & Tract Society of New York*, Inc., 246 Cal.App.4th 566: 588-89 (2016) (citing *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 176;§ 644, subd. (b)). The Court must

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therefore "'independently consider[] the referee's findings and any objections and responses thereto filed with the court.'" *Id.* (quoting § 644, subd. (b); *Marathon Nat. Bank v. Superior Court*, 19 Cal.App.4th 1256, 1261 (1993)). The legislature made clear that in reviewing referees' recommendations, nothing in Section 643 "is intended to deprive the court of its power to ... modify or disregard the referee's recommendations, and this overriding power may be exercised at any time, either on the motion of any party for good cause shown or on the court's own motion.."

B. The Discovery Referee Did Not Give sufficient Consideration to the Severe Intrusion of First Amendment Rights in Compelling Disclosure of the Identities of Peer Reviewers of Academic Scholarship

In balancing CrossFit's right to discover the identity of peer reviewers, the Discovery Referee failed to take into account the severe intrusion of the First Amendment rights and "academic freedom" at issue, which weigh heavily against disclosing their identities. *See Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163 (N.Y.E.D. 1988) (balancing not only litigant's need for discovery, but also the fundamental impact upon first amendment rights of freedom of third party academics); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1988) (same); *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1987) (same); *see also Humane Society of U.S. v. Superior Court*, 214 Cal.App.4th 1233, 1264 (2013) ("Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses.") (quotation omitted). Absent from Order No. 6 is *any* consideration of the potential invasion upon fundamental rights, such as First Amendment rights relevant here, necessitating a higher showing of relevance. *See Solarex*, 121 F.R.D. 163 (adopting higher relevancy standard when considering whether to compel identity of peer review sought in discovery).

As NSCA argued to the Discovery Referee, this Court must undertake and evaluate the competing legitimate interests for and against disclosure: In balancing CrossFit's supposed need to compel disclosure of the peer reviewers' identities against NSCA's "assertion that the discovery will intrude upon protected first amendment rights ..., a court must not only weigh the litigant's need for discovery ... but also must carefully consider the seriousness of [that] intrusion ....

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Obviously, the more fundamental the impact upon the first amendment rights ..., the greater the need for discovery must be before a court will order an intrusion." *Solarex*, 121 F.R.D at 172 (quoting *Tavoulareas v. Piro*, 93 F.R.D. 35, 41 (D.D.C. 1981)).

Relying on federal cases such as *Solarex*, 121 F.R.D. 163 ; *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.,* 71 F.R.D. 388, 389-90 (N.D. Cal. 1976); and *Dow Chemical*, 672 F.2d 1262, NSCA argued that independent peer review in scholarship, such as at issue here, requires confidentiality to preserve the integrity of the peer review process. *See Solarex*, 121 F.R.D. at 174. Without confidentiality and disclosing identities of peer reviewers would invade the "academic freedom" recognized under the First Amendment and have "a 'chilling effect' on candid peer evaluations in the future. " *Id.*; *see also Dow General* 672 F.2d 1262 and *Cusumano*, 162 F.3d 708. Indeed, when the California Court of Appeal was confronted with a similar question—whether disclosure of documents pertaining to prepublication communications and deliberations relating to an academic study should be compelled, the Court of Appeal expressly recognized and adopted the federal view: "We are not the first court to recognize the chilling effect disclosing prepublication research communications could have on academic research or the negative impact such disclosure would have to the quantity and quality of studies and reports produced for the public by that research." *Humane Society*, 214 Cal.App.4th 1233, 1263.

An analogous case instructs the Court that it should deny disclosure of the identities of the peer reviewers. In *Solarex*, 121 F.R.D., the defendant sought to compel a publisher to disclose the identity of an independent peer reviewer who evaluated a manuscript for publication. *Id.* at 166. The court there balanced the parties' interests, and held that independent peer review is important because it contributes to the advancement of science. *Id.* at 171. Additionally, the court recognized (as is this case here) that "the journals' editors may not themselves possess sufficient expertise to evaluate critically the merits of scientific manuscripts in the diverse and complex areas covered by [its] publications." *Id.* at 170. And the court in no uncertain terms concluded that disclosing the identity of reviewers would inhibit rigorous scrutiny of articles and produce a "chilling effect" on candid peer evaluations in the future. *Id.* at 180. Finally, the Court noted that the information sought were from individuals not parties to the present litigation, which made it

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more likely that production of the requested material would unduly burden the publisher. *Id.* at 179.

When then weighing the defendants' noted relevance against the important rights of the peer reviewers and the significant interests of the peer review process itself, the court concluded defendants had not made a sufficient showing, as compelling disclosure would indulge in defendants' speculation and ignore defendant's failure "to demonstrate more than a minimal level of 'need'." *Id.* at 175-80. The court also rejected defendant's suggestion that a protective order would suffice to adequately safeguard the important interests at issue: "the disclosure sought, even limited to the context of this litigation, would, as indicated above, carry a risk that the [journal's] peer review process will be jeopardized. " *Id.* at 180.

The exact same public policies underlying the federal courts' decisions apply here, and while the Discovery Referee references the balancing test utilized in *Solarex*, the Discovery Referee failed to appreciate the great interests in protecting First Amendment rights at issue here. Indeed, the Devor Article—like other JSCR articles—was subject to a double-blind peer review in which the authors did not know the identity of the reviewers, and vice versa. And here, the peer reviewers were unpaid volunteers who agreed to conduct a review of the Devor Article for academic reasons. In order to conduct objective, candid reviews, it is a primary factor for the peer reviewers not to have their identities disclosed, nor does the peer reviewers expect their identities to be disclosed.

Revealing the identities of the Devor Article's peer reviewers, even if only to the parties in this litigation, will inhibit future reviewers from being candid in their criticism, and will hamper NSCA's ability to attract highly qualified scientists to conduct reviews, especially those who are willing to review on a volunteer basis. Just as the court found in *Solarex*, limiting the disclosure of peer reviewer identities to the parties in the present litigation will not eliminate the risk that potential reviewers will learn that their identities could be disclosed in litigation and could very well jeopardize the future of peer review. "There would thus be a 'chilling effect' on candid peer evaluations in the future." *Solarex*, 121 F.R.D. at 180. Indeed, the JSCR peer review process cannot function if the peer reviewers are identified and subjected to being involved in the litigation

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1 process.

2 The Discovery Referee and CrossFit's reliance on *University of Pennsylvania v. EEOC*, 3 493 U.S. 182 (1990) is misplaced. While that case consisted of "peer review" in the academic 4 realm, it concerned "peer review" of "tenure-file documents," not of peer review information 5 (including the identities) related to academic content. Indeed, the Supreme Court specifically 6 concluded that concerns over "academic freedom" under the First Amendment in *University of* 7 *Pennsylvania* were simply not present as the petitioner itself "does not allege that the 8 Commission's subpoenas are intended to or will in fact direct the content of university discourse 9 toward or away from particular subjects or points of view." *Id.* at 198. Under the facts and 10 circumstances of *University of Pennsylvania*, where the EEOC was investigating employment 11 discrimination, the Supreme Court found no "peer review privilege" or overriding interest to 12 preclude disclosure because "[a] university faced with a disclosure request might well utilize the 13 privilege in a way that frustrates the EEOC's mission." *Id.* at 194. In that context, the Supreme 14 Court concluded: "We are reluctant to 'place a potent weapon in the hands of employers who have 15 no interest in complying voluntarily with the Act, who wish instead to delay as long as possible 16 investigations by the EEOC." *Id.* (quoting *EEOC* v. *Shell Oil Co.,* 466 U.S. 54, 81 (1984)). Here, 17 on the other hand, just as in *Solarex* and other relevant federal cases, at issue is not the potential 18 frustration of a government agency's mission, but the protection of "academic freedom" among 19 private litigants and third parties so as to *not* interfere with content of scholarship discourse and 20 publications.

21 Further, CrossFit's cursory explanations as to why there are no First Amendment concerns 22 in this instant are without merit. (See Ex. D, at pp. 17-18.) CrossFit claims *Solarex* is 23 inapplicable because, according to CrossFit, "[u]nlike the 'fishing expedition' in *Solarex*, CrossFit 24 (in the Motion and this reply brief) and the Federal court (in the Sanctions Order and Summary 25 Judgment Order on falsity) have identified extensive evidence of fraud and scientific misconduct," 26 but as discussed below, CrossFit's supposed identification of extensive evidence of fraud and 27 scientific misconduct is based on its own conjecture and speculation, and the Sanctions Order and 28 Summary Judgment Order in *no way* found, much less conclusively ruled, that NSCA committed

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fraud in its peer review process. Even if evidence attached to CrossFit's motion and reply could support that NSCA committed fraud and/or scientific misconduct as to the article itself, by, for example, manipulating the injury data as CrossFit claims (which NSCA vehemently denies), CrossFit *still* has not pointed to evidence that the peer review process itself was conducted in a fraudulent manner aside from its speculation that Dr. Kraemer "handpicked" the reviewers.

Moreover, any review of *Solarex* establishes that the court's conclusion to preclude disclosure was not based on the moving party's apparent desire to undergo a "fishing expedition." As here, the moving party in *Solarex* wanted to identify any individual that peer reviewed the subject manuscript and then depose that individual, which apparently was only *one* person. 121 F.R.D. at 180 (moving party "seeks to depose only a single reviewer.") The court there noted that compelling that narrow request would still impinge upon the interests of the publication and its need to conduct candid peer reviews. CrossFit cannot dispute that *Solarex* is squarely on point.

Finally, NSCA argued that CrossFit cannot establish any sufficient relevance that would demand compelling disclosure of the identities. CrossFit points to in Paragraph 14(A) of the Complaint, in which NSCA alleges it was defamed by a YouTube video stating that "Peer reviewers for the NSCA's scientific publication are handpicked by Dr. Kraemer." But the relevance of the identities of the peer reviewer are not relevant to prove the truth of the statement that the peer reviewers were handpicked by Dr. Kraemer. The allegation relates to the process by which reviewers were selected, and CrossFit *has* obtained discovery on that issue when it deposed Dr. Kraemer and Dr. Triplett in the Federal Action. CrossFit again deposed Dr. Kraemer on July 25, 2017 in the State Action and he was again examined on the Devor Article. Thus, the information as to how the reviewers were selected has been obtained by CrossFit. Accordingly, there is simply no need, much less a compelling need to compel disclosure of the identities of the peer reviewers and infringe upon important constitutional freedoms, which will unquestionably chill future academic discourse.

C. <u>The Discovery Referee's Factual Findings of "Credible Evidence of Fraud" is Based on CrossFit's Speculation and Conjecture</u>

In determining that the balancing of interests weighed in favor of disclosure of the

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identities of the peer reviewers, the Discovery Referee made erroneous factual findings as to "credible evidence of fraud." It is no surprise that CrossFit takes great liberties in the facts of this case, even where its voluminous exhibits do no support its assertions. Indeed, CrossFit repeatedly relied upon the Summary Judgment order and Sanctions order in the Federal Action to state evidence of fraud is apparent and in fact, proven. The Discovery Referee adopted CrossFit's erroneous presentation.

The Summary Judgment order, for example, *did not* rule on fraud, motive, or even knowledge of the falsity of the injury data used in the Devor Article. The federal court simply ruled on the issue of whether the data was in fact false. The court found it was and entered partial summary judgment on that issue. There were no findings, much less conclusive rulings on fraud. And as to the Sanction's order, the federal court did impose "issue" and "adverse inferences" findings on CrossFit, but these findings were not subject to the rigorous standard on summary judgment nor were these issues presented to a jury. These were imposed based on what the federal court saw as NSCA's misuse of the discovery process.[2] While NSCA cannot turn back the clock on the sanctions, the NSCA has not had its day in court to disprove those facts now "deemed established" for purposes of the Federal Action. The sanctions imposed do not *prove* NSCA committed fraud and/or scientific misconduct.

Further, there is no evidentiary support for many of the Discovery Referee's factual findings, aside from CrossFit's conjecture. Indeed, there is *no* evidence supporting:

(1) "[I]t appears that the critical information in the Devor study was based on information, data, and process that the NSCA knew was unscientific, false and unreliable" prior to the publication of the study, (Ex. A, at p. 7, ¶ 2). This is CrossFit's improper conjecture without citation to credible evidence.

(2) "Dr. Kraemer, as the Editor-in-Chief purposely manipulated events to produce a false and scientifically invalid report injurious to CrossFit and helpful to NSCA." (Ex. A, at p. 7, ¶ 5).

[2] NSCA sought reconsideration of that order, which the federal court denied. If necessary, NSCA intends to appeal that order at the conclusion of the trial court proceedings.

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This is again CrossFit's improper conjecture without citation to credible evidence.

(3) "Dr. Kraemer steered the authors of the Devor study to discuss injuries among CrossFit members," (Ex. A, at p. 7, ¶ 6). While it is true that Dr. Kraemer advised Dr. Devor that inclusion of injury data as visual/corroborating support of Dr. Devor's study would make the article publishable, there is no evidence that Dr. Kraemer's advice was to "steer" and "manipulate" data injury from *someone* else's study;

(4) Russell Berger, who had suspicions that the injury data was questionable, *opined* that Dr. Kraemer "had no concerns about it as far as he was concerned because it had been peer-reviewed." (Ex. A, at p. 7, ¶ 7 [Berger deposition, pgs. 232-233].) Mr. Burger's opinion does not and cannot establish Dr. Kraemer's knowledge of the falsity of the data injury.

(5) "The 16% figure of those who dropped out of CrossFit because of injury or overuse was false." (Ex. A, at p. 8, ¶ 10 [Cinea deposition, pgs. 47-48].) Keith Cinea testified to this *long after* CrossFit commenced the Federal Action and does not establish knowledge *at the time* of publication of the Devor Article.

(6) "The peer reviewers did not test the underlying data in the Devor article to determine ow the authors obtained the information." (Ex. A, at p. 8, ¶ 12 [Cinea deposition, pgs. 47-48].) This fact is true, but there is nothing improper about peer reviewers not testing the underlying data, as this is the stand for the peer review, the reviewers do not test the data in an article that someone else wrote.

(7) "The Devor study is constantly cited in professional journals in a way that is harmful to CrossFit and helpful to the NSCA." (Ex. A, at p. 8, ¶ 13.) This is again CrossFit's improper conjecture without citation to credible evidence.

D. **If the Court is Inclined to Adopt the Discovery Referee's Order, It Should Reject the Discovery Referee's Ruling as to the Level of Protection under the Protective Order**

As discussed above, disclosure of the identities of peer reviewers implicate important constitutional rights. If the Court is nonetheless inclined to order disclosure, NSCA respectfully requests that it do so with the requirement that such information be disclosed pursuant to an

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"Confidential - Counsel Only" designation under the protective order. The NSCA has strong concerns that without such designation CrossFit may disseminate this information, directly or indirectly, via social media or other mechanisms, or use it for broader purposes, if it is made known to the individual defendants. And while the existing protective order provides a mechanism for enforcement against such disclosures, NSCA maintains its belief that less intrusive means are available to achieve the needs of the litigants and goals of peer review in academic settings. The NSCA recognizes that circumstances may change which may allow for reclassification under paragraph 13 of the protective order and, therefore, NSCA in no way seeks to suggest an "Confidential - Counsel Only" designation may not be appropriately challenged at a later date. But at this juncture, the needs to maintain confidentiality of the peer reviewer identities as CrossFit's counsel investigates whether each were "handpicked" by Dr. Kraemer does not warrant further dissemination beyond the attorney's eyes.

IV. CONCLUSION

For the foregoing reasons, the Court should reject the Discovery Referee's ruling and issue an order denying CrossFit's motion to compel disclosure of the identities of the peer reviewers. However, should the Court be inclined to compel disclosure, NSCA respectfully requests that the Court reject the Discovery Referee's ruling as to designation under the protective order and enter an order compelling disclosure pursuant to the protective order with the designation of "Confidential - Counsel Only".

DATE: December 15, 2017

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By: [signature]
Kenneth S. Kawabata
Attorneys for Plaintiff, NATIONAL STRENGTH AND CONDITIONING ASSOCIATION

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is 550 West C Street, Suite 1900, San Diego, CA 92101.

On December 15, 2017, I served true copies of the following document(s) described as **OBJECTION TO DISCOVERY REFEREE'S ORDER NO. 6 RULING RE: DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS PURSUANT TO C.C.P. § 643(c); MEMORANDUM OF POINTS AND AUTHORITIES,** on the interested parties in this action as follows:

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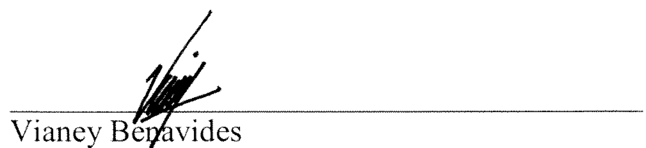
BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Manning & Kass, Ellrod, Ramirez, Trester LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Diego, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address vxb@manningllp.com to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on December 15, 2017, at San Diego, California.



Vianey Benavides

MANNING & KASS
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ATTORNEYS AT LAW