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13 GREENE, and CROSSFIT, INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN DIEGO

16
17 NATIONAL STRENGTH AND
18 CONDITIONING ASSOCIATION,

19 Plaintiff,

20 v.

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

24 Defendants.

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
05/17/2018 at 05:02:00 PM
Clerk of the Superior Court
By Vanessa Bahena, Deputy Clerk

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

**NOTICE OF DISCOVERY REFEREE'S
FINAL ORDER NO. 16 IMPOSING
MONETARY SANCTIONS AGAINST
PLAINTIFF NATIONAL STRENGTH
AND CONDITIONING ASSOCIATION**

[IMAGED FILE]

Dept: C-73
Judge: Hon. Joel R. Wohlfeil
Action Filed: 05/02/2016
Trial Date 04/05/2019

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD;
PLEASE TAKE NOTICE that on May 10, 2018, the Honorable William McCurine, Jr.
(Ret.), duly-appointed Discovery Referee, issued Discovery Referee's Final Order No. 16
Imposing Monetary Sanctions Against Plaintiff National Strength and Conditioning Association
in the above-captioned case. A true and correct copy of the Order is attached hereto as
EXHIBIT A.

Dated: May 17, 2018

TROUTMAN SANDERS LLP

By: 

Wynter L. Deagle
Justin Nahama
Matthew J. Hrutkay

Joseph R. Dunn
MINTZ LEVIN COHN FERRIS
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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 May 17, 2018, I served the following document(s) described as:

**NOTICE OF DISCOVERY REFEREE'S FINAL ORDER NO. 16
IMPOSING MONETARY SANCTIONS AGAINST
PLAINTIFF NATIONAL STRENGTH AND CONDITIONING ASSOCIATION**

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.

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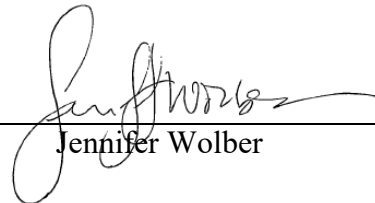
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 17, 2018, at San Diego, CA.



Jennifer Wolber

EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

NATIONAL STRENGTH AND
CONDITIONING ASSOCIATION,

Plaintiff,

v.

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

Defendants.

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

**DISCOVERY REFEREE’S FINAL
ORDER NO. 16 IMPOSING MONETARY
SANCTIONS AGAINST PLAINTIFF
NATIONAL STRENGTH AND
CONDITIONING ASSOCIATION**

[IMAGED FILE]

Dept: C-73
Judge: Hon. Joel R. Wohlfeil
Action Filed: 05/02/2016
Trial Date 04/05/2019

An initial live hearing (the “Initial Hearing”) was held on March 30, 2018, at 10:00 a.m. PDT, before the Honorable William McCurine, Jr. (Ret.), duly-appointed Discovery Referee, at Judicate West San Diego, on Defendants’ Motion for Evidentiary, Issue and Monetary Sanctions (the “Sanctions Motion”) against Plaintiff National Strength and Conditioning Association (“NSCA”).

A further hearing on the Sanctions Motion (the “Further Hearing”; together with the Initial Hearing, the “Hearings”) was held on April 20, 2018, at 10:30 a.m. PDT, before the Discovery Referee, at Judicate West San Diego. Kenneth Kawabata, Esq. and Tonya Mora, Esq., of Manning & Kass, Ellrod, Ramirez, Trester LLP; Christina DiMaggio and Genevieve Ruch, Esq., of Noonan Lance Boyer & Banach LLP and Steven W. Sanchez, contract counsel for Noonan

1 Lance Boyer & Banach LLP, appeared for Plaintiff. Justin S. Nahama, Esq. of Troutman Sanders
2 LLP, and Joseph R. Dunn, Esq. of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., appeared
3 for Defendants CrossFit, Inc., Greg Glassman, Russell Berger and Russ Greene (collectively,
4 “Defendants”).

5 On April 19, 2018, in accordance with the Discovery Referee’s ruling at the Initial
6 Hearing, Defendants submitted to the Discovery Referee, for *in camera* review, certain evidence
7 of the attorneys’ fees and expenses Defendants allege they incurred as a result of the NSCA’s
8 violations of its obligations in discovery and noncompliance with the Discovery Referee’s Orders,
9 as set forth in the Sanctions Motion (the “Fee Submission”). That same day, Defendants also
10 submitted to the NSCA for review the same Fee Submission provided to the Discovery Referee *in*
11 *camera*, with the exception that the descriptions of billing entries in the submission to the NSCA
12 were modified to protect the disclosure by Defendants of any attorney-client privileged
13 information.

14 On Monday, April 30, 2018, the parties jointly submitted to the Discovery Referee a letter
15 brief which set forth (i) the NSCA’s objections to the amount of monetary sanctions requested by
16 Defendants as set forth in the Fee Submission, and (ii) Defendants’ response to the NSCA’s
17 objections (the “Response to Fee Submission”).

18 The Discovery Referee, after reviewing the Sanctions Motion, the NSCA’s opposition thereto,
19 Defendants’ reply to the NSCA’s opposition, the Fee Submission, the Response to Fee Submission,
20 and all other admissible evidence submitted in support of and in opposition to the Sanctions Motion,
21 and having reviewed the various statutory and case law cited by the parties and applicable to this
22 cause, and having heard the arguments of counsel for the Parties at the Hearings, and good cause
23 appearing therefor, hereby finds and orders as follows:

24 1. The Discovery Referee was appointed pursuant to California Code of Civil
25 Procedure §638, by order dated June 14, 2017, to hear and determine various discovery disputes
26 between the parties. The Discovery Referee was expressly authorized to impose and/or
27 recommend the imposition of issue, evidentiary and/or monetary sanctions.

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1 2. Since his appointment, the Discovery Referee has held no less than eight (8)
2 telephonic and in-person hearings and issued no less than nine (9) separate orders compelling
3 the NSCA to comply with various discovery requests propounded by Defendants.

4 3. Over the course of the Parties' proceedings before the Discovery Referee, the
5 Discovery Referee consistently cautioned both parties in written and verbal warnings that the NSCA's
6 failure to comply with its obligations under the Code of Civil Procedure and/or the Discovery
7 Referee's orders may result in the imposition of sanctions, including the issue, evidentiary and
8 monetary sanctions requested in the Sanctions Motion. For example, in Order No. 7, the Discovery
9 Referee specifically warned the NSCA that it had "missed too many deadlines" and that its failure to
10 comply with the Discovery Referee's prior Orders was threatening to "(1) delay the trial, (2) adversely
11 impact the Court's calendar and (3) hurt CrossFit's ability to properly prepare a defense." [ROA 98]

12 4. The Discovery Referee has already found in his April 6, 2018 Report and
13 Recommendation that the NSCA failed to comply with at least seven (7) orders of the Discovery
14 Referee, including Discovery Referee Orders 2, 3, 4, 5, 7, 10 and 11. [See ROA 129 at ¶4] The
15 Discovery Referee further found in his Report and Recommendation that it is clear the NSCA's
16 production of documents and other discoverable information has not been completed, including the
17 production of documents and discoverable information first requested by CrossFit in August, 2016.
18 [Id.] The Discovery Referee further found in his Report and Recommendation that Defendants have
19 submitted evidence illustrating that the NSCA had only recently identified additional NSCA servers
20 and document repositories that have not yet been searched for responsive documents. [Id.] Finally,
21 the Discovery Referee further found in his Report and Recommendation that the NSCA's failure to
22 comply with its obligations under the Code of Civil Procedure and the Discovery Referee's Orders
23 had prejudiced Defendants' ability to conduct full and fair discovery and prepare its defense for trial
24 in this action. [Id. at ¶5] These findings by the Discovery Referee were not challenged by the NSCA
25 and were adopted by the trial court in their entirety.

26 5. Pursuant to the Discovery Referee's Report and Recommendation, the trial court
27 continued the trial date and related discovery and other deadlines to provide the NSCA full
28 opportunity to fully and finally comply with its obligations and mitigate some of the trial-related

1 prejudice suffered by Defendants as a result of the NSCA's misconduct. However, the Discovery
2 Referee finds that significant monetary sanctions are also necessary and appropriate to remedy the
3 additional monetary prejudice incurred by Defendants as a result of the NSCA's discovery abuse.

4 6. The NSCA's pattern of noncompliance has caused Defendants to expend
5 substantial fees and costs unnecessarily. Specifically, Defendants were forced to repeatedly (a)
6 undertake numerous meet-and-confer sessions and (b) seek relief in the form of successive orders
7 from the Discovery Referee compelling the NSCA's compliance, which has yet to fully occur.
8 Accompanying and preceding each of these formal efforts were protracted meet and confer efforts
9 by Defendants to attempt to obtain the NSCA's compliance without seeking formal relief.
10 Defendants were also forced to repeatedly analyze deficient discovery responses and document
11 productions, only to discover multiple deficiencies, including deficiencies in the process
12 undertaken by the NSCA to marshal and produce responsive documents and information, despite
13 the NSCA's averment of compliance with the Discovery Referee's prior orders. This process
14 resulted in Defendants unnecessarily incurring significant expenses associated with processing
15 deficient productions and ultimately engaging in substantial motion practice and hearings before
16 the Discovery Referee.

17 7. The Discovery Referee has reviewed the Fee Submission in detail and finds that
18 the billing entries therein reflect services performed by the Defendants' counsel and other
19 professionals between August 1, 2017 and March 30, 2018 that relate directly to the NSCA's
20 noncompliance in discovery. The Discovery Referee further finds that the fees and expenses set
21 forth in the Fee Submission are reasonable in relation to the necessity of the services performed,
22 the qualifications of the professionals who performed such services, the amount of time spent by
23 each such professional on each task, and the hourly rate charged to Defendants by such
24 professionals.

25 8. The NSCA's objections to the Fee Submission, as set forth in the Response to Fee
26 Submission, are overruled, except as to the voluntary reductions by Defendants set forth in the
27 Response to Fee Submission. The NSCA's general objections to various tasks set forth in the Fee
28 Submission are insufficient in light of the overwhelming evidence that Defendants reasonably

1 incurred such fees and expenses as a direct result of the NSCA's own conduct. In addition, the
2 NSCA's objections to the amount incurred by Defendants in connection with preparing and
3 prosecuting the complex Sanctions Motion and related briefing, which detailed the NSCA's
4 lengthy history of noncompliance in discovery, including noncompliance with at least seven (7)
5 prior Discovery Referee orders, has no basis.

6 9. In its opposition briefing and during oral argument on the Sanctions Motion, the
7 NSCA repeatedly acknowledged that Defendants have been prejudiced by the expense stemming
8 from the NSCA's noncompliance and conceded that monetary sanctions are an appropriate
9 remedy. The Discovery Referee agrees.

10 10. Section 2023.030 of the Code authorizes the Court to impose sanctions for conduct
11 that amounts to a "misuse of the discovery process." CCP §2023.030. "Misuse of the discovery
12 process includes failing to respond or submit to authorized discovery, providing evasive
13 discovery responses, disobeying a court order to provide discovery, unsuccessfully making or
14 opposing discovery motions without substantial justification, and failing to meet and confer in
15 good faith to resolve a discovery dispute when required by statute to do so." *In re Marriage of*
16 *Michaely*, 150 Cal.App.4th 802, 809 (2007).

17 11. Section 2023.030(a) of the Code further requires the imposition of monetary
18 sanctions against a party engaging in the misuse of the discovery process, or for a party to pay the
19 reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct
20 unless the offending party acted with substantial justification or if the sanctions would be unjust.

21 12. The Discovery Referee finds the NSCA has "misused the discovery process," as
22 that phrase is used Section 2023.030 of the Code.

23 13. CrossFit seeks attorneys' fees in the amount of \$501,410.61 and costs in the
24 amount of \$35,388.45. "The customary method of determining [reasonable attorneys'] fees... is
25 known as the lodestar method. 'The lodestar determination has emerged as the predominate
26 element of the analysis' in determining a reasonable attorney's fee award. *Jordan v. Multnomah*
27 *County*, 815 F.2d 1258, 1262 (9th Cir.1987). The "lodestar" is calculated by multiplying the
28 number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly

1 rate.” *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). “A ‘strong presumption’
2 exists that the lodestar figure represents a ‘reasonable fee,’ and therefore, it should only be
3 enhanced or reduced in ‘rare and exceptional cases.’ *Pennsylvania v. Delaware Valley Citizens’*
4 *Council for Clean Air*, 478 U.S. 546, 565 (1986) (internal quotations omitted).” *Fischer v. SJB-*
5 *P.D. Inc.*, 214 F.3d 1115, 1119, n.4 (9th Cir. 2000). *See also Cabrales v. County of Los Angeles*,
6 864 F.2d 1454, 1464 (9th Cir. 1988).

7 14. The Discovery Referee carefully reviewed the billings of CrossFit’s counsel and
8 finds that CrossFit counsel have done a reasonable job in deleting from its fee application work
9 unrelated to identifying and prosecuting the various discovery deficiencies. In addition, CrossFit
10 has had a consistent and appropriately sized team of lawyers working on this matter which aids in
11 efficiency and consistency. The NSCA relies on *Mountjoy v. Bank of Am., N.A.*, 245 Cal. App.
12 4th 266 (2016). *Mountjoy* is useful for the proposition that an across-the-board reduction in
13 attorneys’ fees is not an acceptable way to determine whether attorneys’ fees are reasonable. The
14 case itself on the facts are distinguishable in at least two ways. *First*, the most obvious distinction
15 is that the trial court’s method of reducing the attorneys’ fees was unacceptable. *Second*, in
16 *Mountjoy*, there was not the protracted, repeated discovery deficiencies present in the instant case.
17 *Third*, *Mountjoy* involved more than discovery deficiencies; it also covered a summary judgment
18 motion, the preparation and filing of a complaint, aspects which are absent in the instant case.
19 *Finally*, the trial court found that the attorneys’ fees in *Mountjoy* were “exorbitant”, not merely
20 excessive. The Discovery Referee does not find CrossFit’s fees to be anywhere near
21 “exorbitant.” Moreover, the unrefuted evidence is that CrossFit’s attorneys have reduced their
22 normal hourly rate in order to properly service CrossFit.¹ *See Supplemental Declaration of Justin*
23 *S. Nahama In Further Support of Defendants’ Request For Monetary Sanctions.*
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28 ¹ The *Supplemental Declaration of Justin S. Nahama In Further Support of Defendants’ Request For Monetary Sanctions* demonstrates that CrossFit’s counsel reduced their normal hourly billing rate by as much as 20%.

1 15. The NSCA has raised appropriate concern about the numerous entries under the
2 heading “internal communications.” In the abstract that concern is reasonable. However, in the
3 present case, by agreement of the parties, the billing records sent to the Discovery Referee were
4 not redacted but contained detailed information protected by the attorney work product and
5 attorney-client privileges. The billing records sent to NSCA’s counsel were redacted to exclude
6 that information. After review of the billing records, the Discovery Referee is satisfied that the
7 internal communications were appropriate and reasonable. The NSCA also raised a concern
8 about block billing. However, the Discovery Referee did not find any block billing of the type
9 discussed in and rejected by *Mountjoy*. Instead, the Discovery Referee found reasonable and
10 sufficient detail in the billings of CrossFit’s counsel to justify an award of attorneys’ fees.
11 Several factors should be highlighted. *First*, there may be some inefficiencies due to the rigid
12 time constraints imposed by the Discovery Referee who, at the outset of his involvement and
13 several times thereafter, warned the parties not to expect any continuances. The parties were
14 faced with looming dates for discovery cut-off and trial. There was great pressure to complete
15 discovery within the then appointed time. Indeed, part of the NSCA’s problems in this case arose
16 from the fact that it had initially severely understaffed the case. Indeed, the NSCA’s efforts did
17 not begin to comply with the Discovery Referee’s orders until its legal team was significantly
18 increased. *Second*, the NSCA did not provide any examples from its own billing records showing
19 that its own attorneys did not work as a team or bill for internal communications. *Third*, the
20 Discovery Referee required that CrossFit organize and synthesize the voluminous information in
21 very particular ways for the benefit of the Discovery Referee to keep track of the voluminous
22 discovery. *Finally*, the issues in the discovery were complex, making specificity and detail vitally
23 important. Broad strokes were not acceptable.
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28 16. A significant issue in this case before the discovery referee the discoverability of

1 the identity of the peer reviewers. Substantial briefing and argument were had on this discreet
2 issue. The NSCA's position on this issue, although wrong, was reasonable, not in bad faith and
3 did not constitute misuse of discover. See CCP §2023.030. Therefore, the discovery referee
4 believes that all billing directly and exclusively related to briefing the issue of the discoverability
5 of the identity of the peer reviewers, arguments before the discovery referee and appeals from the
6 discovery referee's order allowing for the discoverability of the identity of the peer reviewers
7 should be excluded from the attorneys' fee award. The Discovery Referee orders the parties to
8 meet and confer on this limited issue on or before May 15, 2018 and to present the results of that
9 conference at the telephonic hearing scheduled for May 17, 2018 at 1p.m.

10 17. The Discovery Referee concludes that CrossFit's application for fees should be
11 reduced by the amount resulting from the immediately preceding paragraph.

12 18. Therefore, based on the findings above and set forth in the Report and
13 Recommendation, which are incorporated herein as if set forth in full, and in accordance with the
14 June 14, 2017 Order appointing the Discovery Referee, the Discovery Referee hereby awards
15 monetary sanctions against the NSCA and orders the NSCA to reimburse Defendants' reasonable
16 attorneys' fees in the amount of \$406,484.39.

17 19. The Discovery Referee also awards and expenses in the amount of \$4,130.51,
18 significantly less than the \$35,338.45 requested for several reasons. *First*, the parties agreed to
19 equally bear the cost of the Discovery Referee. *Second*, the Discovery Referee in this instance
20 will not shift the cost of his fees to one party in order to make it clear to the parties and the public
21 that the Discovery Referee's rulings are not affected by the source of the payment. *Third*, the
22 Discovery Referee excluded the costs associated with e-Discovery vendor processing, the court
23 reporter, team administrative costs and costs related to the review of the "ROA" are largely
24 administrative in character and would have been incurred in some form even in the absence of
25 discovery abuse.

26 20. The above sums shall be paid to Defendants on or before June 26, 2018.

27 21. In this award, the Discovery Referee avoids any desire or intention to be punitive.
28 Indeed, the Discovery Referee finds that the NSCA has recently begun efforts to rectify its past

1 failings and to put in place personnel and safeguards to insure compliance. The Discovery
2 Referee hopes these efforts are sincere, effective and permanent. Therefore, this Award is
3 narrowly tailored to address the monetary prejudice suffered by Defendants as a result of the
4 NSCA's misuse in the Discovery Process. Indeed, Section 2023.030 of the Code expressly
5 contemplates an award that requires a party who misuses the discovery process to reimburse the
6 aggrieved party for its reasonable attorneys' fees and expenses. The Award does just that, and no
7 more. The fees and expenses incurred by Defendants, which comprise the Award, were incurred
8 as a direct result of the NSCA's repeated misuse of the discovery process and failure to heed the
9 Discovery Referee's written and verbal warnings. *See In re Marriage of Michaely, supra*, 150
10 Cal.App.4th 802, 809 (2007).

11 22. The Discovery Referee further notes that, despite the substantial amount of the
12 Award, this amount does not include other fees and expenses incurred by Defendants as a result
13 of the NSCA's misuse of the discovery process, including (i) amounts incurred by Defendants for
14 services rendered in connection with discovery disputes *before* those disputes were referred to the
15 Discovery Referee, or (ii) amounts incurred by Defendants *since* the Initial Hearing, including
16 seeking adoption of the Report and Recommendation, responding to the NSCA's objection to the
17 same, preparing for and attending hearings in the trial court on the same, preparing for and
18 attending the Further Hearing, and preparing their portion of the Response to Fee Submission.²

19 23. Finally, the Discovery Referee continues to hold in abeyance Defendants' request,
20 as set forth in the Sanctions Motion and Defendants' reply brief, for "reasonable attorney's fees
21 when Defendants re-depose Nick Clayton, Carwyn Sharp and William Kraemer once a full and

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28 ² Despite the substantial amount of the Award, the Discovery Referee finds that the record could support an even larger award.

1 fair document production is made.” Defendants’ may renew this request once the neutral forensic
2 evaluation ordered in the Report and Recommendation is complete.

3 **IT IS SO ORDERED.**

4 Dated: May 17, 2018

5 By: William McCurine, Jr.
6 Hon. William McCurine, Ret., Discovery Referee
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PROOF OF SERVICE

National Strength & Conditioning Association vs. Greg Glassman, et al.
Case No.: 37-2016-00014339-CU-DF-CTL

I, the undersigned, an employee of Judicate West, located at 1851 E. First Street, Suite 1600, Santa Ana, CA 92705 declare under penalty of perjury that I am over the age of eighteen (18) and not a party to this matter or proceeding.

On May 17, 2018, I served the foregoing documents, described as:

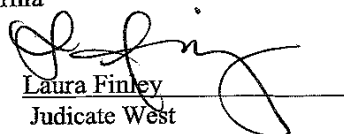
**DISCOVERY REFEREE'S FINAL ORDER NO. 16 IMPOSING MONETARY SANCTIONS
AGAINST PLAINTIFF NATIONAL STRENGTH AND CONDITIONING ASSOCIATION**

to the following parties:

SEE ATTACHED MAILING LIST

- BY E-MAIL** I caused the above-referenced document to be transmitted via electronic mail (e-mail) to the parties as listed on this Proof of Service
- BY ELECTRONIC FILING** I caused such document to be sent via electronic service by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.
- BY FACSIMILE** I caused the above-referenced document to be transmitted via facsimile to the parties as listed on this Proof of Service. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error.
- BY PERSONAL SERVICE** I personally delivered the documents to the persons at the address (es): by leaving the documents at the person (s) office, in an envelope or package clearly labeled to identify the person(s) being served, with a receptionist or an individual in charge of the office.
- BY UNITED STATES PARCEL SERVICE** I am readily familiar with the business' practice for collection and processing of correspondence and mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit with postage thereon fully prepaid at Santa Ana, California in the ordinary course of business
- STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 17, 2018, at Santa Ana, California


Laura Finley
Judicate West



Results Beyond Dispute™

Santa Ana Office

1851 East First Street
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www.judicategwest.com

Case Contact List

as of Thursday, May 17, 2018

JW Case #: A233444

Case Caption: National Strength & Conditioning Association vs. Greg Glassman, et al.

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