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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
18 **COUNTY OF SAN DIEGO, CENTRAL**

19 NATIONAL STRENGTH AND  
20 CONDITIONING ASSOCIATION,

21 Plaintiff,

22 v.

23 GREG GLASSMAN; RUSSELL BERGER;  
24 RUSS GREENE; CROSSFIT, INC. a  
25 Delaware Corporation; and DOES 1 through  
26 20, inclusive,

27 Defendants.

Case No. 37-2016-00014339-CU-DF-CTL

**RESPONSE TO DISCOVERY**  
**REFeree'S ORDER NO. 9**  
**SUPPLEMENTAL RULING RE:**  
**DISCOVERABILITY OF IDENTITY OF**  
**PEER REVIEWERS PURSUANT TO**  
**C.C.P. § 643(c)**

Date: January 18, 2018

Time: 4:00 p.m.

Dept.: 73

The Hon. Joel R. Wohlfeil

Complaint Filed: May 2, 2016

Trial Date: June 1, 2018

28 **TO DEFENDANTS AND COUNSEL OF RECORD:**

29 **PLEASE TAKE NOTICE THAT** Plaintiff NATIONAL STRENGTH AND  
30 CONDITIONING ASSOCIATION ("NSCA") hereby states its response to the Discovery  
31 Referee's Order No. 9 Supplemental Ruling Re: Discoverability of Identity of Peer Reviewers and  
32 in support of its Objection pursuant to C.C.P. § 643(c).

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. The Discovery Referee's Supplemental Ruling Erroneously Presupposes the Speech at Issue is "Commercial Speech," Subject to Less Protection**

The NSCA agrees with the Discovery Referee that "[t]he right to speak, whether anonymously or otherwise, is not unlimited, [] and the degree of scrutiny varies depending on the circumstances and the type of speech at issue." *Anonymous Online Speakers v. United States Dist. Court (In re Anonymous Online Speakers)*, 661 F.3d 1168, 1173 (9th Cir. 2011). However, the Discovery Referee came to a general conclusion, without evidentiary support, that "the aim of the speech in question was to commercially damage CrossFit while at the same time commercially benefitting the NSCA," and erroneously concluded that the speech is "commercial," which resulted in his conclusion that no First Amendment protection is at issue. (Order No. 9 at p. 9:12-13.) As discussed in the Objection, CrossFit has not identified evidence of fraud and scientific misconduct in its peer review process that the NSCA was aware of so as to commercially benefit NSCA, aside from CrossFit's own speculation. Further, the Sanctions Order (also relied upon by the Discovery Referee), while precluding the NSCA from contesting certain "facts" and "issues" in the federal matter, in *no way* found, much less conclusively ruled, that NSCA committed fraud in its peer review process.

The speech at issue is more akin to standard applicable to journalists. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) ("Academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists.")<sup>1</sup> The fundamental constitutional principles at issue *here* are that without confidentiality, compelling the disclosure of the identities of peer reviewers will invade the "academic freedom" recognized under the First Amendment. Such compelled disclosure will have "a 'chilling effect' on candid peer evaluations in the future. " *See Solarex Corp. v. Arco Solar*,

<sup>1</sup> The Discovery Referee takes great pains to distinguish *Cusumano* from the facts of this case. (See Order No. 9 at 12-14.) Respectfully, the Discovery Referee is incorrect. While the two professors in *Cusumano* were known there whereas the identities of the peer reviewers here are not known, the fundamental principles underlying *Cusumano* apply to this very case: pre-publication academic research, which necessarily includes peer review.

1 *Inc.*, 121 F.R.D. 163, 174 (E.D.N.Y. 1988).; *see also Dow Chemical Co. v. Allen*, 672 F.2d 1262  
2 (1982) and *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *see also Humane*  
3 *Society of U.S. v. Superior Court*, 214 Cal.App.4th 1233, 1263 (2013) ("We are not the first court  
4 to recognize the chilling effect disclosing prepublication research communications could have on  
5 academic research or the negative impact such disclosure would have to the quantity and quality  
6 of studies and reports produced for the public by that research.") .

7 In the Court's independent review, the Court should pay particular attention to the  
8 analogous case *Solarex*, which instructs the Court that it should deny disclosure of the identities of  
9 the peer reviewers. In balancing the parties' interests, the court there concluded that independent  
10 peer review is important because it contributes to the advancement of science, 121 F.R.D. at 171,  
11 and that disclosing the identity of reviewers will inhibit rigorous scrutiny of articles and produce a  
12 "chilling effect" on candid peer evaluations in the future, *id.* at 180. This equally applies here,  
13 especially where the Discovery Referee's supplemental ruling is not based on evidentiary support  
14 that the peer review process itself was infected by fraud or scientific misconduct. Indeed, the  
15 Discovery Referee's supplemental ruling adopts CrossFit's unsupported view that the disclosure of  
16 the *identities* are necessary to CrossFit's defense against the NSCA, while ignoring that CrossFit  
17 has *already* discovered any and all information related to the peer review *process*, including  
18 communications between Dr. Kraemer and the peer reviewers (identities redacted), and still cannot  
19 point to any evidence that the *process* itself was fraudulent or misleading or that Dr. Kraemer in  
20 fact "hand-picked" the reviewers aside from its own conjecture. CrossFit has simply failed to  
21 establish its need for the identities outweighs the public policies to protect the identities of the peer  
22 reviewers. Accordingly, NSCA's objection should be sustained and the Discovery Referee's  
23 Rulings Nos. 6 and 9 rejected.

24 **II. The NSCA Repeats Its Request that if the Court is Inclined to Adopt the Discovery**  
25 **Referee's Ruling Compelling Disclosure of the Identities, the Court Order Such**  
26 **Disclosure for "Attorney's Eyes Only" under the Protective Order**

27 As discussed above and in the Objection, disclosure of the identities of peer reviewers  
28 implicate important constitutional rights that will ultimately infringe upon academic freedoms akin

1 to journalism. But if the Court is nonetheless inclined to order disclosure, NSCA repeats its  
2 request that disclosure be ordered with the requirement that such information be disclosed  
3 pursuant to an "Confidential—For Counsel Only" designation under the protective order. At this  
4 juncture, there is no compelling reason for CrossFit, the party, to learn of the peer reviewers'  
5 identities, while CrossFit's counsel investigates the individuals and their participation in the peer  
6 review. Given certain past events, the NSCA has strong concerns that without such designation  
7 CrossFit may disseminate this information, directly or indirectly, via social media or other  
8 mechanisms, or use it for broader purposes, if it is made known to the individual defendants.  
9 NSCA recognizes that such designation may be appropriately challenged at a later date, and only  
10 asks that such level of protection is afforded during the CrossFit's counsel's investigation.

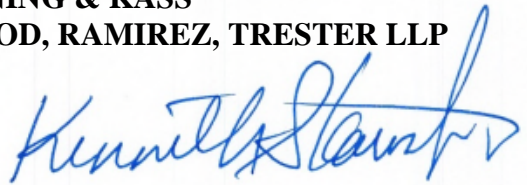
11 **III. Conclusion**

12 For the foregoing reasons and the reasons more detailed in the Objection, the Court should  
13 sustain the NSCA's objection to the Discovery Referee's ruling and issue an order denying  
14 CrossFit's motion to compel disclosure of the identities of the peer reviewers. Should the Court  
15 compel disclosure, NSCA respectfully requests that the Court enter an order compelling disclosure  
16 pursuant to the protective order with the designation of "Confidential—For Counsel Only".

17 DATED: January 8, 2017

**MANNING & KASS**  
**ELLROD, RAMIREZ, TRESTER LLP**

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20 By:



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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.

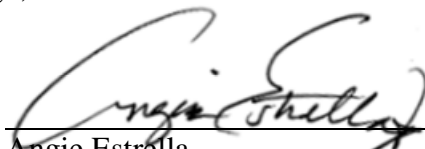
On January 8, 2018, I served true copies of the following document(s) described as **RESPONSE TO DISCOVERY REFEREE'S ORDER NO. 9 SUPPLEMENTAL RULING RE: DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS PURSUANT TO C.C.P. § 643(c)** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY ELECTRONIC SERVICE:** I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at [www.onelegal.com](http://www.onelegal.com).

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

Executed on January 8, 2018, at San Diego, California.

  
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Angie Estrella

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**SERVICE LIST**  
*NSCA v. Glassman, et al.*  
**S.D.S.C. Case No. 37-2016-00014339-CU-DF-CTL**

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Discovery Referee