Troutman Sanders LLP
11682 El Camino Real, Suite 400
San Diego, CA 92130-2092

troutman.com

troutman sanders

Wynter L. Deagle
wynter.deagle@troutman.com

October 20, 2017

VIA EMAIL AND FEDEX

Hon. William McCurine, Jr. (Ret.)
Discovery Referee
6350 Scimitar Drive
San Diego, CA 92114

Re: ***National Strength & Conditioning Association v. Glassman, et al.***
CrossFit's Motion to Compel Responses to Interrogatories and Production of Documents; and for Imposition of Monetary Sanctions

Dear Judge McCurine:

Defendant CrossFit, Inc. ("CrossFit"), hereby moves, pursuant to Code of Civil Procedure ("CCP") §§ 2030.300(a), 2031.310(a) and 2031.320(a), for an order compelling plaintiff National Strength & Conditioning Association ("NSCA") to: (i) respond to CrossFit's Special Interrogatories (Set Two) ("Interrogatories") and Requests for Production of Documents (Set Two) ("RFPs"),[1]; (ii) produce documents responsive to CrossFit's RFPs; (iii) produce documents responsive to CrossFit's Requests for Production of Documents (Set One) ("First Set of Document Requests")[2]; and (iv) provide an executed verification under oath, by a representative of the NSCA, setting forth in detail information concerning the NSCA's search for, and the existence of, documents responsive to the First Set of Document Requests. Finally, CrossFit hereby moves, pursuant to CCP §§ 2030.300(d) and 2031.310(h) and 2023.030(a), for an award of its attorneys' fees and costs incurred as a result of the NSCA's failure to comply with its discovery obligations and its abuse of the discovery process, including the expense incurred in connection with CrossFit's multiple meet and confer efforts and prosecution of this motion.

I. INTRODUCTION AND BACKGROUND

In 2016, the NSCA commenced this defamation case in the midst of defending CrossFit's lawsuit in Federal court to recover damages suffered as a result of the NSCA's widespread efforts to smear CrossFit's reputation in the fitness industry and drive CrossFit, its growing

[1] Copies of all cited Exhibits are included in the Compendium of Exhibits submitted herewith. The NSCA's responses to CrossFit's RFPs is included as Exhibit A. The NSCA's responses to CrossFit's Interrogatories is included as Exhibit B.
[2] The NSCA's Amended Responses to CrossFit's First Set of Document Requests is included as Exhibit C.

troutman sanders

competitor, out of business.[3] This defamation suit – an ill-advised attempt by the NSCA to build leverage against CrossFit in the Federal Case – has only revealed the extent to which the NSCA will go to conceal its fraud on CrossFit, the strength and conditioning industry, and the general public. Based on information uncovered through CrossFit's discovery requests in this case, CrossFit has demonstrated that the NSCA willfully concealed troves of relevant documents and information from CrossFit in the Federal Case. The severe discovery abuses were detailed in a scathing opinion from the District Court awarding heavy sanctions against the NSCA and ordering a full forensic evaluation to determine the full breadth of the discovery violations (the "Sanctions Order").[4] The District Court recently reaffirmed these conclusions in its order denying the NSCA's motion for reconsideration, finding there was "ample evidence" that the NSCA acted in bad faith including by the NSCA's failure to produce numerous responsive documents to CrossFit and though the perjury committed by Mr. Nickolas Clayton, the NSCA's Personal Training Program Manager and "in-house expert" on CrossFit.[5]

Meanwhile, the NSCA's tactics in this case have focused on delay. Soon after filing this case, the parties attended a Mandatory Settlement Conference in the Federal Case and the NSCA discovered its assertion of meritless defamation claims had no persuasive effect on CrossFit. The parties failed to reach a settlement. Unable to simply walk away from its bold claims against CrossFit and its employees here, the NSCA has attempted to slow down this litigation and prevent CrossFit from obtaining relevant discovery, failing to meet deadline after deadline and taking action only when compelled to do so by the Court, after the CrossFit Defendants have expended significant resources. The requests at the center of this motion are illustrative of the NSCA's ongoing and escalating discovery abuse.

II. <u>SUMMARY OF RELIEF SOUGHT</u>

CrossFit seeks an order compelling the NSCA to produce all responsive documents and provide all responsive information in response to the following RFPs and Interrogatories:

- RFPs 71-73 and 76-79 and Interrogatories 36-40 and 42-45, which relate to the NSCA's selection of peer reviewers for the Devor Article published by the NSCA;
- RFP 74 and Interrogatory 41, which relate to certain documents identified in that certain spreadsheet produced by the NSCA, Bates No. NSCAPROD013106;
- RFP 75, which relates to meetings between NSCA representatives and lawmakers;
- Interrogatory 46 (as modified by CrossFit below), which relates to publications where Dr. William Kraemer, the Editor in Chief and Senior Editor of the NSCA's Journal of

[3] The lawsuit is styled CrossFit, Inc. v. National Strength and Conditioning Association, No. 14-CV-1191 JLS (KSC) (S.D. Cal. 2014) (the "Federal Case").
[4] *See generally*, Exhibit D.
[5] Exhibit E at 8-10.

troutman sanders

Strength & Conditioning Research, provided comments to the authors of articles submitted for publication;

- RFP 80 and Interrogatories 47-48, which relate to the NSCA's knowledge regarding which media sources were citing the false Devor Article; and

- All Interrogatories and RFPs for which boilerplate objections were asserted.

In addition, CrossFit seeks an order compelling the NSCA to:

- Provide CrossFit an executed verification under oath, by a representative of the NSCA with sufficient knowledge, containing the following:

  - Affirming the NSCA conducted a reasonable and diligent search for all documents responsive to CrossFit's First Set of Document Requests;

  - Providing a detailed description of all efforts the NSCA made to locate documents that were potentially responsive to CrossFit's First Set of Document Requests of Documents, including, but not limited to, the identification of individuals that participated in the collection, the identification of individuals interviewed to aid the collection, the dates of all actions taken, the electronic and physical locations searched for responsive documents, the method by which electronic searching was performed, and the search terms used to locate potentially responsive documents;

  - Affirming no additional Documents exist that are responsive to the CrossFit's First Set of Document Requests of Documents; and

  - Providing a detailed explanation why no additional Documents exist, including, but not limited to, providing information such as deletion settings on servers, retention policies, etc.

- To the extent additional documents responsive to CrossFit's First Set of Document Requests are located, produce those Documents to CrossFit on or before November 22, 2017.

Finally, CrossFit seeks the imposition of monetary sanctions in the form of its attorneys' fees and expenses incurred in connection with bringing this motion, including the NSCA's failure to meet and confer in a good faith effort to avoid this motion.

III. CROSSFIT IS ENTITLED TO DISCOVERY REGARDING THE PEER REVIEW PROCESS AND THE SELECTION OF THE PEER REVIEWERS (RFPS 74-73, 76-79 AND INTERROGATORIES 36-40, 42-45)

Three of the nine allegedly defamatory statements in the Complaint relate directly relate to the peer review process utilized by the NSCA's Journal of Strength and Conditioning Research's ("JSCR"), including the integrity of the process and the selection of reviewers, specifically:

- A March 9, 2015 YouTube video statement: "Peer reviewers for the NSCA's scientific publication are handpicked by Dr. Kraemer [the editor-in-chief of the JSCR]." *Compl.* ¶ 14A;
- A June 1, 2015 statement: "In 2013 the NSCA knowingly published fabricated injury data about CrossFit. That didn't work, either. CrossFit uncovered the fraud." *Compl.* ¶ 13D; and
- A June 9, 2015 statement: "…. These organizations have all engaged in long-term, systematic, regular, and collaborative fraud—fraud that is scientific, academic, and tortious—in their representatives' collective statements, publications, press releases, and in a paid public-relations campaign against CrossFit." *Compl.* ¶ 13E.

At 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.[6] The Devor Article had quickly became the most popular article in the JSCR's history and the false injury data there inspread like wildfire through magazines (hard copy and online), blogs, professional journals, and social media.

The RFPs and Interrogatories at issue here include certain requests (collectively the "Peer Review Discovery") focused on the entire peer review process undertaken by the NSCA, including the process for selection of peer reviewers, the steps taken in the peer review process, whether any of the peer reviewers had pre-existing biases against CrossFit, the peer reviewers' pre-existing relationships with the NSCA, and whether the peer reviewers were subject to influence by the NSCA. As explained in more detail below, Dr. William Kraemer, the Editor in Chief of the JSCR (and, therefore, the Devor Article) hand-selected a senior editor (Dr. Travis Triplett) with whom he had worked extensively in the past to disparage CrossFit training and directed her to find peer reviewers who would focus on injuries. Further, Dr. Triplett conceded during her deposition that she worked for Dr. Kraemer at the JSCR for over a decade, and during that time she believed Dr. Kraemer hand-selected peer reviewers for all JSCR articles.

---

[6] Michael M. Smith et al., CrossFit-Based High-Intensity Power Training Improves Maximal Aerobic Fitness and Body Composition, Journal of Strength and Conditioning Research, Vol. 27, No. 11 (November 2013) (the "Devor Article").

troutman sanders

The NSCA's responses to the Peer Review Discovery were half-hearted at best[7] and as a result, in both this case and the Federal Case, the NSCA has thus far refused to identify the peer reviewers by name or provide key information regarding the peer review process.

On May 3, 2017, CrossFit sent the NSCA a detailed meet and confer letter identifying the various deficiencies in the NSCA's responses[8] to the Peer Review Discovery; however, over four months later, after the NSCA requested and received an extension to respond to the letter, the NSCA simply reiterated its boilerplate objections to the Peer Review Discovery on two grounds:

> (1) The requests seek "information that is irrelevant and not calculated to lead to the discovery of admissible evidence," and
>
> (2) "the issue related to the peer reviewers has been litigated in the Federal Case (CrossFit, Inc. v. NSCA) and the court there found ***in favor of the privilege*** of the NSCA not to disclose information related to the identities of the peer reviewers." (Emphasis added.) [9]

The NSCA's objections lack merit for at least three reasons. First, the NSCA's repeated use of boilerplate objections are improper. California courts have made it clear that these are "nuisance objection[s]" and that "it is beyond question that" refusal to produce documents based on these objections is "subject to sanction." *Standon v. Superior Court*, 225 Cal.App.3d 898, 901 (1990). Second, the NSCA's relevance objections ignore that the NSCA – the plaintiff who crafted the complaint and commenced this case – put the peer review process directly at issue. The allegedly defamatory statements above place the peer reviewers' identities, the method of their selection, and the NSCA's knowledge of and involvement in the peer review process directly at issue. And third, the NSCA's effort to concoct a peer review "privilege" is not based in law or common practice for the scientific-journal community.

A. Relevant Background: The Two Individuals Overseeing the Peer Review Process Have a History of Working Together to Frame CrossFit Training as Dangerous Without Any Scientific Support

Beginning as early as 2008, Dr. Kraemer was directly involved with the NSCA's efforts to combat CrossFit's growth and increasing market presence. The NSCA and its powerful friends in the fitness community banded together in an effort to regain their market share, particularly among the military and law enforcement community where CrossFit training had become increasingly popular. While the NSCA began directly contributing to a larger campaign to label CrossFit training as unsafe, the NSCA and its counterparts' attacks could not gain traction without an

[7] *See generally*, Exhibits A and B.
[8] Exhibit F.
[9] Exhibit G.

troutman sanders

actual scientific study concluding that CrossFit training is, in fact, more dangerous than other fitness programs.

In 2011, the American College of Sports Medicine ("ACSM") with assistance from the NSCA led the charge against CrossFit training by publishing a "Consensus Paper" labeling CrossFit training as unsafe. The paper, referred to as the "CHAMP Paper,"[10] was authored by, among others, Dr. Kraemer.[11] The CHAMP Paper raised numerous unsubstantiated concerns regarding CrossFit training and concluded that CrossFit training is dangerous.[12] Internal correspondence amongst the CHAMP Paper's authors shows that CrossFit's threat to their certification revenues was at the forefront of the authors' minds in drafting the Paper.[13] For example, email correspondence between several authors warns, "I think we would want to review what the criteria for certification are – I have read educational materials from CrossFit that are not based on science or standard practices. We are working on an alternative certification for DoD thru NSCA and ACSM, but that will take some time."[14]

In addition to Dr. Kraemer, Dr. Triplett also played a key role in the development and publication of the CHAMP Paper,[15] authoring a "White Paper" that evolved into the final CHAMP Paper. For her efforts in reaching these pre-determined (and unscientific) conclusions based on anecdotal information, Dr. Triplett received compensation from the ACSM.[16] Dr. Triplett also served as a key presenter at the CHAMP Workshop, offering "Training Recommendations" to attendees that favored traditional training protocols over the training methods utilized by CrossFit.[17]

In the Federal Case, CrossFit deposed nearly every author of the CHAMP Paper.[18] *All* of these depositions illustrated that the CHAMP Paper had no scientific basis. Indeed, the authors uniformly confirmed that the CHAMP Paper is entirely anecdotal and does not (and cannot) support the proposition that CrossFit training is more dangerous than any other fitness program.

For example, CHAMP Paper co-author Francis O'Connor testified that the Paper was intended to be anecdotal only, noting:

> "for anyone to read this paper and say that this paper says there is more injuries with Crossfit (sic), they're not reading the paper . . . The paper concludes that it's

[10] Exhibit H.
[11] *Id.*
[12] *Id.*
[13] Exhibit I.
[14] *Id.*
[15] Exhibit J at pg. 157:18-22.
[16] Exhibit K.
[17] Exhibit L.
[18] After the NCSA published the Devor Article, the Devor Article has been often cited along with the CHAMP Paper as corroborated evidence that CrossFit training is dangerous. For example, the CHAMP Paper is the first citation injected by Dr. Kraemer into the final version of the Devor Article. The CHAMP Paper was not cited in the original manuscript submitted to the NSCA for peer-review.

troutman sanders

> a gap. We do not know if Crossfit (sic) creates more injuries or less injuries. We don't know."[19]

Mr. O'Connor also confirmed there is no documented evidence suggesting CrossFit training or similar programs increase injury risk.[20] Similarly, CHAMP Paper co-author Walter Thompson testified that the conclusion and related citations supporting the conclusion that CrossFit training and related programs contain a "disproportionate" risk of injury are simply wrong.[21]

The Devor Article was then published in February 2013, falsely claiming that 9 out of 54 participants in a study assessing the effectiveness of CrossFit training were unable to complete the study due to "injury or overuse." To date, the NSCA has refused to fully retract the Devor Article based on the injury data that has been adjudicated in the Federal Case to be false as a matter of law. Despite a mountain of evidence revealing extensive scientific misconduct in connection with the Devor Article – including transcripts of conversations with the underlying study's authors and declarations from the study participants stating they were never injured[22] – the NSCA allowed the fake injury data to saturate the fitness market and harm CrossFit.

In September 2015 (nine months after the participants' declarations *and over 2.5 years after* the false injury data was first cited in the media), the NSCA issued an erratum purporting to address the injury data (the "Erratum"). But, as noted in the Sanctions Order issued in the Federal Case, the NSCA's Erratum contained even more misleading information about CrossFit training. Despite knowing the Erratum was misleading the public,[23] the NSCA took no further action to address the fake injury data.

B. The NSCA's Relevance and Discoverability Objections Lack Merit Because the Integrity of the NSCA's Peer Review Process – or the Lack Thereof – is at the Heart of the Alleged Defamatory Statements

It cannot be seriously disputed that information related to the NSCA's selection of peer reviewers, any pre-existing relationships with such reviewers, and any future communications with such reviewers concerning the erratum or retraction of the false Devor Article relate directly to several alleged defamatory statements. For example, in Paragraph 14(A) of the Complaint the NSCA alleges it was defamed by a YouTube video stating that "***Peer reviewers*** for the NSCA's scientific publication are handpicked by Dr. Kraemer." Dr. Kraemer is the JSCR's Editor in

[19] Exhibit M at pgs. 133:15-25; 135:5-12.
[20] *Id.*
[21] Exhibit N at pgs. 170-171.
[22] In January 2015, the allegedly injured study participants submitted declarations – discussed at length in the federal court's summary judgment order finding the injury data false as a matter of law – confirming they were never injured, never told anyone they were injured, and explaining their reasons for not completing study (e.g., personal and professional scheduling conflicts, moving, etc.) Exhibit O, Federal Case, Dkt. 121 at p. 3-4.
[23] The Sanctions Order discusses how, in the Federal Case, the NSCA concealed email communications where the NSCA's marketing team informed NSCA leadership that the language concerning injuries in the erratum was misleading the public.

troutman sanders

Chief who oversaw and managed the peer review process for the Devor Article. Several other allegedly defamatory statements concerning the NSCA spreading "junk science" or false information about CrossFit—*i.e.*, the false injury data and other false statements—also place the identity of the peer reviewers and the NSCA's (including Dr. Kraemer's) involvement with such reviewers directly at issue.[24]

Throughout the Federal Case, and again in this case, the NSCA has defended its actions by claiming its duties as the "worldwide authority on strength and conditioning" were fulfilled based on the Devor Article's double-blind, "rigorous" peer review process. While the false information in the Devor Article permeated the fitness market and continued to harm CrossFit, the NSCA publicly responded to the Federal Case by claiming CrossFit's statements – directly overlapping with the alleged defamatory statements at issue here – were false because the NSCA's peer review process was beyond reproach. For example, the NSCA issued a press release on its website entitled, "NSCA Update to CrossFit Inc. Claims and Allegations,"[25] stating:

> *CrossFit's ongoing commentaries contain inaccurate information, misquotes, and false statements that seek to disparage, discredit, and defame NSCA. They assert that NSCA manipulates research and produces "junk science" to create the perception that CrossFit is dangerous. CrossFit says NSCA views it as a threat to the NSCA's revenue.*[26] *These charges are patently untrue.*

The NSCA's press release doubled down on the integrity of its peer review process emphasizing that the peer review process uses industry experts to "evaluate the research study for scientific merit":

> *Articles submitted for publication in the JSCR must first go through a thorough double blind peer review process. This process prevents authors and reviewers from knowing each other's identity, thereby reducing potential bias based on personal information. The peer review process invites experts in relevant areas of research to evaluate the research study for scientific merit, to ask rigorous questions, to clarify any gaps in the research methodology, or address any oversight regarding the current body of knowledge.*

---

[24] *See*, *e.g.*, *Compl.* ¶¶ 13(D) ("In 2013 the NSCA knowingly published fabricated injury data about CrossFit. That didn't work, either. CrossFit uncovered the fraud.") and 13(E) ("…. These organizations have all engaged in long-term, systematic, regular, and collaborative fraud—fraud that is scientific, academic, and tortious—in their representatives' collective statements, publications, press releases, and in a paid public-relations campaign against CrossFit.").
[25] Exhibit P.
[26] There is ample evidence that in November 2013 – the same month the Devor Article was formally published – the NSCA and its Board of Directors considered CrossFit the single greatest threat to NSCA revenue in the next 5 years. *See generally* Exhibit D.

troutman sanders

The press release concludes by claiming the JSCR publishes sound research:

> *The NSCA is dedicated to staying true to its mission and will continue to serve our members, exercise professionals, and the research community by publishing sound research-based knowledge in the Journal of Strength and Conditioning Research.*

In contrast, the documents the NSCA *has* produced along with related deposition testimony, reveal the NSCA manipulated the peer review process to further its commercial agenda to unfairly compete with CrossFit. For example, Dr. Kraemer, the JSCR's Editor in Chief and longtime anti-CrossFit advocate, handpicked a Senior Editor (Dr. Travis Triplett) with whom he had extensive history[27] and directed her to find "good reviewers" to focus on injuries:

> Travis ... I thought you would be able to be the editor on this one as it is in an area that you were involved with in a review etc. so we put it in your good hands to get it ok, *so a lot of context is needed for this, fit but at what cost etc*. So see what you think and get some good reviewers to take a close look at this as catabolism will break you down but while fit are you in a catabolic state etc, so here you go, see you next month.. talk to you before that time too... as ever, Bill. (emphasis added.)

Notably, in the Federal Case, Dr. Triplett testified that she believed Dr. Kraemer hand-selected the peer reviewers for all JSCR publications from at least 1996 through 2010:

Page 46
1 THE WITNESS: Sorry, sorry, sorry.
2 MR. MURPHY: When you see my finger
3 pointing, you know.
4 THE WITNESS: Slap my hand.
5 MR. MURPHY: I'm sorry to interrupt. I
6 just --
7 THE WITNESS: No, I need to be scolded.
8 MR. MURPHY: -- want to follow protocol.
9 Q. So when you were an associate editor for
10 the JSCR, who would have -- from 1996 to 2010-ish,
11 who would have been responsible for selecting the
12 peer review editors?
13 A. I'm not 100 percent certain, but it would
14 have almost had to have been Dr. Kraemer.

Documents relating to how Dr. Kraemer – or perhaps Dr. Triplett at Kraemer's direction – selected the peer reviewers, their communications with those peer reviewers, the NSCA policies for the selection of peer reviewers, and the relationships between Drs. Kraemer and Triplett and

[27] More recently, Dr. Triplett applied to serve as the NSCA's President and Dr. Kraemer strongly supported her candidacy. Likewise, internal NSCA correspondence referred to Dr. Triplett as being in the "Kraemer Camp."

troutman sanders

the peer reviewers thus relate directly to the veracity of the alleged defamatory statements regarding Dr. Kraemer's hand-selection of the reviewers and the NSCA's manipulation of the process. At a minimum, they are certainly discoverable. *See Colonial Life & Acc. Ins. Co. v. Sup. Ct.*, 31 Cal. 3d 785, 790 (1982) ("…the relevance of the subject matter standard must be reasonably applied; in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery") (fn. omitted).

Further, Dr. Kraemer, Dr. Triplett and the peer reviewers did not have NSCA email addresses. **As a result, any communications between the peer reviewers and Dr. Kraemer or Dr. Triplett relating to the peer review process, erratum, or retraction processes may not be in the NSCA's direct possession unless the NSCA was copied on the correspondence**. Without knowing the identity of the peer reviewers and having the opportunity to conduct third-party discovery, CrossFit may never be able to obtain these crucial documents.

To date, however, the NSCA has categorically refused to identify *who* actually conducted the peer review and has redacted documents accordingly. Such information is plainly relevant. For example, if the NSCA selected reviewers who it knew would support the NSCA's views, or who were somehow beholden to the NSCA, that would show that the supposedly "rigorous" process lacked integrity and support CrossFit's truth defense relating to the NSCA's "junk science." Further, communications between the NSCA (including Dr. Kraemer) and any peer reviewer about the erratum or retraction is similarly relevant. Those individuals might themselves have relevant documents or information regarding how the process was conducted and whether they were influenced by the NSCA itself.

In the end, the NSCA has placed the integrity of the NSCA's peer review process directly at issue in this case and cannot now hide behind boilerplate and unfounded relevance objections.

C. The NSCA's Objections Based on the Federal Case Are Improper Because the Claims in This Action Are Different, there is No Peer Reviewer Privilege, and the Identities of Peer reviewers are Routinely Disclosed in Scientific Publications

1. The NSCA Cannot Rely on Prior Proceedings in the Federal Case Because the NSCA Has Placed the Integrity of the Peer review Process Directly at Issue in this Action.

In the Federal Case, the Magistrate Judge adjudicated two discovery motions concerning the identity of the peer reviewers. In its ruling on the first motion, filed long before the Sanctions Order and discovery of the NSCA's efforts to conceal information from CrossFit, the court did not require the NSCA to disclose the identity of the peer reviewers based on its conclusion that CrossFit, Inc.'s challenges to the integrity of the peer review process were "wholly speculative *at*

this time."[28] In both instances, the federal magistrate declined to allow discovery into the identity of the peer reviewers because, *based on the record at that time,* it found that "identities of the peer reviewers are not relevant to the claims or defenses alleged ***in the parties' pleadings***."[29] The court also noted its "decision is not intended to preclude plaintiff from making further inquiries about the scope and integrity of the peer review process."[30]

In this case, of course, the pleadings are much different than those in the Federal Case, and certainly were not at issue or before the Federal court when it made the rulings discussed above. Nor can the NSCA point to anything in the Federal court's prior rulings suggesting that information regarding the Devor Article's peer reviewers or the peer review process should be protected from disclosure in this case. Indeed, as discussed above, the NSCA's Complaint in this case puts the identity of and communications with the peer reviewers directly at issue. The NSCA chose to file its separate state court suit against CrossFit and its claims are entirely independent of the Federal Case. The NSCA thus cannot rely on prior rulings in a separate case, based on separate pleadings and a separate record to block discovery into the peer review process when it claims it has been defamed by statements relating to that process.

2. There is No Peer review Privilege.

The NSCA's objections to the Peer Review Discovery also reference a peer review "privilege" that does not exist. There simply is no privilege shielding academic or peer review materials from discovery. The United States Supreme Court affirmatively declined to create such a protection in *University of Pennsylvania v. E.E.O.C.*, rejecting both a First Amendment "right to academic freedom" and a "qualified common-law privilege" regarding "peer review materials" as bases to shield relevant documents arising out a University's peer review process. 493 U.S. 182, 188 (1990). In that case, the University sought to shield materials related to faculty peer reviews, that allegedly contained evidence of discrimination. Allowing discovery into those peer reviews, the Court noted that injury to academic freedom and potential First Amendment rights were "remote and attenuated" at best, while the materiality of the documents was evident. *See id.* at 193 ("indeed, if there is a 'smoking gun' to be found that demonstrates discrimination... it is likely to be tucked away in peer review files."). The Court further noted that "confidentiality is not the norm in all peer review systems" and that the prospect of disclosure, far from chilling free speech, "may simply ground [reviewers'] evaluations in specific examples and illustrations to deflect potential claims of bias or unfairness." *Id.* at 200-01.

The Supreme Court's refusal to create a new federal common-law privilege with respect to review or investigatory processes has been reflected in more recent decisions in California and elsewhere. *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005) (refusing to create peer review privilege for hospital mortality investigations); *Roberts v. Legacy Meridien Park Hosp.*,

[28] Ex Q, Federal Case Dkt. No. 57, pg.14 (emphasis added).
[29] *Id.* at pg.13 (emphasis added).
[30] *Id.* at pg. 15.

299 F.R.D. 669, 673 (D. Or. 2014) (noting that the Ninth Circuit has rejected such a privilege and refusing to create one).

CrossFit is not aware of any statutory or common law protection for the identities of those who review scientific studies (and, as noted above, the Supreme Court has explicitly rejected analogous protections). Further, just as in *University of Pennsylvania*, the "smoking gun" relevant to CrossFit's defenses to the NSCA's claims is most likely to be found in the information the NSCA seeks to shield from disclosure.

Disclosure of the identities of the peer reviewers is also likely to lead to other relevant information. The reviewers are the individuals most likely to have information about the peer review process, including the source of specific edits and proposed changes. Because relevant comments and changes may have been made or suggested by the so-called "independent" reviewers and not NSCA employees, their identities are necessary to make sense of the NSCA's document production and (if necessary) to seek additional materials from the reviewers themselves regarding, for example, their selection, connections to the NSCA, knowledge of the injury data related to the Devor Article, or relevant prior work they may have performed.

Further, there is no legitimate confidentiality concern that justifies withholding the requested information. This is particularly true because the parties previously negotiated and agreed upon a protective order shielding confidential materials from public disclosure. The NSCA may designate sensitive commercial information as confidential pursuant to that order and CrossFit would be unable to disclose it publicly absent relief from this Court. Thus, any concerns regarding confidentiality or a potential "chilling effect" can be addressed sufficiently through the parties' protective order.[31]

Nor can the NSCA claim any burden from providing the unredacted documents; the un-redaction process itself will take a matter of minutes. Accordingly, the NSCA's concocted peer review "privilege" objection should be overruled.

3. Peer reviewer Identities are Routinely Revealed in Scientific Publications, Particularly When Fraud or Scientific Misconduct is Alleged.

The parties agree the JSCR is a scientific journal. The names of peer reviewers are not confidential per se in the scientific journal industry. In fact, many leading scientific journals publicly thank their peer reviewers by name.[32] With particular articles, however, the scientific journal industry may maintain confidentiality with respect to peer reviewers, but does so only in

---

[31] However, a confidentiality designation does not excuse the NSCA's withholding of responsive information altogether – in fact, it affirmatively requires the production of relevant confidential materials.
[32] *See*, e.g., Exhibit R (Journal of American Medical Association ("JAMA") giving thanks by publishing the names of 3,804 peer-reviewers who reviewed manuscripts for JAMA in 2012; Exhibit S (JAMA publicly thanking the 3,960 peer-reviewers who reviewed manuscripts for JAMA in in 2013); and Exhibit T (JAMA publicly thanking the 3,813 peer-reviewers who reviewed manuscripts for JAMA in in 2014; *see also* Exhibit U (Annals of Internal Medicine publicly publishing the names of its 2014 peer-reviewers).

the absence of allegations of fraud or scientific misconduct. Here, the Federal court's Summary Judgment Order on falsity and the Sanctions Order surpasses mere allegations of fraud or misconduct. For example, the Sanctions Order provided, "There is plainly sufficient evidence to find willfulness, bad faith, or fault on the part of the NSCA in withholding the recently discovered documents and in lying under oath in the federal proceeding."[33]

Scientific journals routinely permit disclosure of peer review identities when fraud or scientific misconduct is alleged.[34] To provide context, in the Federal Case CrossFit's expert in scientific-publishing ethics, Dr. Haavi Morreim, issued a report thoroughly detailing the NSCA's extensive ethical breaches during the Devor Article's peer review process.[35] Dr. Morreim's report includes, but is not limited to, the following:

- The standards for properly managing article submissions;
- The standards for properly managing allegations of scientific misconduct;
- The NSCA's failure to comport with the appropriate standards during the Devor Article's peer review process; and
- The NSCA's failure to comport with the appropriate standards for failing to manage the allegations of scientific misconduct relating to the Devor Article. [36]

The evidence reveals the NSCA's plan to manipulate the peer review process was put in place when the first draft of the Devor Article reached Dr. Kraemer's desk:

> "The problems begin even before the first round of peer reviews. In an email dated June 20, 2012, Editor-in-Chief William Kraemer assigns the [Devor Article] to Travis Triplett as senior editor for shepherding the piece through the review process. It appears that, even at that early point Kraemer is proposing that Triplett should ensure that a certain kind content must be included if the Devor Article is to be accepted for publication – namely, that "a lot of context is needed for this," that the paper should say there is a cost to becoming fit by way of CrossFit ("fit at what cost"). Kraemer further suggests that Triplett should secure "some good reviewers to take a close look at this as catabolism will break you down but while fit are you in a catabolic state etc, . . . " While I cannot be certain, Kraemer appears to be alerting Triplett to certain consequences of a catabolic state that he believes may lead to CrossFit-associated harm. In both these directives, then, Kraemer appears to be instructing Triplett to choose reviewers who will require the authors to say (or perhaps to instruct her reviewers to tell the authors to say)

[33] Exhibit D, Sanctions Order, Federal Case Dkt. No. 176, at pg.8.
[34] Exhibits V, W, X.
[35] Exhibit Y.
[36] Exhibit Y.

troutman sanders

> that CrossFit can cause harm, as a kind of prerequisite for publishing the Devor Article."[37]

The NSCA then executed its plan to coerce fabricated injury data in the Devor Article. The NSCA's stunning deposition testimony strongly suggests Dr. Kraemer believed his team's unethical manipulation of the peer review process was bulletproof by simply deferring to the sanctity of the JSCR's self-proclaimed "rigorous" peer review process. For example, during his deposition Dr. Kraemer made the incredible claim that despite serving as the Editor in Chief of a leading journal in the biomedical science of sport, he is unaware of any rules or regulations regarding ethics in publishing in sports science.[38] In a transparent effort to insulate the agenda-driven peer review process from outside scrutiny, Dr. Kraemer also testified that the only approach to take when confronted with evidence of scientific misconduct is to trust the authors.[39] This testimony is another example undermining the NSCA's claim that the JSCR comports with the appropriate standards for scientific publication by using double-blind peer review.

Yet another example of the flawed peer review process is that during the first wave of revisions of the Devor Article on August 28, 2012, Dr. Kraemer's cover letter to the authors "takes a significant step beyond an ordinary review process as [Dr.] Kraemer suggests that authors need to add some specific substantive content regarding injuries to the manuscript."[40] Dr. Kraemer improperly admonishes the authors to "caution" readers that "many people do get injured" during CrossFit training despite having no scientific basis to support that statement.[41] During the second wave of peer reviews on October 13, 2012, the peer reviewers took Dr. Kraemer's lead and honed in on injury data.[42] Notably there is no evidence that at this point in the peer review process the authors had measured any data relating to injuries. Dr. Morreim noted that inviting the authors to collect after-the-fact injury data "would be inviting bad science."[43] Further exposing the manipulated peer review process, the final version of the Devor Article claimed the injury data was collected during the actual study. However, the peer reviewers knew, or should have known, the injury data was not measured during the underlying study. They nonetheless approved the Devor Article for final publication with the unsupported injury data.

In sum, there is ample evidence of scientific misconduct and certainly allegations of the NSCA's fraud surrounding publication of the Devor Article. This is the exact scenario where scientific journals routinely life any otherwise self-imposed cloak of confidentiality. The peer reviewers have personal knowledge and discoverable information regarding whether they raised any concerns about the injury data appearing in the Devor Article without a shred of scientific support. Without the identity of and access to the peer reviewers, CrossFit cannot meaningfully

---

[37] Id. at pg. 10.
[38] Ex. J at pgs. 14-15.
[39] *Id.* at pg. 157.
[40] Ex. Y at pg. 10.
[41] *Id.*
[42] *Id.* at pgs. 11-12.
[43] *Id.* at pg. 11.

assess the scope of the peer reviewers' direct connection to the injury data, pre-existing relationships with the NSCA or Dr. Kraemer/Dr. Triplett, and pre-existing biases against CrossFit training. Each of these areas of investigation is undoubtedly relevant to CrossFit's truth defense to the allegedly defamatory statements asserted by the NSCA.

The alleged defamatory statements coupled with the extensive evidence described above place the peer reviewers' identities directly at issue. Exploiting the public and fitness industry's trust as the "worldwide authority on strength on conditioning," the NSCA highjacked the peer review process to concoct "scientific evidence" that CrossFit training was unsafe. The NSCA's plan worked, confirmed by the NSCA's inexcusable refusal to fully and fairly retract the Article based on the fake injury data. Since 2013, CrossFit has been trying to correct the public record to protect its affiliate gyms and brand, and has been met by the NSCA's blatant efforts to conceal the scope of its fraud by lying under oath and concealing documents. The NSCA should not be permitted to further insulate its well-documented fraud in a "peer review privilege" that does not exist. The objections to the Peer Review Discovery should be overruled.

IV. NSCA MUST BE COMPELLED TO HONOR THE AGREEMENTS REACHED DURING MEET AND CONFER

As an initial matter, on February 9, 2017, CrossFit propounded on the NSCA its second set of RFPs and Interrogatories. Following the grant of an extension requested by the NSCA on the day of the original deadline, the NSCA responded to the RFPs and Interrogatories on March 13, 2017. Despite requesting and receiving an extension, the NSCA responded to the all of the RFPs solely with objections and to all but one of the Interrogatories solely with objections.[44]

On May 3, 2017, CrossFit's counsel sent a detailed letter to NSCA's counsel setting forth six (6) distinct areas of deficiencies in the NSCA's responses to the Interrogatories and RFPs, and inviting the NSCA to meet and confer to address these deficiencies.[45] For months, CrossFit's counsel continued to follow up on its May 3rd letter, but the NSCA repeatedly failed to provide any response – even after agreeing to do so in writing.[46] It was not until September 14, 2017 – over *four months* after CrossFit identified the material discovery deficiencies and after the NSCA had agreed to provide a written response and failed to do so – that counsel for the NSCA finally provided an initial response to the May 3rd letter.[47]

On September 18, 2017, counsel met and conferred by telephone and reached agreements on five of the six areas of dispute set forth in the May 3rd letter.[48] Specifically, the NSCA agreed that **on or before October 2, 2017**, the NSCA would supplement its responses to certain RFPs and Interrogatories as follows:

---

[44] Declaration of Wynter L. Deagle ("Deagle Decl.") ¶ 5.
[45] *Id.* ¶ 7 & Exhibit F.
[46] Deagle Decl. ¶¶ 7, 9 & Exhibit Z.
[47] Deagle Decl. ¶¶ 12-14 & Exhibits G.
[48] Deagle Decl. ¶ 15 & Exhibit AA.

troutman sanders

- The NSCA agreed it would identify which documents had previously been produced in response to RFPs 71 and 73 and confirm such documents represent all responsive documents in the possession, custody or control of the NSCA;
- The NSCA agreed it would identify whether each of the documents identified on NSCAPROD013016, as requested in RFP 74 and Interrogatory 41, have been (i) produced (by Bates number), (ii) withheld (by specifying privilege log date and line number), or (iii) not produced (in which case CrossFit requested production);
- The NSCA agreed it would produce all documents responsive to RFP 75 under the temporal limitation of January 1, 2008 through the present.
- The NSCA agreed it would respond to Interrogatory 46 with the modification such that it reads "Identify all NSCA Publications that reference CrossFit where Dr. William Kraemer provided comments to the authors of a document submitted for publication";
- The NSCA agreed to inform CrossFit by September 20, 207 whether it would withdraw its objections to RFP 80 and Interrogatories 47 and 48 as requested by CrossFit and, if so, provide further responses; and
- The NSCA agreed to confirm whether it would withdraw its various boilerplate objections and produce any documents and information previously withheld on the basis of such objections.[49]

True to form in this case, however, the NSCA failed to deliver on each of these promises. Instead, October 2, 2017 came and went without any word from the NSCA, much less any supplemental responses to the RFPs or Interrogatories.[50] The NSCA did not even respond to a follow-up email confirming that the deadlines had passed without any word from the NSCA.[51] Thus, with no confidence the NSCA would take any further action without Court order, at the October 5, 2017 telephonic hearing with Your Honor, CrossFit requested Your Honor modify the briefing schedule on this Motion so these issues could be raised with the Discovery Master and finally determined.

At 5:05pm. on October 17, 2017, when CrossFit's counsel had already substantially briefed this motion, the NSCA's counsel sent an email *further* agreeing to comply with the some (but not all) of the agreements *already reached* during the September 18, 2017 meet and confer, but requesting until October 27, 2017 to comply.[52] CrossFit, no longer able to rely on the NSCA's

[49] Deagle Decl. ¶ 15 & Exhibit AA.
[50] Deagle Decl. ¶ 18 & Exhibit AB.
[51] Deagle Decl. 18 & Exhibit AB.
[52] Deagle Decl. 18 & Exhibit AC.

troutman sanders

promises of future compliance, proceeded with this motion to compel the responses which were the subject of the May 3rd letter.[53]

A. The NSCA Must Produce and Identify Documents Previously Identified as Responsive (RFP 74 and Interrogatory 41)

On November 11, 2016, in response to CrossFit's First Set of Document Requests, the NSCA produced to CrossFit a spreadsheet Bates No. NSCAPROD013106 (the "Spreadsheet").[54] The Spreadsheet identifies various documents responsive to CrossFit's discovery requests to the NSCA in this case, and contains notations by the NSCA about whether to disclose or withhold certain responsive documents.[55] There is no dispute the Spreadsheet was prepared internally by the NSCA for internal use, and there is no dispute the documents identified on the Spreadsheet are relevant to the claims asserted by the NSCA and CrossFit's defenses. What is troubling, however, is that various highly-relevant documents identified on the Spreadsheet *do not appear to have been produced* by the NSCA in connection with their prior responses, despite having been identified internally by the NSCA in connection with its internal document search.

For instance, the Spreadsheet identifies as document # 8, a May 3, 2013 document titled "FW: JAAC" and includes the following information concerning this document:

> "CrossFit" Appeared in the 2012 Job Analysis Survey for the CSCS and the NSCA-CPT certifications in a list of credentials under the question "Which certifications and/or licenses do you current maintain?" THIS IS THE JOB ANALYSIS REPORT INFORMATION THAT THE NSCA CERTIFICATIONS ARE BUILT FROM (CORE BUSINESS_ AND IS CONFIDENTIAL AND PROPRIETORY (sic) INFORMATION THAT IS CRITICAL TO THE SUCCESS OF OUR CERTIFICATION PROGRAM – THIS REPORT AND FULL INFORMATION SHOULD NOT BE SHARED WITH ANYONE.[56]

Upon review of the NSCA's document production, CrossFit was not able to locate any documents matching this description. Similarly, the other documents provided contain descriptions so vague (such as "email sent to me with a YouTube video describing CrossFit certifications") that CrossFit has no way of determining whether these documents were actually produced.[57] And – given the severe production deficiencies

---

[53] As set forth below, to the extent the NSCA remedies certain deficiencies by October 27, 2017 as it has said it will do, CrossFit will inform Your Honor. However, CrossFit will maintain its request for an award of its attorneys' fees and expenses in preparing and prosecuting the motion based on the NSCA's repeated failures to previously comply, which necessitated this motion.
[54] Deagle Decl. ¶ 31 & Exhibit AD.
[55] Exhibit AD at NSCAPROD013107, NSCAPROD013109.
[56] *Id.* at NSCAPROD013106-7.
[57] Deagle Decl. ¶ 31 & Exhibit AD at NSCAPROD013107.

troutman sanders

outlined herein – CrossFit has well-founded doubts that all of these documents were produced.

In light of the relevance of these documents and the inability of CrossFit to determine whether the documents had been produced, CrossFit propounded two discovery requests directly aimed at obtaining this information. Specifically, RFP 74 requests the NSCA produce all documents identified on the Spreadsheet, and Interrogatory 41 requests the NSCA identify all documents on the Spreadsheet that were not produced by the NSCA previously and the basis for withholding such documents. In its response to these requests, the NSCA asserted a host of outlandish objections, ultimately attempting to put the onus back on CrossFit to sift through 13,000 pages of documents to determine whether any given document not only matches the description on the Spreadsheet but *is in fact* the document described on the Spreadsheet.[58]

In its meet and confer efforts (including the May 3rd letter), CrossFit explained in detail why the objections asserted by the NSCA were unfounded, and that the NSCA should know exactly which documents it has produced and which documents it has withheld (and why). Ultimately, during the September 18, 2017 meet and confer, the NSCA *agreed* to identify, by October 2, 2017, whether each of the documents identified on the Spreadsheet, as requested in RFP 74 and Interrogatory 41, have been (i) produced (by Bates number), (ii) withheld (by specifying privilege log date and line number), or (iii) not produced (in which case CrossFit requested production).[59] The NSCA failed to meet this deadline.[60]

The objections should be overruled and the NSCA compelled to respond fully to RFP 74 and Interrogatory 41.

First, the NSCA's objection that the Spreadsheet itself is attorney-client privileged is a red herring. Setting aside the merits of any belated privilege assertion with respect to the Spreadsheet,[61] the focus of RFP 74 and Interrogatory 41 are the *documents identified* on the Spreadsheet – not the Spreadsheet itself. Thus, even if the Spreadsheet were privileged (it is not), the documents described thereon are not somehow transformed into privileged documents simply by their inclusion. Indeed, the NSCA has not asserted (or provided any support for)

---

[58] Exhibit G at pg. 2.
[59] Exhibit AA.
[60] Exhibit AB.
[61] As set forth in the May 3rd letter, the Spreadsheet itself is not an attorney-client communication. The NSCA's objection to RFP 74 makes clear the Spreadsheet as prepared by the NSCA internally for use by the NSCA internally. The fact that the spreadsheet may have later been "conveyed to counsel" does not transform the Spreadsheet into an attorney-client communication. *See Wells Fargo Bank v. Superior Court* (2000) 22 Cal. 4th 201, 210; *Upjohn Co. v. U.S.* (1981) 449 U.S. 383, 396 ("[T]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). Moreover, even if the Spreadsheet were privileged, that privilege has been waived multiple times by the NSCA, the Spreadsheet is a part of the public record in the Federal Case, and the NSCA agreed in meet and confer to respond to RFP 74 and Interrogatory 41.

privilege with respect to the subject matter of the requests – *i.e.*, the documents identified on the Spreadsheet and information about whether they have been produced or withheld.

Second, the NSCA's assertion that the underlying documents *may* contain highly sensitive information and *may* be subject to trade secret protection is wholly unsupported and does not excuse the NSCA's failure to produce. Indeed, concerns such as these – to the extent they actually exist – are easily dealt with under the parties' stipulated protective order.

Finally, the boilerplate breadth, burden and relevance objections are wholly unsupported and should be overruled as such. The notion that CrossFit should be the party to scour 13,000 pages of documents to determine whether the NSCA produced a document *identified by the NSCA* as relevant and *described by the NSCA* on the Spreadsheet borders on the absurd. Clearly the NSCA is in a better position to determine whether they have produced or withheld a given document.

B. The NSCA Must Produce Documents Relating to Meetings Between NSCA Representatives and Lawmakers (RFP 75)

In the Complaint, the NSCA alleges it was defamed by statements regarding efforts by the NSCA and its lobbying proxy (ICREPs) to effectively outlaw CrossFit training in certain states using the legislative process.[62] Directly relevant to those allegations, RFP 75 requested documents relating to "any meetings any NSCA Representative…attended with lawmakers…" In response, the NSCA asserted the boilerplate objection that the request was vague and did not sufficiently specify the documents being requested.

The NSCA's objections have no merit. Indeed, the NSCA agreed during the September 18, 2017 meet and confer to supplement its response and respond in full to this request no later than October 2, 2017, subject only to the temporal limitation of January 1, 2008 through the present.[63] The NSCA failed to comply with that deadline and provided no explanation.[64] On October 17, 2017, the NSCA again agreed to respond to this RFP 75, this time by October 27, 2017.[65]

In light of the pattern of delay and broken agreements by the NSCA, CrossFit is skeptical of whether the NSCA will come through on its latest promise. Thus, CrossFit maintains this motion with respect to RFP 75 and seek an order compelling the NSCA to respond, without objection, to RFP 75 with the agreed upon temporal limitation. As set forth below, regardless of whether the NSCA fulfills its latest promise, CrossFit requests Your Honor award CrossFit its attorneys' fees and costs given the NSCA's actions which necessitated this motion.

[62] *See* Complaint at ¶¶ 13(e)-(f).
[63] Exhibit AA.
[64] Exhibit AB.
[65] Exhibit AC.

troutman sanders

C. The NSCA Must Identify Instances Where Dr. Kraemer Provided Comments on Crossfit-Related Publications (Interrogatory 46)

As set forth above, Dr. Kraemer, the former President of the NSCA, was, at all relevant times, the Editor in Chief or Senior Editor of the JSCR. In that capacity, Dr. Kraemer has overseen the editorial process for numerous articles presented for review and publication in the JSCR, including the Devor Article.

Dr. Kraemer's involvement with and influence on the peer review process and ultimate publication of the Devor Article (including its false injury data relating to CrossFit) is a significant issue at the center of both this case and the Federal Case. The NSCA has, through its allegations in the Complaint, made Dr. Kraemer's involvement in the editorial process a material issue in this case. In particular, the NSCA alleges in its Complaint that the CrossFit Defendants defamed the NSCA by stating the NSCA "published unsubstantiated and/or fraudulent claims about CrossFit," and that "Peer reviewers for the NSCA's scientific publication are handpicked by Dr. Kraemer."[66]

Here, the evidence from the NSCA in fact shows Dr. Kraemer – a long-time CrossFit critic – was intimately involved in the editorial process of Devor Article, providing his personal comments (including from personal email accounts) directly to the authors. Thus, Dr. Kraemer's history and pattern of personally providing comments to authors of *other* articles presented for review and potential publication is clearly relevant.

Interrogatory 46 originally requested the NSCA to "Identify all NSCA Publications where Dr. William Kraemer provided comments to the authors of a document submitted for publication." After interposing objections on the basis of breadth and relevance, the NSCA responded that the NSCA was "unable to reasonably determine" whether Dr. Kraemer had ever provided comments to authors. During the parties' meet and confer efforts, and for the sole purpose of avoiding further delay in obtaining relevant information, CrossFit agreed to modify Interrogatory 46 to read as follows:

> "Identify all NSCA publications <u>that reference CrossFit</u> where Dr. William Kraemer provided comments to the authors of such a document submitted for publication."

The NSCA agreed during the September 18, 2017 meet and confer to supplement its response to this modified version of Interrogatory 46 by no later than October 2, 2017.[67] The NSCA failed to comply with that deadline and provided no explanation.[68] On October 17, 2017, the NSCA again agreed to respond to this modified version of Interrogatory 46, this time by October 27,

---

[66] Complaint at ¶¶ 13(b), 14(a).
[67] Exhibit AA.
[68] Exhibit AB.

2017.[69] Again, CrossFit is skeptical of whether the NSCA will come through on its latest promise. Thus, CrossFit maintains this motion with respect to Interrogatory 46 and seek an order (1) compelling the NSCA to respond, without objection, to the agreed-to modified version of Interrogatory 46, and (2) reserving the right of CrossFit to seek and order compelling the NSCA to respond to Interrogatory 46 as originally phrased. As set forth below, regardless of whether the NSCA fulfills its latest promise, CrossFit requests Your Honor award CrossFit its attorneys' fees and costs given the NSCA's actions which necessitated this motion.

D. The NSCA Must Produce and Identify Information Related to Its Knowledge of Media Sources Citing the False Devor Article (RFP 80 and Interrogatories 47-48)

In the Complaint, the NSCA alleges it was defamed by the statement "[t]he NSCA also falsely besmirched the reputation of all CrossFit affiliates and spread the lie that they are practicing dangerous training."[70] The subject statement relates, in part, to the NSCA's publication of the Devor Article and the NSCA's knowledge that the Devor Article had been and was continuing to be cited by various media sources, and the ineffectiveness of the NSCA's erratum to the Devor Article.

Relevant to the NSCA's allegation of falsity, RFP 80 requested the NSCA produce documents relating to "specific instances of Media Sources citing the Devor Study that the NSCA was aware of (both before and after the NSCA's erratum)." Similarly, Interrogatories 78 and 48 seek information regarding the NSCA's knowledge of the Devor Study appearing in such Media Sources. In response, the NSCA asserted boilerplate objections that the requests were "vague," "ambiguous," and "unintelligible."

The NSCA agreed during the September 18, 2017 meet and confer to inform CrossFit by September 20, 207 whether it would withdraw its objections to RFP 80 and Interrogatories 47 and 48 as requested by CrossFit and, if so, provide further responses by October 2, 2017.[71] The NSCA failed to comply with either deadline and provided no explanation.[72] On October 17, 2017, the NSCA agreed to *fully* respond to these requests by October 27, 2017.[73] As above, CrossFit is skeptical of whether the NSCA will come through on its latest promise. Thus, CrossFit maintains this motion with respect to RFP 80 and Interrogatories 47 and 48 and seeks an order compelling the NSCA to respond, without objection, to RFP 80 and Interrogatories 47 and 48. As set forth below, regardless of whether the NSCA fulfills its latest promise with respect to these requests, CrossFit requests Your Honor award CrossFit its attorneys' fees and costs given the NSCA's actions which necessitated this motion

---

[69] Exhibit AC.
[70] *See* Complaint at ¶13(a).
[71] Exhibit AA.
[72] Exhibit AB.
[73] Exhibit AC.

troutman sanders

V. THE NSCA'S BOILERPLATE OBJECTIONS SHOULD BE OVERRULED

In its responses to CrossFit's Second Set of RFPs and Interrogatories, the NSCA asserted a significant number of boilerplate "nuisance objections." For example, the NSCA objected to many requests on the basis simply that they are "overbroad," "vague" or irrelevant. *See*, *e.g.*, RFPs 74, 80 and Interrogatories 42, 47. The courts have made clear that failure to produce documents or information on the basis of these boilerplate nuisance objections, unsupported by any explanation, is subject to sanction. *See*, *e.g.*, *Standon v. Superior Court* (1990) 225 Cal.App.3d 898.

Indeed, an objection that a discovery request is "unduly burdensome" or "oppressive" will be sustained only if the objecting party makes a "showing either of an intent to create an unreasonable burden or that the ultimate effect of the burden is incommensurate with the result sought." *West Pico Furniture v. Superior Court*, 56 Cal.2d 407, 417 (1961). No such showing has been made by the NSCA.

Moreover, the "General Objections" prefacing the NSCA's responses to the RFPs and Interrogatories are the exact type of boilerplate, general objections prohibited under the Code. *See* CCP §§ 2030.210(a)(3) (interrogatory responses), 2031.210(a)(3) (document request responses); Rutter, § 8:1071 ("Each objection must be stated *separately* (no objections to entire set)").

In his October 17, 2017 email, counsel for the NSCA stated that no documents have been withheld based on the boilerplate objections (presumably including the General Objections), but when pressed by CrossFit's counsel, he refused to withdraw the objections, asserting that he "believe[d] some are valid."[74] Maintaining these boilerplate objections is wholly improper. Your Honor overrule the boilerplate objections (including the General Objections) and direct the NSCA to serve supplemental responses without such objections so it is clear at trial in this case that the responses given by the NSCA are not limited by the baseless and blanket objections currently asserted.

VI. DEPOSITION TESTIMONY IN THIS ACTION AND POST-SANCTIONS-ORDER DOCUMENT PRODUCTIONS IN THE FEDERAL CASE REVEAL THE NSCA'S PRODUCTION IN RESPONSE TO CROSSFIT'S FIRST SET OF DOCUMENT REQUESTS IS MATERIALLY DEFICIENT

The discovery tactics used by the NSCA in this case – forcing the CrossFit Defendants to expend significant resources to defend baseless claims, and only providing information when finally ordered to do so – are perhaps best illustrated by the NSCA's failure to produce documents which are plainly responsive to CrossFit's First Set of Document Requests. The NSCA was required to produce these documents to CrossFit ***over eleven months ago***. Indeed, to date, the NSCA has refused to even tell CrossFit whether or not it contends the production is complete –

[74] Exhibit AC.

even though its counsel *expressly agreed to do so during meet and confer discussions*. CrossFit respectfully requests that the NSCA be ordered to cease this gamesmanship and abusive behavior.

On August 10, 2016, CrossFit served its Requests for Production of Documents (Set One) on the NSCA.[75] The NSCA issued objections to all of CrossFit's Requests for Production on September 12, 2016 and its verified responses on September 19, 2016.[76] Following substantial meet and confer efforts between the parties, on November 8, 2016, the NSCA provided Amended Responses to CrossFit's Request for Production of Documents (Set One).[77]

As part of its amended responses, the NSCA agreed to produce all non-privileged documents responsive to the following requests (which had all been the subject of meet and confer discussions):

- Request No. 2: All Documents Referring or Relating to CrossFit;
- Request No. 18: All Documents Referring or Relating to the Devor Study including, but not limited to, all Documents from the peer review process utilized for the Devor Study;
- Request No. 28: All Documents Referring or Relating to CrossFit's certifications or seminars including, but not limited to, CrossFit's Level 1 course; and
- Request No. 29: All Documents Referring or Relating to Nick Clayton's attendance at CrossFit's Level 1 course or any other CrossFit seminar.[78]

Thereafter, on November 11, 2016, the NSCA produced documents responsive to CrossFit's First Set of Document Requests, including, purportedly, all documents responsive to Request Nos. 2, 18, 28, and 29.[79] The NSCA supplemented these productions on April 27, 2017, May 9, 2017, and May 24, 2017 to provide documents relating to Ohio State University's investigation into the Devor Article and the NSCA's eventual retraction of the Devor Article on the ground that it lacked Institutional Review Board ("IRB") approval.[80]

Recently, however, CrossFit has discovered that the NSCA's November 2016 production (as supplemented) is, in fact, materially deficient. Similar to the related Federal Case – where the NSCA was sanctioned for this conduct and the Federal court recently confirmed the NSCA acted

[75] Deagle Decl. ¶ 3.
[76] *Id.* & Exhibit AE.
[77] Deagle Decl. ¶ 3 & Exhibit C.
[78] Exhibit C, at pgs. 1, 10, 14 & 15.
[79] Deagle Decl. ¶ 4.
[80] *Id.* ¶ 6.

troutman sanders

in bad faith in withholding documents[81] – the NSCA has wrongfully withheld for nearly a year in this case numerous responsive documents directly supporting CrossFit's truth defenses.

A. <u>Testimony by the NSCA's Chief Science Officer Demonstrates the NSCA Withheld Responsive Documents and Concealed Custodians Who Possessed Plainly Responsive Documents</u>

On July 27, 2017, CrossFit deposed Carwyn Sharp, PH.D., the NSCA's Chief Science Officer and former Director of Education.[82] During his deposition, Dr. Sharp revealed the existence of numerous material and responsive documents that have never been produced to CrossFit. Additionally, during his deposition, Dr. Sharp identified several custodians whose email accounts – based on the metadata contained in the NSCA's production – do not appear to have been searched for responsive documents.

For example, the NSCA produced in this case a document titled "Executive Summary" in relating to the NSCA's November 2013 Board of Director's Strategic Planning Retreat ("2013 Executive Summary"). The metadata associated with this document confirms Dr. Sharp was one of the document's custodians.[83] The 2013 Executive Summary contains ***several explicit references*** to CrossFit. Notably, CrossFit is identified as the "greatest threat to the NSCA" for the next 5 years and the NSCA references its desire "to quadruple" NSCA's military-related revenue so "the moronic cult known as CrossFit [doesn't] render the NSCA irrelevant in the minds of the people who don't know any better."[84]

During his deposition, Dr. Sharp provided additional context to the Executive Summary confirming that more documents "referring or relating to CrossFit" were not produced in this matter. First, Dr. Sharp testified that the content in the 2013 Executive Summary came from "survey responses" the NSCA received from select NSCA Members to help guide the NSCA Board of Director's Strategic Planning Retreat.[85] Neither the surveys, survey responses, nor any related communications discussing the survey responses were produced to CrossFit.[86] Second, Dr. Sharp testified the NSCA created follow-up documents detailing what was discussed at the Strategic Planning Retreat and next steps or action items the NSCA intended to implement based on the Strategic Planning Retreat.[87] No documents created before, during or shortly after the 2013 Strategic Planning Retreat were produced as part of the NSCA's November 2016 production.[88] These documents are plainly responsive to Request for Production No. 1. The NSCA eventually produced some of these Board-of-Director-related documents in <u>August 2017 after extensive prodding from CrossFit and with the forensic evaluation in the Federal Case</u>

[81] *See* Exhibit D at pgs. 8-10.
[82] Deagle Decl. ¶ 4.
[83] Deagle Decl. ¶ 21.
[84] Exhibit AF at NSCAPROD 002460.
[85] Exhibit AG at pgs. 63-65, 74.
[86] Deagle Decl. ¶ 22.
[87] Exhibit AF at pgs. 64-65, 75.
[88] Deagle Decl. ¶ 22.

looming. The documents revealed numerous commercial motives for the NSCA to spread lies about CrossFit training.[89] Given Dr. Sharp's testimony, it is clear that the NSCA continues to withhold the vast majority of these documents from CrossFit.

In addition, Document Request Nos. 28 and 29 sought all documents referring or relating to CrossFit's certifications or seminars and the attendance of Mr. Nickolas Clayton at CrossFit's Level 1 course[90] or any other CrossFit seminar. During his deposition, Dr. Sharp testified that Mr. Clayton –the NSCA's in-house "expert" on anything relating to CrossFit training – developed a detailed plan to study the NSCA's competitors – including CrossFit – *before* Dr. Sharp joined the NSCA.[91] Dr. Sharp explained how his predecessor, William (Bill) Sands, approved and funded Mr. Clayton's plan to study the NSCA's competitors by attending the competitors' certifications.[92] Dr. Sharp also testified that he approved Mr. Clayton's request to attend CrossFit's Level 1 Course ***a second time*** after Mr. Sands left the NSCA.[93] In the Sanctions Order and Order Denying the NSCA's motion for reconsideration in the Federal Case, the court discussed how the NSCA acted in bad faith and Mr. Clayton perjured himself by falsely claiming he never shared the Competitive Analysis with anyone at the NSCA when in reality the analysis was approved, reviewed, and extensively discussed by NSCA leadership. To date, no documents detailing Mr. Clayton's proposal to Dr. Sharp or Mr. Sands have been produced. Likewise, the metadata in the NSCA's production in this case confirms Mr. Sands email records were never searched.[94]

Dr. Sharp also testified that he believes the emails concerning Mr. Clayton's communications with Mr. Sands relating to CrossFit and the Competitive Analysis plan still exist. These documents – which are also clearly responsive to Document Request Nos. 28 and 29 – were not produced.[95]

Further, the metadata from the NSCA's production in this case confirms that the most incriminating communications directly involving Mr. Clayton and his Competitive Analysis did not come from Mr. Clayton's email account.[96] Rather, it appears Dr. Sharp was the custodian for the majority of the aforementioned documents relating to the Competitive Analysis.[97] It therefore appears that Mr. Clayton's email account – the email account of the NSCA's in-house expert on CrossFit – was not properly searched.[98] Equally problematic, it also appears the email

---

[89] *Id*.
[90] CrossFit's Level 1 Certificate Course is CrossFit's primary means to certify fitness professionals to teach CrossFit training.
[91] Exhibit AG at pgs. 122-123, 206-207.
[92] *Id*. at pgs. 94-97, 206-208, 212-213.
[93] *Id.*
[94] Deagle Decl. ¶ 24.
[95] Importantly, NSCA employees Keith Cinea, Mr. Clayton, Dr. Sharp and Wayne Rivinius (the NSCA's IT Director) have all submitted sworn declarations in the Federal Case that the NSCA's email accounts have been preserved. *Id.*
[96] Deagle Decl. ¶ 25.
[97] *Id.*
[98] *Id.*

account of Mr. Sands, the NSCA's former Education Director, was not searched based on the metadata in the NSCA's production.[99]

As a final example, Dr. Sharp testified that as early as October 2013, the NSCA's marketing department was running "web analytics" to assess and improve the NSCA's website content.[100] In keeping with that testimony, the NSCA produced a single web analytics document concerning the NSCA's website content that referenced CrossFit.[101] In contrast, however, Dr. Sharp also testified that the NSCA was also running web analytics to assess articles published in the JSCR – such as the Devor Article.[102] No documents were produced in this case relating to web analytics for the Devor Article or other NSCA content referring to CrossFit in this action.[103] These web analytics documents are responsive to Document Request Nos. 1 and 2 seeking documents referring or relating to CrossFit or the Devor Article.

Finally and also troubling, the one web analytics report produced by the NSCA that refers to CrossFit was created by Chris Thomas, the NSCA's Web Production Manager.[104] Based on the metadata in the NSCA's production, it does not appear that Mr. Thomas' email account was searched in connection with this case.[105]

B. The NSCA's Federal Court Production Reveals More Withheld Documents

On August 11, 2017, CrossFit received a production of documents from the NSCA in the Federal Case following the Sanctions Order.[106] That production contained numerous documents responsive to Document Request Nos. 2 and 18.[107] These documents, however, were wrongfully withheld from the NSCA's production to CrossFit in this case.[108]

For example, in the Federal Case, the NSCA produced a PowerPoint presentation from the NSCA's 2015 National Conference.[109] Beginning on page 58-63, the power point exclusively discusses CrossFit including its training methods and popularity.[110] Every single slide from pages 58-63 contains the term CrossFit.[111] In addition, pages 75 through 79 detail the Devor Article's results and the study upon which it was based.[112] ***This document is direct evidence of the NSCA spreading lies about CrossFit training at its national conferences, corroborating the***

[99] *Id.*
[100] Exhibit AG at pgs. 346-347.
[101] Deagle Decl. ¶ 26.
[102] Exhibit AG at pg. 347.
[103] Deagle Decl. ¶ 23.
[104] *Id.* ¶ 26.
[105] *Id.*
[106] *Id.* ¶ 27.
[107] *Id.*
[108] *Id.*
[109] Exhibit AH.
[110] *Id.* at pgs. 58-63.
[111] *Id.*
[112] *Id.* at pgs. 75-79.

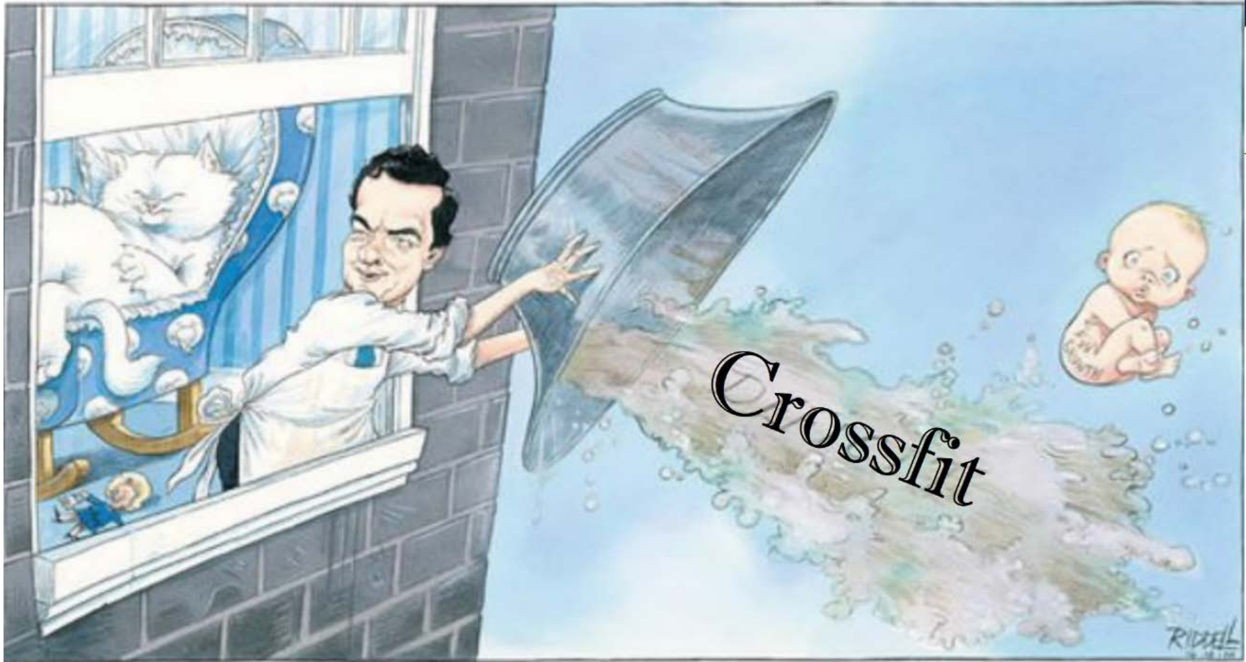
troutman sanders

truth of several alleged defamatory statements identified in the Complaint.[113] There is no dispute that this document is responsive to Requests for Production Nos. 2 and 18 and the NSCA should have produced it to CrossFit ***over eleven months ago.***

As another example, the NSCA also produced in the Federal Case *another* PowerPoint presentation from its 2015 National Conference.[114] The title of the PowerPoint presentation is "CrossFit: Friend or Foe."[115] Nearly every page in this document contains the word CrossFit.[116] Indeed, the entire 61-page presentation is devoted to analyzing CrossFit and its training methods.[117] This document is plainly responsive to Request No. 2 and should have been produced in November 2016, which it was not.

As a final example, in its post-Sanctions Order production in the Federal Case, the NSCA produced a PowerPoint presentation from its 2014 National Conference again titled: "CrossFit Friend or Foe."[118] Yet again, every page in this 52-page presentation is devoted to discussing CrossFit and its training methods including the advantages and perceived risks of CrossFit.[119] As an example, the presentation contains the following illustration regarding CrossFit[120]:

[113] For example, the NSCA asserts that the following statements are false and defamatory: (i) "… The NSCA also falsely besmirched the reputation of all CrossFit affiliates, and spread the lie that they are practicing dangerous training." *Compl.* ¶ 13A; (ii) "The American College of Sports Medicine (ACSM) and National Strength and Conditioning Association (NSCA) published unsubstantiated and/or fraudulent claims about CrossFit." *Compl.* ¶ 13B; and (iii) "… These organizations have all engaged in long-term, systematic, regular, and collaborative fraud – fraud that is scientific, academic, and tortious – in their representatives' collective statements, publications, press releases, and in a paid public-relations campaign against CrossFit." *Compl.* ¶ 13D.
[114] Exhibit AI.
[115] *Id.*
[116] *Id.* at pgs. 1-61.
[117] *Id.*
[118] Exhibit AJ.
[119] *Id.* at pgs. 1-52.
[120] *Id.* at pg. 19.



The presentation also offers the following sage advice on how traditional fitness can "survive" now that CrossFit is a major player in the fitness industry:[121]

> *CrossFit has been successful because they utilize and integrate the best from other areas of fitness (i.e. strong man, Olympic weightlifting, power lifting, nutrition, etc.) into their system; to evolve, progress and survive, we must do the same.*

This document is plainly responsive to Document Request No. 2 and provides further proof the NSCA was spreading lies about CrossFit training and had concealed documents revealing its commercial motive to do so. The document is plainly in the possession of the NSCA and it should have been produced to CrossFit nearly a year ago in this case.

C. <u>The NSCA Fails to Honor Agreements Reached During Meet and Confer</u>

Following the discovery of the withheld documents and production deficiencies, CrossFit's counsel tried to resolve this issue through extensive meet and confer efforts. CrossFit's efforts were unsuccessful because the NSCA – true to form in this case – failed to honor multiple agreements reached during the meet and confer process.

On July 31, 2017, CrossFit's counsel sent the NSCA a detailed letter identifying numerous categories of responsive documents that were identified by Dr. Sharp that were not produced to CrossFit as well custodians identified by Dr. Sharp whose email accounts had not been

[121] *Id.* at pg. 50.

troutman sanders

searched.[122] The NSCA did not respond to the letter.[123] On August 29, 2017, CrossFit's counsel emailed the NSCA's counsel requesting to meet and confer regarding the deficiencies in the NSCA's production of documents.[124] On September 5, 2017, the NSCA's counsel agreed to discuss the issue and stated "My sense is that this is a discovery issue better suited to before Judge McCurine but let's talk about that further as I don't know what the particular issues are."[125] On September 11, 2017, CrossFit's counsel again emailed the NSCA's counsel requesting to meet and confer regarding the production deficiencies identified in CrossFit's July 31st meet and confer letter as well as the deficiencies identified as a result of the receipt of the post-Sanctions production in the Federal Case.[126] On September 12, 2017, the parties met and conferred by telephone and reached the following key agreements which CrossFit's counsel confirmed in writing:

- On or before September 19, 2017, the NSCA would provide CrossFit with a written response to its July 31, 2017 letter – which identified production deficiencies identified as a result of Dr. Sharp's deposition testimony;
- On or before September 22, 2017, the NSCA would review its production of documents and provide CrossFit with a letter unambiguously stating whether the NSCA is taking the position its prior state court production is complete.[127]

The NSCA did not honor these agreements as the deadlines came and went with no communication from the NSCA's counsel.[128]

On September 25, 2017, CrossFit's counsel emailed the NSCA regarding the NSCA's failure to honor the agreements reached in the meet and confer.[129] Despite all deadlines having passed and the failure of the NSCA to contact CrossFit regarding the matter, CrossFit unilaterally extended the deadlines to 12:00 p.m. on September 28, 2017.[130] The NSCA also failed to meet this deadline.[131]

Instead, at 4:54 p.m. on September 28, 2017, the NSCA's counsel emailed CrossFit's counsel a letter that – again – failed to provide the information requested.[132] With regard to the 7-page July 31st letter, the NSCA provided a four-paragraph response that wholly failed to address any of the deficiencies identified in the NSCA's state production.[133] Regarding the document

[122] Ex. AL
[123] Deagle Decl. ¶ 8.
[124] Deagle Decl. ¶ 9 & Ex. Z.
[125] Deagle Decl. ¶ 9 & Ex. Z.
[126] Deagle Decl. ¶ 11 & Ex. Z.
[127] Deagle Decl. ¶¶ 12-13 & Ex. Z.
[128] Deagle Decl. ¶ 16.
[129] *Id.* & Ex. Z.
[130] Exhibit Z.
[131] Deagle Decl. ¶ 17.
[132] Exhibit AK.
[133] *Id.* at pgs. 1-2

troutman sanders

production, the NSCA still did not answer the straight forward question of whether it was taking the position its production was complete. Instead, the NSCA asserted that its counsel had "attempted to go over the production" but "it was a huge undertaking to compare the production with requests for documents made as part of the state court action."[134]

On October 3, 2017, CrossFit's counsel emailed the NSCA's counsel regarding the NSCA's failure to substantively address the production issues raised by CrossFit.[135] As stated in that email, CrossFit spent several months meeting and conferring with the NSCA in good faith to narrow the discovery disputes and try to move this matter forward. In contrast, the NSCA had – yet again – unjustifiably delayed discovery, failed to honor its agreements, and unnecessarily driven up the costs of this case. CrossFit should not be forced to continue this wasteful pattern of spending its resources to ensure the NSCA complies with its fundamental discovery obligations.

There is no question that the NSCA's production of documents in response to Request Nos. 2, 18, 28, 29 and 32 is not complete. The NSCA has acted in bad faith and failed to produce these responsive documents to CrossFit for ***more than 11 months***. In addition, the failure of the NSCA to produce all documents responsive to these Requests strongly calls into question whether the remainder of the NSCA's production is complete. At present, CrossFit has no way of knowing, with any degree of confidence, whether or not the NSCA has also failed to produce other key documents in this litigation. Further, based on recent concessions in the Federal Case, CrossFit strongly suspects the NSCA's production is grossly deficient.[136] This uncertainty is delaying CrossFit's ability to move this case forward with additional discovery and depositions.

The NSCA's antics must come to an end and the case must be litigated on an equal playing field. Thus, CrossFit requests Your Honor issue an order compelling the NSCA to:

- Provide CrossFit an executed verification under oath, by a representative of the NSCA with sufficient knowledge, containing the following:
    - Affirming the NSCA conducted a reasonable and diligent search for all documents responsive to CrossFit's First Set of Document Requests;
    - Providing a detailed description of all efforts the NSCA made to locate documents that were potentially responsive to CrossFit's First Set of Document Requests of Documents, including, but not limited to, the identification of individuals that participated in the collection, the identification of individuals interviewed to aid the collection, the dates of all actions taken, the electronic and physical locations searched for responsive documents, the method by which electronic searching

[134] *Id.* at pg. 2.
[135] Deagle Decl. ¶ 18 & Exhibit AB.
[136] For example, in connection with CrossFit's post-Sanctions-Order discovery in the Federal Case, the NSCA has identified over 100 electronic devices, numerous previously-concealed custodians, and ***over 700,000 files that contain responsive information.***

troutman sanders

was performed, and the search terms used to locate potentially responsive documents;

  - Affirming no additional Documents exist that are responsive to the CrossFit's First Set of Document Requests of Documents; and

  - Providing a detailed explanation why no additional Documents exist, including, but not limited to, providing information such as deletion settings on servers, retention policies, etc.; and

- To the extent additional documents responsive to CrossFit's First Set of Document Requests are located, produce those Documents to CrossFit on or before November 22, 2017.

VII. CROSSFIT IS ENTITLED TO ITS ATTORNEYS' FEES AND COSTS

Upon a successful motion to compel, a court must impose monetary sanctions against the delinquent party unless that party "subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." *See* CCP § 2031.310(h) (responses to request for production); 2030.300(d) (responses to interrogatories). The court may also impose a monetary sanction under section 2023.030 if a party "has engaged in misuse of the discovery process." *See Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404-05; CCP §§ 2023.010, 2023.030(a). A misuse of the discovery process includes a party's failure to respond "to an authorized method of discovery," such as a Request for Production of Documents or Special Interrogatories, or making, without substantial justification, an unmeritorious objection to discovery. CCP § 2023.010(d)-(e).

Both provisions are applicable here. Upon a successful motion to compel, CrossFit is entitled to its fees and costs associated with bringing the motion as a matter of right. CCP § 2031.310(h); 2030.300(d). Additionally, the NSCA has blatantly misused the discovery process by asserting unmeritorious (and boilerplate) objections and failing to provide complete discovery responses despite CrossFit's exhaustive attempts to meet and confer and various agreements met during meet and confer, followed only by the NSCA's repeated broken promises to supplement or otherwise respond to the discovery requests which are the subject of this motion. CCP §§ 2023.010(d)-(e), 2023.030(a).

CrossFit is entitled, through authorized methods of discovery, to seek information and documents that may support its defenses or inform the NSCA's claims. CrossFit has incurred significant attorneys' fees and costs (in addition to significant delay) resulting from the NSCA's unfounded objections, unreasonable positions and empty promises to remedy its deficiencies. Indeed, even if the NSCA meets its latest promise to respond to certain requests by October 27, 2017 – nearly six (6) months after CrossFit's first attempt to meet and confer – the NSCA has forced CrossFit to incur the time and expense to bring this motion The meet and confer correspondence included herewith, including the NSCA's agreements to withdraw many

troutman sanders

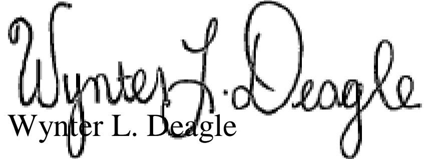
of unfounded objections, confirms the NSCA has acted without substantial justification, its actions constitute an abuse of the discovery process, and sanctions are thus appropriate.

CrossFit has also incurred significant delay – of over eleven months – as a result of the NSCA's failure to produce plainly responsive documents that it agreed to produce in response to CrossFit's First Set of Document Requests. As a result of the NSCA's failure to meet its discovery obligations, CrossFit took three depositions without the benefit of these documents – the critical depositions of Dr. William Kraemer, Dr. Carwyn Sharp and Nickolas Clayton. Once CrossFit actually receives these withheld documents, CrossFit may be required to seek leave to re-depose these critical witnesses. In addition, despite multiple attempts to meet and confer regarding these issues, the NSCA has refused to even confirm whether it believes the production is complete and has not meaningfully responded to any of the production issues raised by CrossFit. As a result, CrossFit has incurred significant attorneys' fees and costs (in addition to significant delay) resulting from the NSCA's discovery misconduct.

CrossFit respectfully requests Your Honor, in addition to granting the Motion as set forth above, require the NSCA to reimburse CrossFit in the amount of (i) $34,968.60 for the reasonable attorneys' fees and costs incurred in connection with the discovery issues above, including preparing the instant motion, (ii) such other amount that may be incurred by CrossFit in preparing its reply to any opposition to the motion by the NSCA, and preparing for and attending the hearing on the motion, and (iii) all such other amounts as may be incurred for Your Honor's time in deciding CrossFit's motion. *See* the Declarations of Joseph R. Dunn, Wynter L. Deagle, Justin S. Nahama and Jhony A. Ospina submitted concurrently herewith.

Sincerely,

TROUTMAN SANDERS LLP



Wynter L. Deagle

Attachments

cc: Jeffrey M. Lenkov
Kenneth S. Kawabata
Joseph R. Dunn
Justin S. Nahama

33009515v3

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of CA. I am over the age of 18 and not a party to the within action; my business address is 11682 El Camino Real, Suite 400, San Diego, CA 92130-2092.

On October 16, 2017, I served the following document(s) described as:

LETTER BRIEF DATED OCTOBER 20, 2107 RE CROSSFIT'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS; AND FOR IMPOSITION OF MONETARY SANCTIONS

☒ **BY OVERNIGHT MAIL**: As follows: I am readily familiar with the firm's practice of collection and processing correspondence for overnight mailing. Under that practice, it would be deposited with overnight mail on that same day prepaid at San Diego, CA in the ordinary course of business.

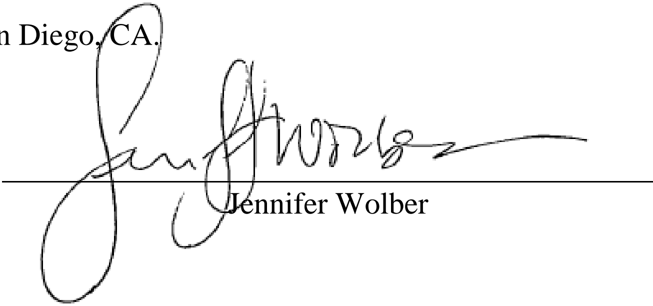
Hon. William McCurine, Jr. (Ret.) (619) 814-1966
Discovery Referee
6350 Scimitar Drive
San Diego, CA 92114

☒ **BY ELECTRONIC MAIL** (CRC 2.251): Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses, as last given or submitted on any document which he or she has filed in the case, listed on the attached service list.

Jeffrey M. Lenkov MANNING & KASS, ELLROD, RAMIREZ, TRESTER LLP 801 S. Figueroa Street, 15th Floor Los Angeles, CA 90017	Attorneys for Plaintiff Telephone: (213) 624-6900 Facsimile: (213) 624-6999 jml@manningllp.com
Kenneth S. Kawabata MANNING & KASS, ELLROD, RAMIREZ, TRESTER LLP 550 West C Street, Suite 1900 San Diego, CA 92101	Attorneys for Plaintiff Telephone: (619) 515-0269 Facsimile: (619) 515-0268 ksk@manningllp.com
Joseph R. Dunn MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO P.C. 3580 Carmel Mountain Road, Suite 300 San Diego, CA 92130	Attorneys for Defendants Telephone: 858-314-1500 Facsimile: 858-314-1501 jrdunn@mintz.com

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

Executed on October 16, 2017, at San Diego, CA.



Jennifer Wolber

TROUTMAN SANDERS LLP
11682 EL CAMINO REAL
SUITE 400
SAN DIEGO, CA 92130-2092

EXHIBIT 2

Troutman Sanders LLP
11682 El Camino Real, Suite 400
San Diego, CA 92130-2092

troutman.com

troutman sanders

Wynter L. Deagle
wynter.deagle@troutman.com

November 3, 2017

VIA EMAIL AND FEDEX

Hon. William McCurine, Jr. (Ret.)
Discovery Referee
6350 Scimitar Drive
San Diego, CA 92114

Re: ***National Strength & Conditioning Association v. Glassman, et al.***

CrossFit's Reply to NSCA's Opposition to Motion to Compel Responses to Interrogatories and Production of Documents and for Imposition of Monetary Sanctions

Dear Judge McCurine:

CrossFit, Inc. ("CrossFit") respectfully submits this reply to the opposition (the "Opposition" or "Opp.") of National Strength & Conditioning Association ("NSCA") to CrossFit's October 20, 2017 Motion to Compel Responses to Interrogatories and Production of Documents and for Imposition of Monetary Sanctions (the "Motion").

It is telling that the Opposition fails to address nearly all of the legal and factual arguments advanced by CrossFit in its Motion, which fall into three categories:

(i) the discovery sought by CrossFit is relevant and not protected from disclosure;

(ii) the NSCA agreed to provide various documents and information to CrossFit during meet and confer discussions and then inexplicably reneged on those agreements; and

(iii) the NSCA failed to produce numerous documents responsive to CrossFit's First Set of Documents Requests for over a year.

Unable to offer any substantive counterargument to these contentions *six months* after these issues were first raised by CrossFit on May 3, 2017, the NSCA instead resorts to misdirection, misrepresentation and further empty promises of its compliance with discovery obligations. The NSCA has not acted in good faith.

For instance, rather than attempting to refute the undeniable relevance of the Peer-Review Discovery ***to this case***, the NSCA accuses CrossFit of attempting to end-around a 2015 order from the Federal Case.[1] In doing so, however, the NSCA blatantly misrepresents the Federal court's order and ignores that the information sought is not only relevant, but was placed at issue in this case by the NSCA. Indeed, as set forth below, information concerning the identities of the peer reviewers, the method of their selection, and the integrity of the peer-review process is not only relevant in this case, but its disclosure in this case is directly consistent with the holding of Federal court's order.

More troubling, the NSCA readily admits that it failed to produce "many" documents responsive to CrossFit's First Set of Document Requests.[2] These documents have been wrongfully concealed ***for over a year.*** And the NSCA does not deny that it failed to honor an agreement to confirm the completeness of its production and respond to CrossFit's concern regarding missing documents.[3] Instead of providing explanation or attempting to justify its conduct, the NSCA seeks to shift blame to CrossFit for burdening the NSCA with discovery in the Federal Case. But what the NSCA fails to disclose to Your Honor is that the Federal Case discovery referenced by the NSCA was served ***less than six months ago***, after discovery was reopened based on the Federal court's determination that the NSCA acted in bad faith, committed perjury, and concealed relevant and responsive documents that were "too numerous to comprehensively catalog" from CrossFit ***for years***.[4] Rather than take responsibility or defend its continued disregard for the discovery process, the NSCA instead falsely claims that all issues related to the First Set of Document Requests "have already been resolved and litigated" and that CrossFit's motion is "time-barred."[5] As set forth below, these excuses hold no water. The NSCA's willful efforts to avoid responsibility and shift blame to CrossFit are patently bad faith.

Finally, the NSCA does not deny that it failed to honor multiple agreements reached in meet and confer discussions and has not complied with requests made in meet and confer ***in May 2017***.[6] Instead, the NSCA boldly asks Your Honor to vitiate one of the agreements it reached, excuse the NSCA from providing supplemental responses to RFP 74 and Interrogatory 41 and grant some unspecified amount of time to fulfill its other commitments made months ago.[7] The NSCA has offered no excuse for its actions, nor justified any of its requests.

CrossFit's Motion is before Your Honor because of the flagrant discovery abuse by the NSCA over the past year. The NSCA's games, accentuated by the positions in the Opposition, have

---

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

[2] Opp. at 9.

[3] Motion at 28-30; Opp. at 8-9.

[4] Ex. D at pgs. 3-13; Ex. E at 7-10.

[5] Opp. at 8.

[6] Opp. at 7.

[7] *Id.* at 9.

caused months of delay for CrossFit and forced it to needlessly incur tens of thousands of dollars in legal fees. CrossFit asks that Your Honor hold the NSCA accountable for its conduct, order the NSCA to comply with its discovery obligations, and reimburse CrossFit for related legal fees.

I. COMPELLING THE NSCA TO RESPOND TO THE PEER-REVIEW DISCOVERY IS APPROPRIATE AND CONSISTENT WITH THE FEDERAL COURT'S RELEVANCE ANALYSIS

According to the NSCA, the peer-review process is designed to promote "reliable science" and "enhance[] the scientific credibility of studies published in the JSCR." CrossFit does not dispute this goal. Similarly, the NSCA does not dispute that there is no "peer-review privilege," and that there is nothing reliable, credible, or scientific about the fake injury data that was created during the peer-review process for the Devor Article. Nevertheless, despite placing the integrity of its peer-review process *directly* at issue in this case, the NSCA seeks to insulate its actions and ignore the mountain of evidence demonstrating the process was unethically highjacked from the start. The NSCA should not be permitted to use the peer-review process as both a sword and shield.

Seeking to justify its refusal to respond to the Peer-Review Discovery, the NSCA's Opposition merely re-hashes arguments it made years ago in the Federal Case while ignoring the claims in this action and the dramatic evolution of evidence since July 2015. In so doing, the NSCA fails to address nearly all of CrossFit's substantive arguments why the peer-review process, as a whole, is central to this litigation. The NSCA's recycled arguments fail for the following five reasons, which are discussed in more detail below:

First, the NSCA does not dispute CrossFit's arguments in the Motion (*see* Section III(C)(3)) that peer reviewer's names are routinely disclosed when fraud or scientific misconduct is alleged. Here, it is not only alleged, it has been *proven*. The record in both the federal and state actions—including the NSCA's September 2015 Erratum, the Federal court's September 2016 summary judgment order on the false injury data, the NSCA's May 2017 Retraction, the NSCA's May 2017 deposition testimony and the Federal court's May 2017 Sanctions Order—confirm there is ample evidence of both fraud and scientific misconduct that began with the deeply-flawed peer-review process.

Second, in public statements and on countless occasions in litigation, the NSCA has claimed it had no obligation to investigate, address, or stop the spread of the false-injury data because of the peer-review process. In addition, nearly all of the Alleged Defamatory Statements in this case center on the false-injury data, and the NSCA does not dispute that the false-injury data was injected into the Article during the peer-review process based on comments from Dr. Kraemer (Editor in Chief) and the peer reviewers. Indeed, the NSCA does not dispute that the peer-review process—which is supposed to facilitate scientific integrity—was manipulated from the start. The NSCA's efforts to use the "integrity" of the peer-review process as a sword to assert claims against CrossFit and shield to insulate discovery into the fraud and misconduct should not be tolerated.

Third, the Opposition points Your Honor to an excerpt of a July 15, 2015 order ("2015 Order") from the Federal Case as support for the argument that the Federal court had already found the peer-reviewers' identities should never be disclosed. The NSCA, however, misrepresents the 2015 Order's actual findings and ignores the context surrounding those findings. For example, when read in context along with the footnotes, the quote the NSCA frames as a "finding" on First Amendment protection was in fact just *a summary of the NSCA's own 2015 arguments*. The 2015 Order makes no finding agreeing with the NSCA's arguments. Rather, as explained below, the true findings in the 2015 Order center on relevance based on *the pleadings at issue in that case*. On at least seven different occasions the 2015 Order explains how the Federal court's conclusions were based on the record as of July 2015 as it related to the claims in CrossFit's Federal Case. The NSCA's claims against CrossFit in this case are, of course, very different. Further, since July 2015, additional evidence has surfaced that highlights the NSCA's efforts to manipulate the peer-review process in furtherance of its commercial agenda.[8] And of-course, as discussed below, the NSCA chose to put the identities of the peer reviewers, the method of their selection, and the integrity of the peer-review process directly at issue in this case. Compelling the NSCA to respond to the Peer-Review Discovery is entirely consist with the 2015 Order, in which the Federal court reasoned:

> *"The [Federal] Complaint does not challenge the integrity of the peer review process, and it is possible that [CrossFit] may, at some time in the future, be able to present evidence and additional argument that would tip the balance in favor of disclosure of the identities of the peer reviewers. For these reasons, the Court will only issues a limited protective order precluding [CrossFit] from discovering the identities of the peer reviewers at this time."*[9]

Thus, even in the Federal Case in 2015, where the Court found the identity of the reviewers was not sufficiently relevant at that time, the Court declined to do what the NSCA is seeking here – prohibit CrossFit from pursuing discovery regarding the integrity of the peer-review process and the selection of peer reviewers.[10] The relief CrossFit seeks in this case, two years later, is warranted and consistent with the Federal court's 2015 Order.

Fourth, the NSCA ignores that three of the nine Alleged Defamatory Statements directly relate to the integrity of the peer-review process. CrossFit identified the three statements in its Motion, but the NSCA chose to address only one of the statements in its Opposition. The NSCA does not dispute, and therefore waives, all related relevance arguments concerning two of the three

---

[8] An agenda the NSCA was sanctioned for concealing. In both this and the Federal Case, the NSCA also concealed documents revealing that it viewed CrossFit as the single greatest threat to the NSCA's relevance and revenue during the same time period it coerced and published (twice) the false injury data. *See* Ex. D at pgs. 3-10, 13 & Ex. E at pgs. 8-10.

[9] Ex. Q at 16:11-16.

[10] *Id.* at 20:15-24 (stating "However, [CrossFit] is not precluded from making further inquiries about the peer reviewers for the Devor Study and/or the integrity of the peer review process.")

Alleged Defamatory Statements. These statements – which the NSCA chose to claim are false and defamatory – unequivocally place the identities of the peer reviewers, the method of their selection, and the integrity of the peer-review process directly at issue in this case.

Finally, the Opposition inaccurately summarizes proffered case law while failing to provide any actual meaningful analysis. Even if the NSCA's proffered legal framework was accurate, a simple application of the facts in this case only illustrates why the NSCA must be compelled to respond to the Peer-Review Discovery.

A. The NSCA Does Not Contest that Peer-Reviewer's Identities are Routinely Disclosed When Fraud or Scientific Misconduct is Present

The Motion provides evidence illustrating that peer-reviewer's identities are routinely disclosed when scientific misconduct or fraud is *alleged*. For example, the International Committee of Medical Journal Editors ("ICMJE") sets out best practices and ethical standards in the conduct and reporting of published research in scientific journals. The parties do not dispute the JSCR is a scientific journal. The ICMJE's "Responsibilities in the Submission and Peer review process" provides, in part, "*Confidentiality may have to be breached if dishonesty or fraud is alleged, but editors should notify authors or reviewers if they intend to do so and confidentiality must otherwise be honored*."[11]

In its Opposition, the NSCA remained silent on this point, instead attempting to downplay the evidence of misconduct by framing the false statements in the Devor Article as merely "a-sentence-and-a-half" appearing in a "scholarly piece" that "was not written by the JSCR."[12] But a mountain of evidence, including direct admissions from the NSCA's Publications Director, belies the NSCA's efforts to marginalize the fraud and scientific misconduct – conduct that began with Dr. Kraemer's order that the peer-review process should focus on injuries.

For example, in the Ohio action,[13] the NSCA's Publications Director Keith Cinea—also the NSCA's 30(b)(6) in the Federal Case—was handed the Devor Article[14] and asked to identify all statements the NSCA believes are false. Mr. Cinea identified far more than a "sentence-and-a-

[11] Motion, Ex. V; *see also* Motion Ex. W (International Journal of Biology of Exercise Privacy and Confidentiality Policy, stating, "Reviewers also have rights to confidentiality, which must be respected by the editor. Confidentiality may have to be breached if dishonesty or fraud is alleged but otherwise must be honoured.") & Ex. X (Sao Paulo Medical Journal Confidentiality Policy, stating the same).

[12] Opp. at 2.

[13] As noted in the Opposition, the Ohio action refers to the claims brought against the NSCA by the CrossFit Affiliate owner Mitch Potterf, who owns the gym where the injuries allegedly occurred.

[14] The Devor Article is Ex. 1 to the Opposition, and was also Ex. 1 in the Cinea deposition transcript attached to this brief, if Your Honor wishes to follow along with Mr. Cinea's testimony concerning the false statements.

troutman sanders

half," as stated in the Opposition. Specifically, Mr. Cinea described how several *paragraphs* contain false statements including the coerced citation to the CHAMP Paper co-authored by Dr. Kraemer.[15] The Opposition does not mention these other glaring defects, which required an Erratum and Retraction by the NSCA, and fails to explain how these defects could have survived the NSCA's self-proclaimed "rigorous" peer-review process, which Dr. Kraemer describes as necessary to facilitate "reliable" and "scientific" publications.[16] The integrity of that process and the rigor with which it was followed is directly at issue in this case.

The relevance of the defects in the peer-review process, and the NSCA's efforts to conceal them, are further revealed by the NSCA's actions (and inactions) once an outside source realized the injury data was fabricated. At each step since publication of the Devor Article, the NSCA has attempted to turn the spotlight away from the peer-review process and place the blame on CrossFit, Ohio State University ("OSU"), and the Devor Article's authors. The Opposition attempts the same.

The NSCA knew that any outside investigation into the fabricated data would lead directly to the peer-review process. So, as explained below, once the NSCA could no longer claim the injury data was valid, starting in May 2013,[17] it developed a scheme to keep the false-data-related investigation in house by issuing an Erratum. At the same time, the NSCA began looking for a scapegoat to justify a full retraction.

The NSCA was asked what duty it believed it had after suspecting scientific misconduct occurred in the Devor Article. Its Publications Director testified that the NSCA's only duty is to alert the institution (here, OSU) where the misconduct took place.[18] The Opposition's efforts to downplay the various flaws in the Devor Article and a simple comparison of the facts surrounding the Erratum and Retraction expose the NSCA's scheme to shield the peer-review process from scrutiny.

To begin, it is undisputed that a scientific study involving human beings must be immediately retracted if it had claimed it secured Institutional Review Board ("IRB") approval, but it is discovered IRB approval was never obtained. Here, the NSCA claims it learned that the Devor

---

[15] See Reply Ex. AM (Excerpts from Keith Cinea May 11, 2017 deposition in Ohio matter) at 46:13-49:16.

[16] See Opp. Ex. 7 at p. 2, ¶¶ 4-6.

[17] See Section B below discussing Russell Berger's May 2013 email and report to the NSCA.

[18] See Reply Ex. AM (Cinea May 2017 deposition excerpts) at 73:19-74:7.

troutman sanders

Article lacked IRB approval[19] in March 2015,[20] but waited until December 2016 to send a letter to OSU providing extensive evidence of IRB-related scientific misconduct.[21] So why would the NSCA keep the false injury data to itself, but alert OSU to the IRB fraud?

To shift focus away from the peer reviewers and Dr. Kraemer, the NSCA's December 2016 letter claimed the NCSA had "no authority" to make any misconduct findings despite spending several pages detailing the scientific misconduct requiring an immediate retraction. This posture was designed to provide OSU with a neatly-packaged analysis so OSU would expose the IRB violations and the peer-review process would remain concealed. *But the belated efforts to blame OSU cannot be reconciled with the fact that only the NSCA (not OSU) can retract a JSCR article*.[22] There is no reason the NSCA could not retract the Article itself.

Indeed, the NSCA's motives become clear when the NSCA's IRB tactics are compared with its treatment of the false injury data. The NSCA has not and cannot explain why it never informed OSU that it suspected the injury data was fabricated during the peer-review process. Nor can the NSCA explain why the peer reviewers, supposed industry experts, failed to review the IRB protocol or challenge the injury data that quickly appeared *without any scientific support* after their, and Dr. Kraemer's, demands. These fatal defects in the Devor Article should have been quickly identified by neutral, qualified peer reviewers.

The NSCA also cannot explain why it chose to issue an Erratum for the fake injury data on its own, while not alerting OSU to the fake injury data, yet was unable to issue a retraction based on IRB deficiencies without OSU's blessing. When asked why the NSCA did not alert OSU to the false injury data, but did alert OSU to the IRB issues, Mr. Cinea responded, "I—I don't know."[23] The NSCA's December 2016 letter to OSU, however, provides the answer: it sought to avoid scrutiny of the peer-review process.

Ultimately, even after the Federal court found the injury data false as a matter of law, and even after the NSCA received sworn declarations from each "injured" study participant confirming they were never injured and never told anyone they were injured, ***the NSCA still claimed that***

---

[19] Please note that the basis for the May 2017 Retraction of the Devor Article was lack of IRB approval, *not* the false injury data. However, after prodding from CrossFit once the NSCA disclosed during Mr. Cinea's May 2017 deposition that it intended to retract the Devor Article, the NSCA used the Retraction to try to clean up some of the misleading injury-data-related statements in the Erratum.

[20] See Reply Ex. AN (NSCA December 20, 2016 letter to OSU). The NSCA's letter claims it first suspected there was an issue with IRB approval when lead Devor Article authors Mike Smith and Steven Devor were deposed (see NSCAPROD 15590). Those depositions took place in March 2015.

[21] *Id.*

[22] See Reply Ex. AM (Cinea May 2017 deposition excerpts) at 14:14 to 16:16.

[23] *Id.*

troutman sanders

the injuries occurred to keep focus away from the peer-review process. Once again, this posture was designed to shield the peer-review process from scrutiny. The NSCA's December 2016 letter to OSU inexcusably continued the charade that the injury data was not fabricated[24]:

everyone stronger

approval period was twenty, and there were no complaints, withdrawals, unanticipated events, or external events.

As you are well aware, the Article was based off a study that contained fifty-four total participants. Of those, eleven dropped out, with two subjects citing time concerns and nine subjects citing overuse or injury for failing to complete the program and finish follow-up testing. It is our understanding that the overuse and injury published in the Article was an "unanticipated event." However, to the NSCA's knowledge, the Authors did not alert the participants of the Article to the possibility of overuse or injury when obtaining their informed consent. Additionally, to the NSCA's knowledge, the Authors, including the principle investigator, did not advise the IRB that there were fifty-four subjects (as opposed to twenty) enrolled in the underlying study or that nine of the subjects reported unanticipated events.

It is inconceivable that peer reviewers, who according to Dr. Kraemer have "*an interest and expertise in the subject matter of the study*,"[25] would not check for IRB approval or question how injury data simply appeared in a manuscript submitted *without* injury data. It is equally inconceivable that the NSCA, as the self-proclaimed worldwide authority on strength and conditioning, would not investigate the injury data or peer-review process based on the report CrossFit provided in May 2013 (detailed below in section B). CrossFit anticipates that the NSCA's extensive efforts to conceal the peer reviewers' identities are nothing more than an effort to conceal that the reviewers' "interests and expertise" were aligned with the NSCA's and Dr. Kraemer's interests in disparaging CrossFit training.

In sum, the Opposition does not refute any of the corroborated evidence revealing extensive scientific misconduct and fraud surrounding the creation, publication (twice), and subsequent use of the false-injury data concocted during the peer-review process. According to industry practice, this evidence alone justifies disclosure of the peer reviewers' names and relationships with the NSCA and Dr. Kraemer.

---

[24] See Reply Ex. AN (NSCA December 20, 2016 letter to OSU) at NSCAPROD 15592.

[25] *See* Opp. Ex. 7 at p. 2, ⁋ 4.

B. The NSCA Has Placed the Peer-Review Process at Issue by Repeatedly Claiming It Had No Obligation to Investigate, Address, or Stop the Spread of the False-Injury Data Because of the Peer-Review Process

As described in the Motion, the NSCA's public position has long been that it had no obligation to address the false injury data or stop its publication ***because the study was peer reviewed***. Indeed, when CrossFit first reached out to Dr. Kraemer about the injury data shortly after the NSCA published the Devor Article in February 2013, Dr. Kraemer claimed he was surprised by the injury data and had no concerns about the integrity of the data because "it had been peer reviewed and that was good enough."[26]

As detailed in the Motion, Dr. Kraemer has testified that as Editor in Chief of the JSCR, he was unaware of ***any*** ethical rules or regulations governing the peer-review process.[27] That testimony is simply incredible considering the 2014 Declaration testimony from Dr. Kraemer (cited in the Opposition) claimed that the peer-review process is designed to "support[] the public interest in reliable science" and "enhance the quality of scientific publishing,"[28] and that the NSCA uses the peer-review process to "enhance[] the scientific credibility of studies published in the JSCR."[29]

None of the false information injected in the Devor Article during the peer-review process was reliable, credible or supported by any scientific basis. Even if the authors simply concocted the injury data, it was the peer reviewers' job to ensure the data was reliable. As Dr. Morreim notes in her ethics expert report, adding post-hoc-data is far from "scientific." Here, the evidence reveals the peer reviewers and Dr. Kraemer were responsible for coercing the false information, allowing it to saturate the fitness market, and trying to prevent CrossFit and the public from identifying the full scope of the NSCA's misconduct.

For example, to insulate the peer-review process from scrutiny, Dr. Kraemer instructed the NSCA to not investigate the extensive evidence of scientific misconduct that CrossFit identified shortly after the Article was first published.

In May 2013 (after the Devor Article was published "ahead of print" in February 2013 and before it was formally published in November 2013), CrossFit employee Russell Berger emailed the NSCA Board a detailed report he wrote for the CrossFit Journal addressing various concerns with the injury data.[30] Mr. Berger's report provided the following evidence:

- Both Mr. Berger and Mr. Potterf (the CrossFit Affiliate gym owner in Ohio where the study took place) had separate conversations with study participants who confirmed they were never injured.

---

[26] Reply Ex. AO (Deposition excerpts from Russell Berger in Federal action).

[27] See Motion at 14, Ex. J.

[28] Opp. Ex. 7 at p. 2, ¶¶ 4,6.

[29] Opp. at p. 2.

[30] Reply Ex. AP (2013 Berger email and CrossFit Journal Article).

- The nurse who coordinated *all of the data* for the study stated: "I know every person who didn't re-test. It was easy to figure out they weren't injured. This data is inaccurate. Those individuals were not injured, and that wasn't the reason they didn't test out. To me this questions the validity of the research."
- In contrast to the injury data claiming nine people were hurt from CrossFit in ten weeks, Mr. Potterf stated, "I haven't hurt nine people in four years."
- A transcript of a recorded interview with lead author Dr. Devor (who consented to the recording) confirmed he could not explain the basis for the injury data and conceded Mr. Berger had legitimate concerns.
- The purportedly "double blind" study was not actually blind because the authors were able to determine the identities of the "injured" participants after the study was over.

The NSCA cannot, with any shred of credibility, contest that Mr. Berger's report casted serious doubt on the credibility and scientific basis for the injury data in the Devor Article. Nevertheless, the NSCA received the email, shared it amongst NSCA leadership, and chose not to investigate the injury data *based on a direct order from Dr. Kraemer*.[31] The NSCA also never shared the information with OSU. Instead, the NCSA published the Devor Article a second time in November 2013, which quickly became the most popular article in the JSCR's history.

The NSCA is attempting to use the peer-review process as a shield to insulate its fraud and scientific misconduct from scrutiny, and as a sword to assert claims based on CrossFit's statements regarding that process. The NSCA made its choice to put the peer-review process, including the peer-reviewers names, at issue when it commenced this action. The peer-review process, including the identities of the reviewers, strikes at the heart of the Alleged Defamatory Statements.

C. Compelling Compliance with the Peer-Review Discovery is Consistent with the Federal Court's Analysis

The NSCA's reliance in the Opposition on the Federal court's 2015 Order is misleading at best. The 2015 Order emphasizes no less than seven times the Federal court's decision was based on the *relevance* of the peer-review process as it related to the "claims or defenses in the parties' pleadings."[32] Glossing over the Federal court's emphasis on relevance, the NSCA invites Your Honor to blindly follow a single sentence in the 2015 Order taken out of context.

Specifically, the NSCA claims the 2015 Order found that "there were First Amendment concerns as identifying peer reviewers would **undoubtedly chill** the JSCR's ability to obtain scholars to volunteer their time to conduct reviews of academic manuscripts."[33] This argument fails for at

---

[31] Reply Ex. AQ (Deposition excerpts from Keith Cinea in Federal action) at 284:20-285:22.

[32] See, e.g., Ex. Q at 13:12-14; 14:15-22; 14:22-26; 15:11-14; 15 at footnote 3; 16:11-14; 16:18-23.

[33] Opp. at 3, emphasis is the NSCA's, citing NSCA Ex. 3 at 13:12-15:10.

troutman sanders

least two reasons. First, even if the Federal court made this finding (it did not), "the impact of the requested discovery on First Amendment protections" is only one of four factors a court may consider.[34] As described in sections I(E) and I(F) below, the NSCA makes little, if any, effort to address the other three factors, assuming they even apply.

Second, the quoted provision of the 2015 Order is simply reciting *the NSCA's own arguments*, not any finding or conclusion by the Federal court. Indeed, the phrase "undoubtedly chill" is directly from the NSCA's 2015 briefing, which the Federal court places in quotes and cites when *recapping* the NSCA's arguments.[35] At no point in the 2015 Order did the Federal court conclude any First Amendment protections are afforded to peer reviewers. Rather, immediately following the quote distorted in the Opposition, the 2015 Order emphasized that the court's conclusions are based on *relevance*. For example, the 2015 Order notes:

> *"The [Federal] Complaint does not challenge the integrity of the peer review process, and it is possible that plaintiff, may, at some time in the future, be able to present evidence and additional argument that would tip the balance in favor of disclosure of the identities of the peer reviewers. For these reasons, the Court will only issues a limited protective order precluding [CrossFit] from discovering the identities of the peer reviewers at this time."*[36]

The Federal court's *relevance* inquiry was based on the record as of July <u>2015</u>. At that time, the Federal court ordered:

> *"At this time, [CrossFit] is not entitled to an order compelling [the NSCA] to disclose the identities of the peer reviewers or to disclose documents or information that would make the identities of the peer reviewers obvious. However, [CrossFit] is not precluded from making further inquiries about the peer reviewers for the Devor Study and/or the integrity of the peer review process. "*[37]

The Court further ordered that its 2015 Order was "without prejudice to [CrossFit] seeking to compel the identities of the peer reviewers in the future if it can establish the relevance of this information to its false advertising and/or unfair business competition causes of action in the Complaint or to an affirmative defense in defendant's Answer…"[38]

---

[34] *See* Ex. Q at 12:20-25.

[35] *See* Ex. Q at 15:5-10.

[36] *Id.* at 16:11-16.

[37] *Id.* at 20:15-24.

[38] *Id.*

The record in both actions have evolved dramatically since July 2015, including, but not limited to:

- The NSCA issuing an Erratum in September 2015 based on the undeniable scientific misconduct;
- The Federal court ruling in September 2016 that the injury data was false as a matter of law;
- The NSCA fully retracting the Devor Article in May 2017 based on the authors' failure to secure IRB approval – *over two years* after the NSCA suspected IRB-related problems and *over four-and-a-half years* since the Devor Article was first published; and
- The May 2017 Sanctions Order, and October 2017 Order denying the NSCA's request to reconsider the issue sanctions, confirming the NSCA lied under oath and concealed documents about its commercially-driven efforts to unfairly compete with CrossFit.

Putting aside the NSCA's misrepresentation of *its own arguments* as a judicial finding, the Opposition fails to acknowledge the two relevant aspects of the 2015 Order: (1) the holding was expressly limited to the claims asserted *in the Federal Case* based on the record *at that time*; and (2) the court acknowledged CrossFit could later seek disclosure of the identity of the peer reviewers "if it can establish the relevance of this information." In other words, the Court engaged in a relevance analysis based on the record before her at that time, in that case. Thus, there is no support for the NSCA's argument that Your Honor is constrained in any way from performing that same analysis based on the issues *in this case*, and *on this record*. Indeed, doing so is entirely consistent with the 2015 Order. As set forth in the Motion and herein, the Peer-Review Discovery is undoubtedly relevant to the claims voluntarily asserted by the NSCA here.

D. <u>The Oppositions Fails to Address How Three Alleged Defamatory Statements Place the Integrity of the Peer-Review Process Directly at Issue</u>

The Opposition contends "CrossFit cannot establish the relevance of the identities of the peer reviewers … [,]"[39] but only acknowledges one of the three Alleged Defamatory Statements that place the peer-review process directly at issue in this litigation: the statement concerning Dr. Kraemer hand-selecting peer reviewers.[40] The NSCA ignores—and therefore waives any relevance arguments regarding—the other two Alleged Defamatory Statements identified in the Motion:

- A June 1, 2015 statement: "In 2013 the NSCA knowingly published fabricated injury data about CrossFit. That didn't work, either. CrossFit uncovered the fraud." *Compl.* ¶ 13D; and

---

[39] Opp. at 6.

[40] The three Alleged Defamatory Statements are identified on page 4 in Defendants' Motion. In its Opposition, the NSCA only references the statement found in Complaint ¶ 14A, but ignores the statements found in Complaint ¶¶ 13D and 13E.

- A June 9, 2015 statement: "…. These organizations have all engaged in long-term, systematic, regular, and collaborative fraud—fraud that is scientific, academic, and tortious—in their representatives' collective statements, publications, press releases, and in a paid public-relations campaign against CrossFit." *Compl.* ¶ 13E.

The peer-review process lies at the heart of each these two statements the Opposition ignores. Taken together, these statements illustrate that the NSCA is alleging it never knowingly published false injury data that was created during the peer-review process and that the NSCA never engaged in any type of scientific, academic, or other form of fraud in its JSCR publications. The peer-review process holds one of the keys to determine whether these statements are true.

While the Opposition focuses only on identities, the Peer-Review Discovery is far broader given the broad nature of the Alleged Defamatory Statements. For example: the process for selection of peer reviewers; the steps taken in the peer-review process; whether any of the peer reviewers had pre-existing biases against CrossFit; the peer reviewers' pre-existing relationships with the NSCA; whether the peer reviewers were subject to influence by the NSCA; and whether the peer reviewers had any communications with the NSCA about addressing the false-injury data (to include the Erratum and Retraction). These questions must be answered so Defendants can fairly prepare their defenses.

Accordingly, the Alleged Defamatory Statements in Complaint paragraphs 13D and 13E confirm each request in the Peer-Review Discovery is relevant.

E. The Case Law Cited by the NSCA is Inapposite and Even if the *Solarex* Test Applies, the Relevance of the Peer-Review Discovery Outweighs Any Legitimate Confidentiality Concerns

At the outset, the NSCA appears to concede there is no peer-review privilege.[41] But the NSCA appears to request that the Court apply a "balancing test" to determine whether the identities of the peer reviewers should remain confidential. But the cases cited by the NSCA in support of this alleged "balancing test" are inapposite.

First, the NSCA cites *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 389-390 (N.D. Cal. 1976) for the proposition that California courts protect "confidential academic information."[42] But *Richards* did not protect disclosure of the identity of peer reviewers of a published academic article. Instead, *Richards* recognized a "public interest in maintaining confidential relationships between academic researchers and ***their sources***."[43] There, the court was concerned about production of "raw data" upon which research was based.[44] There is no

[41] Opp. at 5.

[42] Opp. at 4.

[43] *Richards*, 71 F.R.D. at 389 (emphasis added)

[44] *Id.* at 390.

troutman sanders

discussion in *Richards* suggesting that the peer-review process—undertaken after research is completed and the proposed paper has been submitted —is confidential or otherwise protected.

Similarly, the Seventh Circuit's decision in *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982) focuses on protection of *raw data* upon which research was based. Again, the Seventh Circuit specifically cited hazards in disclosing incomplete research or raw data *before* the peer-review process.[45]

Though touted in the Opposition as "the most squarely on-point case," *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163 (E.D.N.Y.[46] 1988) also did not create a special "balancing test" for determining whether to order disclosure of academic information. Instead, the *Solarex* court merely compared the potential hardship to the party against whom discovery is sought with that to the party seeking discovery, as required for any motion to compel under Rule 26(c).[47] Indeed, in the 2015 Order, the Federal court explained that "the circumstances at issue here are somewhat distinguishable from those in *Solarex*, 121 F.R.D. 163, in that defendant [NSCA] is a party to the action rather than a third-party publisher with no interest in the outcome of the litigation."[48]

In evaluating the burden on the publisher to reveal its peer reviewers' identities, the analysis by the *Solarex* court undermines the NSCA's arguments. *Solarex* noted that "the peer review function performed by independent referees for editors of scholarly journals contributes to the advancement of science by helping to assure that 'faulty, incomplete or misleading results are not published.'"[49] Further, the court acknowledged that confidentiality of the identity of the peer reviewers in that case was important to ensure the "complete and candid advice."[50] As described in *Solarex*, "[t]he reviewers assess for the editors the worthiness of manuscripts for publication, and their conclusions in this regard are heavily relied upon in the decision whether and what to publish."

Here, the peer-review process was defective because of the NSCA's interference and manipulation of the process, and the NSCA has put that fact at issue in this case by asserting CrossFit's attack on that process was defamatory. Instead of soliciting "complete and candid advice" or "heavily relying upon" the peer reviewers, undisputed evidence reveals Dr. Kraemer and Dr. Triplett directed the peer reviewers to certain conclusions related to CrossFit's safety. Unlike in *Solarex*, the actual substance of the peer-review is undoubtedly relevant to CrossFit's defenses against the NSCA's defamation claims.

---

[45] *Id.* at 1273-74.

[46] Notably, *Solarex* is non-binding authority as an opinion from the Eastern District of New York.

[47] *Id.* at 169.

[48] Ex. Q (2015 Order) at 16:8-11.

[49] *Solarex* at 171.

[50] *Id.*

In contrast, the *Solarex* court concluded the requesting party there did not have strong relevance grounds to support disclosure of the reviewer's identity.[51] The defendant in *Solarex* wanted to depose the reviewer to determine whether there was any link between the reviewer and the inventor of a patent,[52] but had no factual basis to support this link and admitted that such a link was "wholly speculative."[53] The *Solarex* court refused to compel discovery based on the complete lack of any factual predicate to support the defendant's theories.[54]

Here, far from mere speculation, CrossFit has presented corroborated and unopposed evidence that Dr. Kraemer highjacked the peer-review process from the outset and the fake injury data was added to the Devor Article only after comments from Dr. Kraemer and the peer reviewers. Further, the NSCA does not dispute Dr. Triplett's testimony that Dr. Kraemer handpicked peer reviewers for JSCR articles for over ten years – a fact the NSCA asserts is false by virtue of its allegations in the Complaint. Thus, the cases cited by the NSCA in its Opposition, including *Solarex*, are distinguishable at best, but in no respect, establish any privilege protecting disclosure of peer reviewer identities.

F. Even if *Solarex's* Balancing Test Applies, the Opposition Fails to Analyze All Four Factors Because They All Weigh Heavily in Favor of Disclosure

Even if *Solarex* were applicable here,[55] the Opposition makes no effort to apply the four-factor test enunciated there for "balancing the need for discovery against intrusion upon editorial processes."[56] Rather, the Opposition focuses solely on how the peer-review process *may* be impacted if the reviewers' identities are disclosed in this action. At best, these arguments relate only to the fourth inquiry in the *Solarex* test: First Amendment considerations. But tellingly, the NSCA *offers no legal support* for the notion that First Amendment protection—even assuming it exists here—can insulate fraud, scientific misconduct or evidence directly supporting a truth defense in defamation claims based on the peer-review process.

---

[51] *Id.* at 175 ("[T]here is virtually nothing in the record to suggest that disclosure of the referee's identity would enable Arco to adduce this evidence.").

[52] *Id.* at 177-78.

[53] *Id.*

[54] *Id.* at 179. In the 2015 Order, the Federal court also notes this important relevance determination. Ex. Q, 2015 Order, at 12:20-13:24 (examining *Solarex* and concluding, the defendant's desire to learn the identity of the peer reviewer was merely a 'fishing expedition,' as there was nothing in the record to indicate there was any substance to the defendant's theory . . . .")

[55] See Ex. Q (2015 Order) at 16:8-11 (stating, "The Court acknowledges that the circumstances at issue here are somewhat distinguishable from those in *Solarex*, 121 F.R.D. 163, in that defendant is a party to the action rather than a third-party publisher with no interest in the outcome of the litigation.")

[56] *Id.* at 12:20-25.

In reality, this factor, along with the three other *Solarex* factors ignored by the Opposition — (1) the nature of the suit; (2) whether the information goes to the heart of the claim of the party seeking disclosure; and (3) whether the party seeking disclosure has exhausted other sources—[57] all weigh heavily in favor of disclosure.

1. The Nature of the NSCA's Claims Place the Peer-Review Discovery Directly at Issue and Go to the Heart of Defendants' Defenses in This Action

As explained above, the Alleged Defamatory Statements alone place the integrity of the peer-review process directly at issue in this action, and the extensive evidence of fraud and scientific misconduct in the beginning, middle and aftermath of the peer-review process cement the critical need for the Peer-Review Discovery. The first two *Solarex* factors therefore heavily favor disclosure.

2. CrossFit Has Exhausted All Other Sources to Obtain the Peer-Review Discovery

The NSCA does not dispute that Dr. Kraemer, Dr. Triplett, and the peer reviewers all used non-NSCA email addresses to communicate about the Devor Article. And the NSCA has provided no trustworthy assurances that it has searched for any communications with the peer reviewers in the NSCA's possession. As a result, by concealing the identities of the peer reviewers and not providing written responses to *any* of the Peer-Review Discovery, the NSCA has successfully concealed the gateway to this critically-relevant universe of information.

In Dr. Kraemer's July 25, 2017 deposition in this matter, he confirmed that he selected peer reviewers for all JSCR Articles from 1996 to 2010.[58] Dr. Kraemer also confirmed that since 2010, he has continued to select peer reviewers based on the workload of senior editors.[59] Regarding the Devor Article, Dr. Kraemer testified that it was Dr. Triplett who "**recruited**" the peer reviewers.[60] Indeed, Dr. Kraemer emphasized that the term "selected" with respect to the peer reviewers was inaccurate, and the more accurate term is "recruited."[61]

When asked about his history with the peer reviewers for the Devor Article, Dr. Kraemer suggested he knew the identity of one, but then backtracked. Dr. Kraemer testified that he did

[57] *See Solarex* at 173.

[58] Reply Ex. AR (Dr. Kraemer July 2017 deposition excerpts) at 199:7-200:8.

[59] *Id.*

[60] *Id.* at 198:6-22

[61] *Id.*

troutman sanders

not *think* he worked with one of the reviewers in the past, but then claimed he could not answer any more questions because he did not know their names:[62]

William Kraemer, Ph.D.

Page 205

1 BY MR. DANZIG:
2 **Q. So without showing their names, have you**
3 **ever worked with either of the peer reviewers for the**
4 **NSCA article in the past?**
5 MR. KAWABATA: Objection. Vague as to
6 the term "worked." If you understand.
7 A. I think, first of all, I couldn't tell
8 you who they are right now because I wasn't involved in
9 that process. The one I suspect, no, but I don't think
10 I did, but I don't know because I really couldn't even
11 tell you who they were.
12 BY MR. DANZIG:
13 **Q. So at this point, Peer Reviewer A and**
14 **Peer Reviewer B, you don't know their names?**
15 A. I don't know their names.
16 **Q. You can't answer on your past history**
17 **with them?**
18 A. Yeah. There's no understanding of that
19 at all.
20 **Q. Okay. So sitting here today, you don't**
21 **know if either of these individuals ever served as peer**
22 **reviewers for the JSCR for prior articles?**
23 A. No, I don't.

Additionally, Dr. Kraemer testified he "has no understanding" of whether he had any past history with the peer reviewers.[63] Likewise, Dr. Triplett testified that she did not know the identity of the peer reviewers, but noted there were two.[64] Evidence that Dr. Kraemer or Dr. Triplett did know the peer reviewers' identities; had worked with them in the past; or were communicating with them at any point in time about the Devor Article would directly relate to the *three* Alleged Defamatory Statements that implicate the peer-review process, as well as the credibility of these NSCA employees as witnesses. CrossFit has exhausted its other avenues to this information.

3. First Amendment Considerations

The final *Solarex* factor also favors disclosure. Unlike the "fishing expedition" in *Solarex*, CrossFit (in the Motion and this reply brief) and the Federal court (in the Sanctions Order and Summary Judgment Order on falsity) have identified extensive evidence of fraud and scientific misconduct. While CrossFit and the NSCA appear to agree that candor during the peer-review process is important, the process itself cannot be used as a vehicle for fraud. The NSCA offers no authority suggesting that First Amendment rights are implicated in this context, much less that those rights can be asserted to insulate fraud and deprive a defendant of relevant information that goes to the heart of the claims asserted against it.

[62] *Id.* at 205:2-23.

[63] *Id.*

[64] See Opp. Ex. 5 at 176:8-177:4.

troutman sanders

In sum, the four-factor balancing test in *Solarex,* even if it applies, tips heavily in favor of disclosure. While the 2015 Order has no bearing on Your Honor's determination here, the court there correctly foreshadowed that CrossFit may in the future "present evidence and additional argument that tip the balance in favor of disclosure of the identities of the peer reviewers." There is no question that showing has been made and the context of this case requires disclosure. The NSCA has not identified any cognizable basis to shield the peer-review process from discovery in this context, particularly in the face of fraud and scientific misconduct. Such a holding would, ironically, undermine the very purpose of the peer-review process offered by the NSCA: integrity. For the reasons in the Motion and above, the NSCA should be compelled to respond to the Peer-Review Discovery.

II. THE NSCA RAISES NO CREDIBLE OPPOSITION TO CROSSFIT'S REQUEST FOR AN ORDER COMPELLING COMPLIANCE WITH THE AGREEMENTS REACHED BETWEEN THE PARTIES

In addition to the NSCA's failure to respond to the Peer-Review Discovery, the Motion detailed the NSCA's refusal to respond to certain other discovery requests. In particular, the Motion explained (i) the lengthy history of CrossFit's good faith attempts to meet and confer regarding the NSCA's objections to such requests, (ii) the NSCA's agreement to supplement its responses to comply with the requests, and (iii) the NSCA's repeated breaches of the agreements reached between the parties in meet and confer. Armed with only another empty promise by the NSCA to comply with its prior agreements by October 27, 2017, CrossFit had no choice but to include these other discovery requests in its motion and seek an order compelling the NSCA's compliance.

The Opposition perfectly illustrates the bad-faith tactics being employed by the NSCA in discovery. The NSCA has not only blown through the most recent October 27, 2017 deadline by which it had promised compliance with outstanding requests – stating, without explanation, that it is now "requesting for a date to provide supplemental responses" – the NSCA has also renewed its objections to RFP 74 and Interrogatory 41 after agreeing six weeks ago it would respond to those requests in full.[65] The NSCA's Opposition only makes the case stronger for the relief sought in the Motion, including the imposition of mandatory monetary sanctions.

A. The NSCA Must Produce and Identify Documents Previously Identified as Responsive (RFP 74 and Interrogatory 41)

The Motion explained that the NSCA had previously produced a spreadsheet (the "Spreadsheet")[66] on which the NSCA had identified responsive relevant documents, and that CrossFit had propounded follow up discovery requesting production of the documents identified on the Spreadsheet (RFP 74) and identification of any such documents *not* produced and the basis for withholding such documents (Interrogatory 41).

---

[65] Opp. at 9.

[66] *See* Ex. AD at NSCAPROD013106.

During the parties' September 18, 2017 meet and confer regarding the NSCA's objections to these requests, the NSCA *agreed* to identify, no later than October 2, 2017, whether each of the documents identified on the Spreadsheet have been (i) produced (by Bates number), (ii) withheld (by specifying privilege log date and line number), or (iii) not produced (in which case CrossFit requested production). In its Opposition, the NSCA does not dispute the relevance of the requested information, nor the substance of its agreement on September 18th. Nor does the NSCA dispute it failed to meet the October 2, 2017 deadline, without explanation. Instead, the NSCA now formally reneges on its September 18th agreement and contends that CrossFit – not the NSCA – should have to filter through 13,000-plus pages of documents to determine whether *the NSCA* has produced these admittedly relevant documents.[67]

As set forth in the Motion, the position that CrossFit should bear the burden of confirming whether *the NSCA* produced or withheld documents *the NSCA identified as relevant* is absurd. The NSCA has made no showing it is unable to comply with the requests, nor can it. It was the NSCA who identified these documents on the Spreadsheet in the first place, and it was the NSCA that either produced or withheld these documents. Certainly, it is the NSCA that is in the best position to provide the requested information and produce the documents not previously produced.

Nor has the NSCA made any showing that compliance with the requests (and the September 18th agreement) would be a burden on the NSCA, much less an undue burden.[68] The Opposition makes clear the NSCA's efforts to comply with the requests have been limited to *counsel* for the NSCA performing a cursory review to compare the Spreadsheet with the NSCA's prior productions. The Opposition contains no evidence that the NSCA itself – including the author(s) of the Spreadsheet – made any attempt to determine whether the responsive documents had been produced or withheld. Nor does the Opposition explain what burden would be imposed if the author(s) of the Spreadsheet were compelled to simply review the Spreadsheet and identify the documents for counsel. CrossFit can only surmise this exercise would take a matter of hours, if not minutes. In any event, the NSCA has clearly failed to meet its burden of demonstrating any "undue burden" would be imposed.

Finally, the fact that counsel for the NSCA claims he encountered difficulty with carrying out the required comparison, after he personally oversaw the prior productions (including the decisions to withhold documents), cuts directly against the NSCA's argument that CrossFit would be in a better position to make any such comparison. Only the NSCA (including the author(s) of the Spreadsheet) can determine whether the documents identified on the Spreadsheet were actually produced or withheld (and if withheld, whether they were properly logged). The NSCA cannot simply foist this burden on CrossFit. CrossFit's request for an order compelling the NSCA to respond in full to RFP 74 and Interrogatory 41 should be granted.

---

[67] The NSCA does not argue in opposition that the documents are privileged or confidential, as it previously asserted, focusing instead solely on the purported burden on the NSCA.

[68] *See West Pico Furniture v. Superior Court*, 56 Cal.2d 407, 417 (1961) (noting objecting party must make showing to establish burden).

troutman sanders

B. The NSCA Does Not Oppose the Relief Sought in the Motion regarding Other RFPs and Interrogatories (RFPs 71, 73, 75 and 80 and Interrogatories 46-48)

The Motion explained that CrossFit was forced to seek an order compelling the NSCA to comply with various agreements reached during the September 18th meet and confer between the parties based on the NSCA's unilateral, and unexplained, failure to comply with those agreements. In the Opposition, the NSCA does not dispute it agreed as outlined in the Motion,[69] and reiterates its agreements as to the relevant requests as follows:

- The NSCA will identify which documents had previously been produced in response to RFPs 71 and 73 and confirm such documents represent all responsive documents in the possession, custody or control of the NSCA;
- The NSCA will produce all documents responsive to RFP 75 under the temporal limitation of January 1, 2008 through the present;
- The NSCA will respond to Interrogatory 46 with the modification such that it reads "Identify all NSCA Publications that reference CrossFit where Dr. William Kraemer provided comments to the authors of a document submitted for publication."; and
- The NSCA will provide a further response to Interrogatories 47 and 48, and RFP 80 notwithstanding its objections.

The NSCA also does not dispute it failed to comply with each of these agreements by October 2nd (the agreed deadline), forcing CrossFit to engage in successive meet and confer efforts and ultimately file the Motion seeking compliance with these agreements. Instead, the NSCA now asserts it will comply, but not by the October 27, 2017 date it most recently offered for compliance. The NSCA makes only the ambiguous statement in the Opposition that "in light of CrossFit now moving to compel on these issues, the NSCA is requesting for a date to provide supplemental responses."[70]

Enough is enough.

The record reflects a clear pattern by the NSCA of shirking its discovery obligations, reneging on agreements intended to avoid motion practice, and dragging out compliance until it is finally ordered by Your Honor to take action. The NSCA has not acted in good faith. The Court should enter an order compelling the NSCA's compliance with the above undisputed agreements within seven (7) days of the hearing on the Motion. The NSCA has had since May 3, 2017, when CrossFit first raised these issues in meet and confer, to correct its deficient responses, and since September 18th to comply with the agreements reached in meet and confer. No further time is warranted or necessary.

---

[69] The NSCA also does not oppose CrossFit's request that the Court overrule the various improper boilerplate objections asserted in the Second Set of RFPs and Interrogatories.

[70] Opp. at 8.

troutman sanders

III. CROSSFIT IS ENTITLED TO THE PRODUCTION OF ALL DOCUMENTS RESPONSIVE TO ITS FIRST SET OF DOCUMENT REQUESTS

In its Opposition, the NSCA does not dispute that its production in response to CrossFit's First Set of Document Requests is materially incomplete. Indeed, the NSCA readily concedes that "***many of the documents***" the NSCA is currently reviewing in connection with the Federal Case "relate to those RFPs, Set no 1."[71] The NSCA agreed – and was required by the Code of Civil Procedure – to produce those documents to CrossFit ***over a year ago***. True to form, the NSCA has now forced CrossFit to file a motion seeking an order compelling the NSCA's compliance with discovery obligations it acknowledges it has not met.

Unable to deny its failure to produce a trove of responsive documents, the NSCA instead claims that all issues related to CrossFit's First Set of Documents Requests have already been "resolved and adjudicated" and that, as a result, CrossFit's motion is "time-barred." These assertions are entirely without merit.

First, the NSCA's failure to produce documents responsive to *at least* Document Request Nos. 2, 18, 28, 29 and 32 was not resolved or adjudicated. CrossFit's December 2016 motion to compel requested that the Court compel production of documents responsive *only* to Document Request No. 7, 10, 34, 35, and 36.[72] That motion did not move to compel documents responsive to Document Request Nos. 2, 18, 28, 29 and 32 (or any of the other requests propounded by CrossFit) because the NSCA ***agreed*** that "The NSCA will produce all non-privileged documents in its possession, custody, or control that are Responsive to the Request" and that it would log any documents withheld on a privilege log.[73] Keith Cinea – ***the executive the NSCA tasked with collecting all potentially responsive documents*** – also provided a signed verification attesting under penalty of perjury that the information contained in the response was "true."[74]

Second, the NSCA cites no authority for its position that the Motion is time barred with respect to the First Set of Document Requests. Nor could it. As here, where a party agrees to produce documents in its written responses and then fails to produce those documents, there is no time limit on a motion to compel compliance. *See Standon Co. v. Superior Court*, 225 Cal. App. 3d 898, 903 (Ct. App. 1990) ("… a failure in the actual compliance with the demand is governed by section 2031, subdivision (m). Under that subdivision, a party may seek to compel 'compliance' with the demand if 'a party filing a response ... under subdivision (f) thereafter fails to permit the inspection in accordance with that party's statement of compliance. No time limit is placed on such a motion.") (quotations omitted); *Purofirst Oakland East Bay v. Ryan*, 2010 WL 9067348, at *1 (Super Ct. June 9, 2010) (…there is no time limit on a motion to compel compliance with a party's statement of compliance.").

---

[71] Opp. at 9.

[72] Reply Declaration of Wynter Deagle ("Deagle Reply Decl.") ¶ 8.

[73] Ex. C at Response Nos. 2, 18, 2, 18, 28, 29, 32.

[74] Ex. C at Verification.

troutman sanders

Third, on September 5, 2017, the NSCA's counsel expressly agreed that the issues raised by CrossFit related to the completeness of the NSCA's document production should be submitted to Your Honor if not resolved by the parties. As such, the NSCA has waived any argument that Your Honor cannot adjudicate this dispute. Specifically, On August 29, 2017, CrossFit's counsel raised the production deficiencies relating to the First Set of Document Requests in a meet and confer email to Mr. Kawabata:

> "State case. Documents identified in the NSCA's first post-Sanctions-Order federal production, along with documents recently produced by Lippincott, confirm that the NSCA's state-court production[75] was incomplete. We would like to schedule a call with your team to discuss these issues. In the meantime, we would like the NSCA's agreement that these issues will be presented to the Special Master to facilitate a more efficient resolution. We, however, reserve the right to seek the appropriate relief for the NSCA's failure to provide a complete production.[76]

In response, Mr. Kawabata offered to meet and confer the next day and that the issue was "better suited" to resolution by Your Honor:

> "State case/Lippincott issues: Both Jenifer and I are available to discuss this issue tomorrow afternoon or Thursday afternoon. Let us know what works. My sense is that this is a discovery issue better suited to before Judge McCurine but let's talk about that further as I don't know what the particular issues are."[77]

The next day, CrossFit's counsel sent an email to "set the stage" for the meet and confer discussion and confirmed the agreement to submit the issue to the Discovery Referee:

> "As you are aware, on November 11, 2016, the NSCA produced documents in response to CrossFit's First Requests for Production of Documents. It supplemented these productions on April 27, 2017, May 9, 2017 and May 24, 2017. The NSCA's first post-sanctions federal production, the Lippincott production, and Dr. Sharp's testimony, however, all have made plain that the NSCA's production is materially deficient with respect to multiple categories of documents. We need a date certain, in the next 30 days, by which the NSCA will complete its production. Otherwise, we agree that we will need to present this issue to Judge McCurine in the coming weeks."[78]

---

[75] There is no dispute that CrossFit's counsel was referring to the NSCA's production in response to CrossFit's First Set of Document Requests. As of August 29th, the NSCA had not made any other production in this case. Deagle Decl. ¶¶ 4, 9.

[76] Ex. Z at pg. 11.

[77] *Id.* at pg. 8.

[78] *Id.* at 6.

troutman sanders

Thereafter, CrossFit relied upon this agreement and all parties proceeded as though the dispute would be resolved by Your Honor if the parties were unable to resolve the matter.[79] Having agreed to resolution by Your Honor and acted in accordance with that agreement, the NSCA cannot now avoid resolution of this dispute.

In a further attempt to justify its abusive conduct and wrongful withholding of responsive documents, the NSCA disingenuously claims that issues "related to the first set of discovery… have been addressed in meet and confers." This representation is misleading and ignores the events that resulted in this Motion. First, as CrossFit explained in the Motion, the parties engaged in extensive meet and confer discussions and reached several agreements regarding the NSCA's deficient production. The NSCA, however, failed to honor any of those agreements. The NSCA failed to meet multiple agreed-upon deadlines to provide a substantive response to CrossFit's meet and confer letter regarding withheld documents.[80] The NSCA also failed to honor its agreement to explicitly confirm whether it was taking the position that its production of responsive documents was complete.[81] Multiple deadlines came and went without any communication from the NSCA's counsel.[82] Indeed, until the Opposition was filed, CrossFit was still uncertain whether the NSCA contended its production was complete. The NSCA's failure to honor its meet and confer agreements left the issues uncertain and unresolved.

Finally, the NSCA suggests that its forthcoming productions of documents in the Federal Case somehow satisfies its obligation to produce documents responsive to CrossFit's First Set of Discovery Requests. This assertion is fundamentally incorrect for at least four reasons:

First, this position ignores that the NSCA has withheld those documents and failed to meet its discovery obligations ***for over a year***. There is no support in the Code of Civil Procedure or other applicable law for the notion that a party may simply refer to a forthcoming production at an uncertain future date in separate litigation pending in a different forum to satisfy its discovery obligations or excuse its misconduct.

Second, there is no agreement in place that any of the documents produced in the Federal Case may be used in this litigation. Indeed, this is the same position that the NSCA originally took in responding to CrossFit's First Set of Document Requests – that it had already produced some responsive documents in the Federal Case and need only produce documents that had not previously been produced in this case.[83] CrossFit disagreed and, following meet and confer, the NSCA amended its responses – including its responses to Document Request Nos. Nos. 2, 18, 28, 29 and 32 – to expressly provide that it would produce all responsive documents in this case

[79] *Id.* at 1, 3; Ex. AB at 2; Ex. AK at 2.

[80] Motion at pgs. 28-30.

[81] *Id.*

[82] *Id.*

[83] Deagle Reply Decl. ¶ 5.

troutman sanders

irrespective of whether those documents had been produced in the Federal Case.[84] Moreover, the Federal Case protective order specifically prohibits using documents produced in that case for any other purpose, including this case.[85] And even if such use were permitted, CrossFit should not bear the burden of having to sift through the NSCA's forthcoming production in the Federal Case – which the NSCA contends includes a "massive amount of documents"[86] – to determine which documents are responsive to the First Set of Requests for Production and should have been produced to CrossFit a year ago.

Third, that the NSCA is currently in the process of reviewing and producing documents to CrossFit in the Federal Case has no relevance to the NSCA's obligations in this case. The process being undertaken in the Federal Case arises out of the same reason CrossFit was forced to file the instant Motion– the NSCA was caught withholding relevant and responsive documents that were "too numerous to comprehensively catalog" from CrossFit ***for years***.[87] The harm flowing from the NSCA's failure to produce documents in this case is not mitigated by fact that the NSCA has also been forced to respond to additional discovery and collect, review and produce documents in the Federal Case because of its discovery misconduct, perjury, and bad faith concealment of documents there.

Fourth, the NSCA filed this litigation against CrossFit, its founder, and two employees. Having done so, it cannot now complain about the burden of having to respond to discovery in two separate cases. The NSCA's counsel's letterhead lists a total of 161 attorneys employed by the firm.[88] If counsel is overwhelmed, the appropriate remedies are to add additional attorneys to the case team, hire contract attorneys to review documents, and/or hire a discovery vendor – not to ignore the NSCA's discovery obligations entirely and then fail to honor multiple discovery agreements. Further, the NSCA has three law firms working on the Federal Case and, based on the NSCA's representations to date, the document review and production in the Federal Case is being handled by the Noonan Lance law firm not the NSCA's counsel in this case.[89] Thus, the efforts of the NSCA and its counsel toward productions in the Federal Case (which is also three months overdue) is not relevant to the NSCA's obligation to timely produce documents in this case. These documents should have been produced ***over a year ago***. The NSCA only has itself to blame that it is now simultaneously responding to discovery in both the Federal Case and this case.

In sum, the NSCA admits that it failed to produce "many" responsive documents for over a year without any justification. It failed to honor agreements reached in meet and confer discussions

---

[84] Ex. C at pgs. 3-24.

[85] Deagle Reply Decl. ¶ 9.

[86] Opp. at 9.

[87] *See* Ex. D at pgs. 3-10, 13 & Ex. E at pgs. 8-10

[88] See Ex. G at pg. 1.

[89] Deagle Reply Decl. ¶ 11.

relating to CrossFit's concern about the completeness of the NSCA's document production. The NSCA refused to even take a position prior to filing its Opposition on whether its document production was complete. As such, in addition to awarding CrossFit monetary sanctions for this blatant discovery abuse,[90] the NSCA should be compelled to provide CrossFit with the executed declaration under penalties of perjury detailed in the Motion and produce all documents responsive to CrossFit's First Set of Document Requests on or before November 22, 2017.

IV. THE NSCA DID NOT ACT WITH SUBSTANTIAL JUSTIFICATION AND THE IMPOSITION OF MONETARY SANCTIONS IS JUST AND APPROPRIATE

An award of monetary sanctions against the NSCA and/or its counsel for forcing CrossFit to bring and prosecute this Motion and misusing the discovery process is mandatory "unless [Your Honor] finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Code of Civil Procedure §§ 2030.300(d) and 2031.310(h) and 2023.030(a). "In a variety of similar contexts, the phrase 'substantial justification' has been understood to mean that a justification is clearly reasonable because it is well grounded in both law and fact." *Doe v. United States Swimming, Inc.*, 200 Cal. App. 4th 1424, 1434 (2011). The "burden of proving 'substantial justification'" is on "the losing party claiming that it acted with 'substantial justification.'" *Id.* at 1435; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 8:1964, p. 8M–7. Thus, to avoid the imposition of sanctions, the NSCA must establish that its actions – withholding of relevant and responsive documents for over a year, failure to honor discovery agreements, and refusal to respond to discovery – were "clearly reasonable because [they were] well grounded in both law and fact" or that the imposition of sanctions would be unjust. The NSCA has not met either burden.

A. The NSCA Cannot and Has Not Demonstrated Substantial Justification

To be clear, the NSCA does not attempt to provide any justification for failing to honor numerous discovery agreements and forcing CrossFit to seek an order to enforce those agreements. The NSCA also makes no attempt to justify withholding relevant and responsive documents for over a year, or refusing to confirm whether its production was complete, thereby forcing CrossFit to file the instant Motion. The NSCA's Opposition fails to mention these actions because this conduct is inexcusable and there is simply no justification, much less substantial justification. These actions alone are grounds for the full sanctions award requested in the Motion.

The NSCA argues only that opposing the Peer-Review Discovery was substantially justified. Its argument, however, ignores that the NSCA could not and did not substantively oppose the majority of CrossFit's factual or legal arguments. The NSCA further ignores that there is no

[90] To be sure, CrossFit believes the NSCA's discovery abuses detailed in the Motion and above warrant sanctions beyond mere monetary sanctions, and CrossFit reserves the right to seek such additional sanctions in the event the NSCA continues its pattern of shirking its discovery obligations in this case.

troutman sanders

legal support whatsoever for the NSCA's claimed "peer-review privilege" and that its position is in fact contradicted by the case law. The NSCA further ignores that the relief sought by CrossFit is entirely consistent with the Federal court's relevance analysis and order concerning discovery into the peer-review process and identity of the reviewers. Most importantly, it ignores that the NSCA chose to put the identities of the peer reviewers, the method of their selection, and the integrity of the peer-review process directly at issue in this case. In sum, neither the law nor the facts support the positions advanced by the NSCA with regard to the Peer-Review Discovery. The NSCA drew a line in the sand for tactical reasons, not legal reasons, and it must live with the consequences.

B. Imposition of Monetary Sanctions Would be Just, Appropriate and Consistent with the Policies Underlying the Relevant Law

Recognizing that its conduct was not substantially justified, the NSCA argues that the imposition of sanctions would be unjust because: (i) there has been extensive discovery in the Federal Case and this case; (ii) "the parties take the position that discovery in both actions … can be used in both actions"; and (iii) the inability to reach agreement about the peer reviewers necessitated this motion. None of these assertions is accurate or excuses the NSCA's abusive conduct.

First, the fact that there has been extensive discovery in two cases is a purported "problem" of the NSCA's own making. The NSCA filed this second litigation during the pendency of the Federal Case, seeking to obtain leverage over CrossFit in advance of the mandatory settlement conference. Further, discovery was reopened in the Federal Case because of the NSCA's bad faith, perjury and extensive discovery misconduct. The NSCA cannot therefore rely on the burden it imposed on itself and its counsel – a firm of 161 attorneys – to excuse its repeated misconduct. Second, no agreement exists that documents produced in the Federal Case may be used in this case. In contrast, CrossFit has already declined to agree that documents produced in that case need not be produced or may be used in this case. And the Federal Case protective order specifically prohibits using the documents in any other case. Even if that were the agreement – which it is not – the documents referred to by the NSCA should have been produced in this case over a year ago and also have not been produced in the Federal Case.

Third, the peer-review issue is not the sole issue in the Motion. Even if agreement had been reached on that issue, CrossFit would still have been forced to file this Motion based on the NSCA's failure to comply with multiple discovery agreements and produce documents responsive to the First Set of Requests for Production. Under these circumstances, the imposition of sanctions is undoubtedly just and appropriate.

C. The Amount Sought by CrossFit is Reasonable and Appropriate

The NSCA further objects to the total amount of time spent meeting and conferring and drafting the Motion. The NSCA ignores, however, that the cost of the Motion and multiple meet and confer efforts by CrossFit's counsel directly correlates to the NSCA's discovery misconduct. The NSCA's failure to honor its meet and confer agreements necessitated constant, extended,

troutman sanders

and detailed follow-up in the form of multiple conference calls and emails.[91] In addition, because of the NSCA's refusal to comply with its discovery obligations or honor meet and confer agreements, multiple attorneys were needed to meet and confer with the NSCA given the nature and variety of issues being discussed.[92] Indeed, the variety of the issues being discussed and ultimately briefed necessitated the presence of more than one attorney on meet and confer calls because, as one would suspect, CrossFit's counsel has not relied on merely one attorney to handle the plethora of issues that have arisen as a result of the NSCA's conduct. The NSCA has acted similarly, with Mr. Kawabata's colleague, Jenifer Wallace, also participating in the majority of the meet and confer discussions.[93] Ultimately, CrossFit was forced to brief all of the issues that had previously been the subject of meet and confer discussions,[94] and the extensive number of issues in the Motion–driven again by the NSCA's conduct–dictated the amount of attorney time spent on the Motion.

The NSCA does not assert that the time spent was unreasonable or excessive. Indeed, the total attorney time spent on the motion totaled less than 50 hours – an objectively reasonable amount for the level of complexity and number of issues briefed. As further evidence of the reasonableness of its fee request, CrossFit is not seeking reimbursement for the time spent by associate attorneys and Ms. Deagle researching the legal issues and case law cited in the Motion, the Opposition or this reply brief – which would add thousands of dollars to the fee request.

Finally, the NSCA's objection to the recovery of fees for the work of paralegal Jhony Ospina is meritless; California courts regularly award costs of paralegal time as part of an "attorneys' fees" award. See, e.g., *Guinn v. Dotson*, 23 Cal.App.4th 262, 262 (1994) (examining the legislative intent of attorney fee statutes and finding considerable case history to support the concept that the generic term "attorney fees" was intended to encompass paralegal fees where the prevailing practice is to separately bill a client for paralegal service time and holding that an award of attorney fees that did not compensate for paralegal service time would not fully compensate the attorney and remanding for determination of reasonable paralegal fees); *Sundance v. Municipal Court*, 192 Cal. App. 3d 268, 274 (1987) (affirming award of paralegal fees and noting that the award of attorney fees for paralegal fees has become common place in California); *Margolin v. Regional Planning Com.*,134 Cal.App.3d 999, 1002 (1982) (affirming the award of $300,000 in attorneys' fees composed of charges for time by attorneys, law clerks and paralegal); *Beach Colony II. v. Cal. Coastal Com.*, 166 Cal.App.3d 106,110 (1985) (affirming award of paralegal fees as part of attorneys' fees award); *Citizens Against Rent Control v. City of Berkeley*, 181 Cal.App.3d 213, 232 (1986) (same); *County of San Luis Obispo v. Abalone Alliance*, 178

[91] *See* Deagle Decl. ¶¶ 7-20; Exs. F, Z, AA-AC, AK & AL.

[92] *See* Deagle Decl. ¶¶ 7-20; Exs. F, Z, AA-AC, AK & AL.

[93] *See* Deagle Reply Decl. ¶ 10.

[94] *See* Motion at 15-31; Deagle Decl. ¶¶ 7-20; Exs. F, Z, AA-AC, AK & AL.

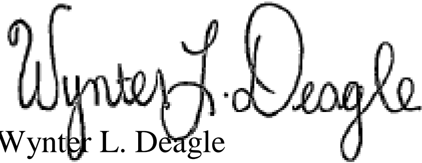
troutman sanders

Cal.App.3d 848, 869 (1986) (same); See also *Richlin Security Serv. Co. v. Chertoff*, 553 U.S. 571, 571 (2008) (holding paralegal fees are recoverable as part of attorney's fee award).

The NSCA's wrongful withholding of documents and information, and pattern of refusing to honor agreements reached during meet and confer efforts amply justifies an award of fees and costs to CrossFit. Accordingly, CrossFit respectfully requests Your Honor, in addition to granting the Motion as set forth above, require the NSCA to reimburse CrossFit in the amount of (i) $34,968.60 for the reasonable attorneys' fees and costs incurred in connection with the discovery issues above, including preparing the instant Motion, (ii) $29,337.20 for the reasonable attorneys' fees and costs incurred by CrossFit in reviewing the Opposition and preparing its reply to the Opposition, (iii) such other amount that may be incurred by CrossFit in preparing for and attending the hearing on the Motion, and (iv) all such other amounts as may be incurred for Your Honor's time in reviewing and determining CrossFit's motion. *See* the Reply Declarations of Joseph R. Dunn, Wynter L. Deagle, Justin S. Nahama and Jhony A. Ospina submitted concurrently herewith.

Sincerely,

TROUTMAN SANDERS LLP



Wynter L. Deagle

Attachments

cc: Kenneth S. Kawabata
Joseph R. Dunn
Justin S. Nahama

33176799