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Plaintiffs' Class Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

EDWARD C. O'BANNON, JR. on behalf of himself and all others similarly situated,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA); ELECTRONIC ARTS, INC.; and COLLEGIATE LICENSING COMPANY,

Defendants.

Case No. 4:09-cv-3329 CW

PLAINTIFFS' POST-TRIAL REPLY BRIEF

Judge: The Honorable Claudia Wilken
Courtroom: 2, 4th Floor
Trial: June 9-27, 2014

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GLOSSARY OF ABBREVIATIONS

APs	Antitrust Plaintiffs
BD	Accompanying "Declaration of Swathi Bojedla"
DB	"NCAA's Post-Trial Brief" (July 8, 2014) (Dkt. 279)
DX ___	NCAA Trial Exhibit
EA	Electronic Arts, Inc.
FBS	NCAA Division I Football Bowl Subdivision
FCS	NCAA Division I Football Championship Subdivision
FGR	Federal Graduation Rate
GIAs	Grants-in-aid
GSR	Graduation Success Rate
NCAA	Defendant National Collegiate Athletic Association
NBA	National Basketball Association
NFL	National Football League
NIL	Name, image, and likeness
PB	"Plaintiffs' Opening Post-Trial Brief" (July 2, 2014) (Dkt. 275)
Players	Division I men's basketball and FBS football players
PX ___	APs' Trial Exhibit
RoP	Right of Publicity
Tr. __	Trial Transcript

The NCAA's post-trial brief is a stunning admission of defeat. Instead of focusing on trial testimony and documentary evidence that it believes supports its procompetitive justifications, the NCAA revisits stale legal debates (or unveils new ones for the first time ever) and preserves issues decided long ago for appeal. In some places, it is as if our three-week trial did not occur.

The NCAA essentially concedes that, with respect to Players' NIL compensation, it engages (along with its members) in what the United State Supreme Court in *NCAA v. Board of Regents of the Univ. of Okla*., 468 U.S. 85, 99 (1984) ("*BoR*") would characterize as a "horizontal restraint." Its counsel and its principal expert admit it. Tr. 3072:13-16, 3255:16-18, 3347:21-22. The NCAA nonetheless attempts to immunize its conduct by again relying on anachronistic *dicta* in *BoR* that this Court has concluded does not govern this litigation. The NCAA next argues that APs' expert Dr. Roger Noll failed to define the relevant markets or show anticompetitive effects in any of them. But Noll provided detailed market definitions supported by recognized economic principles and by the NCAA's own documents. NCAA expert Lauren Stiroh's counteranalysis of anticompetitive effects, meanwhile, is bizarre and unsupported, as the case law demonstrates. Elsewhere, the NCAA again relies on state RoP laws to argue the absence of a cognizable market, a proposition the Court has rejected twice. With respect to the NCAA's procompetitive justifications, little effort is made to satisfy its burden of proof. Rather than grappling with the admissions in its own documents, the NCAA argues feebly that these materials only reflect "debates" within the association. With respect to less restrictive alternatives, the NCAA ignores proposals to reform its binding restraints advanced by its members and instead invokes a vision of amateurism that defies its own principles or asserts newly minted and erroneous immunity arguments based on state statutes or the Eleventh Amendment.

I. THE NCAA'S ANTICOMPETITIVE CONDUCT IN THE RELEVANT MARKETS.

No Procompetitive Presumption. The NCAA first spends over three pages (DB at 1-3) arguing that *BoR* immunizes it from antitrust liability here. That argument was rejected by this Court in *In re NCAA Student-Athlete Name & Likeness Licensing Litig*., No. 09-1967, 2013 WL 5778233 (N.D. Cal. Oct. 25, 2013) ("*NCAA I*"). The Court determined that the NCAA's oft-

quoted language from *BoR* was *dicta* and did not reflect the nature of Division I men's basketball and FBS football as they have evolved over the last 30 years. *Id*. at *4-5 & n. 6. The NCAA disputes the former point but cannot escape the fact that *BoR* involved a successful effort to break the association's restraint on television rights, not the rules denying Players compensation for commercial use of their valuable property. *See* Tr. 3328:2-7. On the second point, the NCAA ignores the developments of the last three decades. Instead, it relies on the Seventh Circuit's citation to *BoR* in *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), even though *Agnew* observed that the ban on multi-year athletic scholarships was not "presumptively procompetitive" because it was not a commercial restraint "directly related" to the prohibition on "pay for play athletics." *Id*. at 345; *see NCAA I*, 2013 WL 5778233, at *5-6 & n. 7. The same is true here of injunctive relief that does not compel any pay for play but rather may result in group licensing of NILs with deferred payment. Moreover, *Agnew* was decided on a motion to dismiss. Here, any such "presumption" has been rebutted by the wealth of trial evidence.

Education Market. The NCAA presented no meaningful rebuttal to Noll's testimony concerning a market for higher education services for Players. His analysis was based on well-recognized economic methods. PB at 2. The NCAA's brief abandons any attempt to rely on Stiroh to identify a broader market. It argues instead that the market cannot be defined by consumer preferences, because it is the preferences of producers that should control. DB at 7.[1] However, in the education market, prospective recruits *are* the producers, so Noll's analysis of their college acceptances is entirely accurate. *See In re NCAA I-A Walk-On Football Players Litig*., 398 F.Supp.2d 1144, 1150 (W.D. Wash. 2005).[2] And defining the market to consist of the

[1] This assertion is inaccurate. Consumer preference may be considered in defining the relevant market. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356-357 (1963) (considering consumer preference in defining the relevant product market); *FTC v. Lundbeck, Inc*., 650 F.3d 1236, 1241 (8th Cir. 2011) (affirming district court definition of relevant market that relied on doctor's stated preference for one drug over another, without regard to costs); *Tasty Baking Co. v. Ralston Purina, Inc*., 653 F. Supp. 1250, 1261 (E.D. Pa. 1987).

[2] *See Agnew*, 683 F.3d at 347 ("These are all part of the competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain."); *Banks v. NCAA*, 977 F.2d 1081, 1098 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (NCAA colleges are consumers in the college football labor market); *Clarett v. NFL*, 306 F.Supp.2d 379, 399 (S.D.N.Y. 2004), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 1061 (2005) (same as to NFL labor market).

NCAA's own products is also proper, given the revenue-generating characteristics of the sports at issue. Other cases involving NCAA college athletes have reached similar conclusions.[3]

The NCAA repeatedly echoes Stiroh's argument that any anticompetitive effects must involve reduction of output to consumers—a position that the Court found "quite surprising." [4] Tr. 3283:3; DB at 4-5, 12-13, 23. As pointed out in the APs' opening brief, cases involving agreements to suppress wages do not support that conclusion (PB at 6-8), and the NCAA has no meaningful response to them (DB at 14 n.11).

The cases it does cite are unpersuasive. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), involved single-firm predatory pricing, not a buyer-side cartel. The same is true of *Chicago Professional Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996), which has also been subject to criticism and is at odds with other decisions inside and outside the Seventh Circuit.[5] And the reasoning in *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F.Supp. 1194 (W.D.N.Y. 1995), was explicitly rejected in *Telecor Commc's Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1133-34, 1136 (10th Cir. 2002), where the court stated that "[t]he Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users."[6] In *Walk-On* and *White*, two cases involving college athletes, the courts found

[3] *Walk-On*, 398 F.Supp.2d at 1150 (market of labor inputs to Division I-A football); *Rock v. NCAA*, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, at *10 (S.D. Ind. Aug. 16, 2013) (finding a relevant market of Division I FBS and FCS football); *White v. NCAA*, Case No. 2:06-cv-999-VBF-MAN, 2006 Dist. LEXIS 101366, at *6-8 (C.D. Cal. Sept. 20, 2006) (finding relevant market of Division I-A football). The United States Supreme Court has also held that a single manufacturer's product can constitute a cognizable relevant market. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481-82 (1992) (citing *BoR*, 468 U.S. at 101-02, 111-12).

[4] Stiroh's theory would mean that sellers to a buyer's cartel (even one judged under a *per se* theory of liability) lack antitrust injury, absent the demonstration of downstream effects. Tr. 2844:22-2845:3, 2847:8- 2849:10. Her theory would also mean that *per se* illegal cartels cannot cause antitrust injury to direct-purchaser consumers where the demand for a product is highly inelastic, as with essential medicines. Tr.2881:25-2884:19. Under her view, the Supreme Court's *per se* rules (*Catalano v. Target Sales, Inc.*, 446 U.S. 643, 646. (1980)) make no sense because proof of a downstream effect is always required.

[5] *See Banks*, 977 F.2d at 1097 (Flaum, J., concurring in part and dissenting in part) (citing *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986)); *Clarett*, 306 F.Supp.2d at 398-99.

[6] *Accord West Penn Allegheny Health Systems, Inc. v. UPMC*, 627 F.3d 85, 105 (3d Cir. 2010) ("Highmark's improperly motivated exercise of monopsony power . . . was anticompetitive and cannot be defended on the sole ground that it enabled Highmark to set lower premiums on its insurance plans."); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000)

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anticompetitive injury to the plaintiffs without regard to downstream output effects. 398 F.Supp.2d at 1151; 2006 Dist. LEXIS 101366, at *9-10. Thus, one of the linchpins of the NCAA's antitrust injury argument fails as a matter of law.[7]

The NCAA also asserts that the APs can cite no case where "negative prices" were at issue. DB at 6. That is wrong.[8] Moreover, the assertion ignores the reality of the "exchange" transaction between colleges and athlete-recruits. Each may be viewed as both a buyer and a seller. Colleges sell educational services and buy athletic services, while athletes buy educational services and sell athletic services. These dual aspects of the exchange transaction are intertwined. Tr. 418:19-419:4. The NCAA cites no economic principles requiring that one disentangle separate parts of a unified transaction in order to assess competitive effects. The buyers and sellers on both sides of the exchange are the same: the schools and their athletic recruits. In either view of the market, the NCAA exercises market power. Tr. 3063:1-3064:23.

Licensing Submarket. With respect to the licensing submarket, the NCAA first argues that the APs have no right to raise a monopsony claim given that it was not presented prior to trial. DB at 8. That is nonsense. In his expert report, Noll identified this market as one where

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("When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs."); *United States v. Brown Univ.*, 5 F.3d 658, 668, 673-74 (3d Cir. 1993) (challenged restraint "anticompetitive 'on its face'" despite no argument that "it has caused or is even likely to cause any reduction of output"); *Clarett*, 306 F.Supp.2d at 398 ("[s]uch a rigid 'price or output' rule finds little support in the case law", citing *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504 (9th Cir. 1989)); *Kamakahi v. American Soc. for Reproductive Medicine*, No. 11–01781, 2013 WL 1768706, at *7 (N.D. Cal. March 29, 2013) (citing *Telecor*).

[7] The NCAA's argument is that if members of a cartel agree that their sellers pay less, the resultant "wealth transfer" does not give rise to an antitrust violation, even though it causes antitrust injury. Tr. 3285:1-11, 3321:12-13. Its counsel drew the distinction between "antitrust injury" and "anticompetitive effects." However, antitrust injury flows from the anticompetitive effects of the challenged restraint. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 911 (6th Cir. 2003).

[8] Some markets do feature negative prices. *See United States v. American Express Co.*, No. 10–CV–4496, 2014 WL 1817427, at *2-3 (E.D.N.Y. May 7, 2014) (describing negative prices because of consumer rewards for the use of credit and charge cards). Contrary to the NCAA's assertion, an agreement to charge "a price of zero" can still cause antitrust injury. *See Wallace v. International Business Machines Corp.*, 467 F.3d 1104, 1107-8 (7th Cir. 2007) (agreement to fix prices at zero subject to rule of reason scrutiny and could cause consumers or other producers antitrust injury); *see also LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06–6994, 2007 WL 6865852, at *7-10 (C.D. Cal. June 4, 2007), *aff'd*, 304 Fed. Appx. 554 (9th Cir. 2008) (defining relevant antitrust market of social networking websites available to consumers free of charge).

Players license their NILs to colleges or the NCAA or licensees operating under its rules. Tr. 144:10-145:17. This testimony was consistent with his expert report (*see Keller* Dkt. 898-15 at 63-65) and came as no surprise to the NCAA, who prepared Stiroh to rebut it. Even if it were new, the NCAA provided implied consent to try it under Fed. R. Civ. P. 15(b)(2).

The NCAA next spends three pages rearguing that there is no broadcast licensing market because the Players have no NIL rights to sell under state RoP laws. DB at 9-11. The Court has rejected that argument, holding that the RoP laws of any particular state do not preclude a nationwide antitrust claim so long as the laws of some state might permit such a claim. *NCAA I,* 2013 WL 5778233, at *7; *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-1967, 2014 WL 1410451, at *11-12 (N.D. Cal. Apr. 11, 2014) ("*NCAA II*"). Those rulings should not be revisited.[9] Players' expectation of revenue from group licenses (absent the restraint) is not dependent on their ability to sue under particular state RoP statutes. *See Masters v. Wilhelmina Model Agency, Inc.*, No. 02-CV-4911, 2003 WL 145556, at *5 (S.D.N.Y. Jan. 17, 2003) (plaintiff properly alleged a Sherman Act claim premised in part on violating a state law for which there may be no private right of action). Moreover, as the Court has noted, even if the Players' NIL rights were an open question, businesses might still want to license them as a precautionary measure to avoid any uncertainty that might interfere with the creation of their products. *Keller* Dkt. 1091 at 3-4. *Accord Keller* Dkt. 1092 at 4 n. 1; *see also* PB at 4 n.8. This occurs frequently in licensing agreements regarding intellectual property.[10]

[9] At trial, the APs presented extensive evidence from their expert Edwin Desser, the NCAA's expert Neal Pilson, and from contracts between the NCAA or its members and broadcasters showing that the contracts explicitly or implicitly convey NIL rights. PB at 3-4; Tr. 631, 658-61, 797-99, 804-05. The NCAA responds by pointing to short-form agreements that it contends cannot be so characterized. DB at 11 n. 8. Even there, the NCAA's argument is undermined by a review of the available long-form agreements. For example, with respect to PX 2110, the corresponding draft long-form agreement explicitly grants the licensee the right to "publish the name, likeness, and voice of each person appearing in . . . the games." Decl. of Swathi Bojedla ("BD"), Ex. A, at 2111-32. While the APs never received the contemporaneous long-form agreement of PX 2117, the next contract between the parties includes a "Name and Likeness" provision requiring the conference to provide "all name and likeness rights of all participants." BD Ex. B, 2165-26. As contemplated by the Court's prior order (*O'Bannon* Dkt. 278 at 2, 3), the APs hereby move these additional contracts into evidence styled as PX 2111 and PX 2165.

[10] Parties often acquire licenses to uncertain intellectual rights. *See, e.g., C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 826 (8th Cir. 2007) (Carelton, J., dissenting) (citing *Paragould Cablevision, Inc. v. City of Paragould*, 930

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In contrast to its contentions about broadcasts, the NCAA *admits* that there is a demand for Players' NILs with respect to videogames and merchandise but insists that Noll never defined those markets. DB at 14, 16. Yet Noll defined an overall group licensing submarket. Stiroh trisected that submarket into three sub-submarkets, including ones for videogames and merchandise, and then asserted that market power and anticompetitive effects in each sub-submarket had to be individually analyzed. She provided no economic principle requiring such an analysis, and the NCAA cites none in its brief.

The NCAA next argues that no anticompetitive effects were shown because loss of consumer choice is not a cognizable anticompetitive effect. Not so. The Ninth Circuit has observed that a "reduction in choice of market alternatives" that is the "direct result" of an antitrust violation is cognizable antitrust injury. *Theme Promotions, Inc. v. News America Marketing FSI*, 546 F.3d 991, 1004 (9th Cir. 2008). A restraint that "limit[s] consumers' choice to one source of output" can be an antitrust violation; "[o]ne form of antitrust injury is '[c]oercive activity that prevents its victims from making free choices between market alternatives.'" *Glen Holly Entm't, Inc. v. Tektronix Inc*., 343 F.3d 1000, 1011 (9th Cir. 2003) (quoting *Amarel v.*

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F.2d 1310, 1315 (8th Cir.1991)) ("CBC surely can 'agree,' as a matter of good business judgment, to bargain away any uncertain First Amendment rights that it may have in exchange for the certainty of what it considers to be an advantageous contractual arrangement"); *Mondis Tech., Ltd. v. LG Electronics, Inc*., Nos. 2:07–CV–565–TJW–CE, 2:08–CV–478–TJW, 2011 WL 2417367, at *4 (E.D. Tex. June 14, 2011) (in considering license contracts that had been entered into at a time when the validity of the patent was disputed, the court noted that "[t]he licenses at issue all appear to be executed before litigation (or at least before there was an adjudication regarding validity and infringement). At the same time, the parties executed the license in the 'real-world' with uncertainty regarding the validity of the patents and infringement of the licensed products"); *Hynix Semiconductor, Inc. v. Rambus Inc*., No. CV–00–20905 RMW, 2006 WL 1991760, at *2, 4 (N.D. Cal. July 14, 2006) (defendant's expert testified that that "his proposed [reasonable royalty] rates were conservative because they did not account for an 'uncertainty discount' that a negotiating patentee and licensee take into account because of uncertainty as to whether the patents are actually valid and infringed at the time of negotiations." Additionally, "Teece [the expert] also explained that a negotiating patentee and licensee generally agree to a lower royalty rate if there is uncertainty as to whether the patents are actually valid and infringed"). Similarly, the Ninth Circuit and courts within it have held that a licensee cannot obtain a refund of royalties paid under a license agreement for a patent that was later held to be invalid. *Bristol Locknut Co. v. SPS Technologies, Inc*., 677 F.2d 1277, 1282-83 (9th Cir. 1982); *St. Regis Paper Co. v. Royal Industries*, 552 F.2d 309, 314 (9th Cir. 1977); *Applied Elastomerics, Inc. v. Z-Man Fishing Products, Inc*., 521 F.Supp.2d 1031, 1040 (N.D. Cal. 2007); *Wang Laboratories, Inc. v. Ma Laboratories, Inc*., No. 95–2274 SC, 1995 WL 729298, at *11 (N.D. Cal. Dec. 1, 1995).

Connell, 102 F.3d 1494, 1509 (9th Cir.1996)).[11]

Here, as a function of its rules and policies, the NCAA ceased licensing to EA (thus ending the latter's NCAA-branded videogames) and stopped selling merchandise searchable by player name, even though there was considerable demand among college sports fans for both. *See* PB at 8-9. The NCAA *does not dispute this*. As the Court noted, it is no answer that a fan of the *NCAA Football* videogame can instead buy *Just Dance*. Tr. 2776:13-16. Indeed, the NCAA's argument that the loss of consumer choice is irrelevant in this context is inconsistent with its contention that amateurism expands consumer choice and is thereby procompetitive. DB at 18-21.

II. NO VALID PROCOMPETITIVE JUSTIFICATIONS EXIST.

Amateurism. The NCAA has a heavy burden in establishing any of its claimed procompetitive justifications.[12] Here, it has failed to meet that burden and has not demonstrated that amateurism is a revered, immutable concept or that it has any meaningful effect on the popularity of Division I men's basketball or FBS football.

The NCAA points to the history of scandals and the paying of college athletes prior to the 1950s. DB at 19. During that same period, however, it espoused amateurism. This history merely underscores its "hypocrisy." In any event, it is undisputed that during this period, intercollegiate men's football and basketball flourished. Indeed, the APs' expert Dr. Ellen Staurowsky noted that the creation of the term "student-athlete" by former NCAA Executive Director Walter Byers was intended to deflect attention from the fact that a "pay for play" system was formally adopted in the mid-1950s in the form of GIAs. Tr. 1241:8-1242:4. The NCAA's own internal documents reflect that the "amateurism" is malleable as needed to serve the NCAA's purposes. PB at 11-12.

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[11] The same point is noted in *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012), on which the NCAA relies. DB at 15-16.

[12] The NCAA claims that this is not the appropriate standard. DB at 17 n. 13. But it is the test applied by the Supreme Court in *BoR* when there is a "naked restraint" on price or output. 468 U.S. at 110, 113. That is certainly the case here, and this Court has applied that standard in prior rulings. *NCAA I*, 2013 WL 5778233, at *5. So too did the district court in *Law v. NCAA*, 902 F. Supp. 1394, 1406 (D. Kan.), *aff'd*, 134 F.3d 1010 (10th Cir.), *cert. denied*, 525 U.S. 822 (1998). As one treatise has explained, "[w]hen the anticompetitive character of the restraint is particularly strong, or where anticompetitive effects are sufficiently severe, the burden of persuasion (as well as the burden of production) will then shift to the defendant." I ABA Section of Antitrust Law, *Antitrust Law Developments (Seventh)* 74 n. 248 (2012).

The NCAA Constitution currently defines the principle of amateurism by stating that intercollegiate sports is an "avocation" and that college athletes need to be protected from "commercial exploitation." PX 2340-18. At trial, current NCAA President Mark Emmert abandoned this definition, removing the athlete's motivation as its keystone. Tr. 1840:6-13. He testified that amateurism simply means "you don't get paid," claiming that although this definition is not codified anywhere, it is nevertheless the NCAA's intent. Tr. 1851:19-1852:9. And he further modified the current definition of amateurism to permit payment above the current levels of GIAs, up to the costs of attendance. Tr. 1839:10-13.[13] The NCAA reiterates this point about no compensation in its brief, proclaiming that the "core value" of amateurism is that college athletes "do not get paid for playing their sport." DB at 21. This is the perfect tautology: Players cannot be paid if they are amateurs, and Players are amateurs because they are not paid.

The NCAA argues that the APs have conflated "commercialism" with "amateurism." DB at 20. But since *BoR*, intercollegiate athletics has experienced explosive growth; the newly lucrative media contracts and other sources of revenue have—according to the NCAA's own statements in public and internal NCAA documents—professionalized Division I men's basketball and FBS football so that the only aspect of the sports still colorably "amateur" are the Players themselves. PX 424-2 to -3, 2011-36, 2292-14. The NCAA admitted in scores of documents that this emphasis on commercialization *endangers* the constitutional principle of amateurism. *Id*. And the definition of amateurism in the NCAA Constitution includes protecting athletes against commercial exploitation. PX 2340-18. These were not mere "debates" among academics, as the NCAA now asserts. *No one* disagreed with these concerns. *See* Tr. 1811:14-1815:10.

The NCAA contends that it had the best interests of Players at heart and continually rejected NIL proposals that would have taken greater advantage of them. DB at 20-21. But the APs presented voluminous documentary evidence to show that such exploitation was going on anyway, despite what the membership declined to enact. PB at 12-13. For example, the NCAA

[13] The NCAA's principal expert, Dr. Daniel Rubinfeld, would disagree. Tr. 2941:2-6.

argues that the evidence was "undisputed" that it did not relax its rules against the use of Players' NILs in EA videogames. DB at 21. That is false. Through a series of administrative interpretations, former NCAA President Myles Brand and former NCAA Executive Vice President for Championships Greg Shaheen did exactly that, often causing concern among their subordinates. PB at 13. Emmert conceded that what was done was inappropriate. Tr. 1978:24-1981:5. He was shown numerous other examples of commercial exploitation, which the NCAA now dubs "promotional." DB at 21. Yet Emmert was uncertain how to characterize some examples, while others troubled him. Tr. 1810:12-1811:13, 1959:3-1961:22.

The NCAA also fails to mention that its membership refused to authorize multiple proposals that would have loosened the restrictions on college athletes and allow them to profit modestly off their own NILs. Those were routinely killed. PB at 13-14. Just as the NCAA once "commandeered the [broadcast] rights of its members," it has commandeered Players' NIL rights. *BoR*, 468 U.S. at 106 n.30.

The problem, as Noll testified, is that forbidden "pay" is whatever the NCAA says it should be on any given day. Tr. 163:6-20. Staurowsky cited NCAA Division I Bylaw 12.02.07, which codifies this point. Tr. 1229:12 -1230:6; PX 2340-72. She noted that the concept of "pay" has been applied in an arbitrary and inconsistent manner, pointing to such items as "laundry money" back in the 1950s, the creation of the student assistance fund, which incorporates money received from the settlement in *White* and other benefits. Tr. 1230:7-23, 1231:3-16. Another of the APs' economic experts, Dr. Daniel Rascher, likewise pointed to college athletes receiving store credit cards with prepaid limits, which occurred with players participating in the Belk Bowl. Tr. 908:16-909:14. And, again, permissible "pay" may soon include the full cost of attendance, after years of falling short, without violating the NCAA's ever-changing notion of "amateurism".

The fact that the public is well aware of the commercialization of intercollegiate athletics and its popularity is still increasing strongly suggests that amateurism does not govern popularity. PB at 15-17; *see, e.g.*, PX 424, 2074-11. As this Court observed, this popularity may well turn on the affinity of students and alumni to their colleges rather than on any idealized notion of amateurism. Tr. 3326:3-18. Moreover, as APs detailed in their opening brief, Rubinfeld, Pilson,

and Muir testified that individual payments totaling $300 million or more would not threaten amateurism or, in Rubinfeld's view, endanger competitive balance. PB at 9. The NCAA's only response to all of this is its deeply flawed survey, conducted by J. Michael Dennis.[14]

That survey, like the others relied on by Rubinfeld in his opening merits report, asked about "pay for play"—another topic entirely. Dennis chose not to ask the question that actually fits this case. Tr. 2706:7-22. Thus, neither the Dennis survey nor Rubinfeld's opinions based on it are entitled to any weight.[15] The survey also included nearly 2000 non-fans, roughly 80% of respondents. *See* TX 4045-23. Accordingly, the results were driven by people unlikely to have an opinion, making their answers nothing more than guesses.[16] Tr. 2729:4-11. Compounding the problem, Dennis failed to include a control group, which the NCAA excuses on the ground that the survey was "directly measuring what consumers' beliefs and behavior are in the first place." DB at 23 n.18. Yet the question of *what would a consumer do* if Players were compensated for their NIL rights is *exactly* the sort of causal proposition question that the Reference Manual insists must be subject to a control. *See* Reference Manual at 359, 397-401. Dennis's failure to include a control is fatal to the reliability of his results.[17]

Competitive Balance. In *NCAA II*, the Court informed the NCAA that "[i]n order to prevail on this issue at trial, however, the NCAA will have to present evidence that the challenged restraint promotes a level of competitive balance that (1) contributes to consumer demand for Division I football and basketball and (2) could not be achieved through less restrictive means."

[14] The NCAA finds it "telling" (DB at 22) that APs did not commission their own survey but omits the relevant chronology and burden; the NCAA bears the burden of demonstrating a procompetitive benefit, yet it did not produce the Dennis survey until the *last* day for rebuttal merits expert reports, after Rubinfeld had lodged his opinions. Accordingly, APs moved to strike this late effort as untimely. *See Keller* Dkt. 1025.

[15] *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also* Federal Judicial Center, *Reference Manual on Scientific Evidence* at 357, 373 (3d ed. 2011) ("Reference Manual").

[16] *See Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d 866, 878 (C.D. Cal. 2013) (rejecting survey because it included the wrong people, had closed-ended questions without an "I don't know option," and did not include any controls or basis for comparison); Reference Manual at 359, 390 (survey should include an "I don't know" because "the question reduces the demand for an answer and, as a result, the inclination to hazard a guess just to comply").

[17] *See, e.g., Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1148 (10th Cir. 2013); *THOIP v. Walt Disney Co.*, 788 F.Supp.2d 168, 181-83 (S.D.N.Y. 2011); *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F.Supp.2d 1051, 1075 (E.D. Cal. 2009); *NFL Properties, Inc. v. ProStyle, Inc.*, 57 F.Supp.2d 665, 668-69 (E.D. Wis. 1999).

2014 WL 1410451, at *15. The NCAA did not satisfy these requirements.

As NCAA counsel conceded, "at least with respect to a couple of our procompetitve justifications, they very much rely upon the views of professional educators regarding what's best for education." Tr. 3341:21-24. The trial testimony of university and conference personnel did not differ materially from the evidence presented in pretrial declarations that the Court deemed deficient. They described their opinions as "hypothetical," involving scenarios that were "just my opinion," "just a projection," "complicated to imagine" or "hard to see," and required predictions about a "fictional world" or "potential" consequences that might involve looking into a "crystal ball." Tr. 1401:6-12, 1593:18-1594:6, 1690:22-1691:13, 1698:21-1699:13, 2123:18-2125:3, 2313:14-2314:5, 2412:5-2414:12. Many of their opinions (along with the views expressed by certain NCAA personnel) were based on anecdotal evidence of occasional victories by "Cinderella" teams against superior opponents. *E.g.*, Tr. 2319:20-2322:5, 3183:24-3187:22. This type of self-serving evidence is entitled to little weight. Tr. 3349:2, 3354:11-22.

Likewise, Rubinfeld conducted no analysis of the effect on competitive balance of a modest equal payment to Players. Rather, his only quantitative analysis was based on the switching that might occur if Rascher's inoperative "fully pooled" damages model were somehow realized (despite the NCAA's long-standing position that these amounts would never come to pass). But even with group licensing payments of 50% of total television revenues, those differential offers would only result in some 7 to 10 percent of Players switching among schools in the power conferences and those in the smaller conferences. Critically, Rubinfeld performed no analysis of any kind regarding whether such Player switching would actually impact competitive balance, particularly in light of the *im*balance that exists currently in the NCAA.

Finally, the NCAA does not attempt to grapple with the many documents produced in discovery that demonstrate that the restraint has no relationship to competitive balance. PB at 18-19. NCAA Chief Policy Advisor Wallace Renfro made that very point in a February 2009 memorandum to Brand when he wrote that "competitive advantage or disadvantage doesn't appear to have any rational connection to the principle of amateurism." PX 2049-1. At the conclusion of trial, the NCAA has failed to answer the critical questions of how much

competitive balance is necessary to maintain or increase consumer demand and how lifting the restraint would affect optimal demand, if at all.

Output. The NCAA fares no better in shouldering its burden to prove that "output effects" somehow make its restraint procompetitive. Abandoning its other pretrial claims, the NCAA relies on the argument that schools would drop out of Division I collegiate sports if they were required to pay Players for their NIL rights, in turn limiting the number of Players and scholarships. DB at 23-25.[18] No university official, athletic director, or conference commissioner testified in support of this speculative prediction. PB at 24. But more importantly, Rubinfeld conducted no economic analysis with respect to it. In contrast, Rascher explained that it would make no economic sense to drop out of Division I if the alternative was simply a sharing of the television revenues with the Players. He explained that schools are clamoring to join Division I because of its financial profitability and the huge intangible benefits it brings to the school as a whole. Tr. 881:19-882:7.[19]

The NCAA also contends that procompetitive justifications can operate in markets different from that in which the restraint operates. DB at 18 n.15. This Court has twice reached a contrary conclusion. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-1967, 2014 WL 1949804, at *1 (N.D. Cal. May 12, 2014); *NCAA II*, 2014 WL 1410451, at *15-17; *see United States v. Topco Assoc., Inc.*, 405 U.S. 596, 609-10 (1972); *see also United States v. Phila. Nat. Bank*, 374 U.S. 321, 370 (1963). *Cf. In re Elec. Books Antitrust Litig.*, 11 MD 2293 DLC, 2014 WL 1282298 (S.D.N.Y. Mar. 28, 2014).

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[18] The NCAA abandons the argument that the NIL money paid to Players would result directly in reductions in scholarships, a position that Rubinfeld had taken in his report. Tr. 875:10-877:12. This reversal is understandable because Rascher thoroughly rebutted the argument. Tr. 873:20-874:20. He explained that the member schools have historically offered every athletic scholarship up to the maximum imposed by the NCAA (from 105 to 85), which shows that the schools consider them quite valuable and would find other budget items as more likely targets of cost-cutting efforts.

[19] Rascher further explained that in the group licensing scenario that may result from conference-by-conference negotiations, the smaller schools would be paying much less in NIL rights fees, further diminishing the likelihood of exiting Division I. For example, the Horizon League, whose commissioner explained by declaration that its television contract does not generate revenue—it pays for the privilege of being broadcast—still would lose millions in March Madness money if it dropped out of Division I. Tr. 885:6-886:4.

Integration. This Court noted in *NCAA II* that "if the NCAA seeks to argue at trial that the challenged restraint promotes the integration of education and athletics, it must present evidence to show that (1) the ban on student-athlete compensation actually contributes to the integration of education and athletics and (2) the integration of education and athletics enhances competition in the 'college education' or 'group licensing' market." 2014 WL 1410451, at *16. The NCAA failed to satisfy this burden and presents no argument whatsoever that the challenged rules and policies are responsible for positive academic outcomes.

The NCAA did not establish any nexus between the rules forbidding compensation for use of NILs and the integration of education and athletics. Rubinfeld presented no evidence that fan interest turns specifically on the education Players receive, disclaiming any argument that this factor would impact consumer demand for games. Rather, he focused on the quality of the educational services received by the athletes as the procompetitive benefit. Tr. 3023:3-16.

The evidence demonstrates unequivocally that no metric exists that can reliably measure the concept of integration.[20] Furthermore, the NCAA demonstrated no procompetitive benefit within any of the relevant markets at issue in this case. It argues that somehow Players' quality of education would be diminished if they received payment for use of their NILs, even if that payment were deferred. Rascher explained that Players are already being paid for their play, through full scholarship that are not available to all athletes. Some athletes in other sports are given half scholarships, others none at all—without adverse effect on the student or the student-athlete communities. Other athletes live off campus and receive the room-and-board portion of

[20] The NCAA's discussion of the graduation rates of Players is deeply misleading. The aggregate federal graduation rates (FGR) for the most recent Player cohort are 59% and 47%, which are, respectively, 5% and 17% lower than the FGRs for the student population overall and 6% and 18% lower than the FGRs for all athletes. DX3369-20, -23. And while the FGRs for these Players have improved since the mid-1980s, they have not improved as much as the rates for athletes overall, *id.* at 21 (13% improvement overall vs. 9% in men's basketball and 12% in FBS football); as the NCAA itself concedes, "the overall rates [for Players] lag behind the rates of males in the student body." *Id.* at 20. Similarly, even under the NCAA's own metric, the graduation success rate (GSR)—which, despite the NCAA's commitment to "integration," does not permit comparisons with non-athlete student populations—the rates for the most recent four-year Player cohort (70% for basketball and 70% for football) trail behind the aggregate rate for athletes overall (81%), as well as the aggregate rate for male athletes (75%), and are the lowest of the rates for all men's sports. *Id.* at 6-7.

their GIA in cash; they are likewise rewarded for bowl play without any apparent impact on the integration of athletics and education. Tr. 907:21-909:14.

Moreover, Players already have a student experience far different from that of the ordinary student. PB at 20-21. They spend most of their time throughout the year training for, playing, and practicing their sport. They cannot avail themselves of academic opportunities available to non-athletes. They often have separate dining and study facilities. A brand new "arms race" is emerging to provide specialized dormitories while complying with the ineffectual NCAA rule that Player housing must also include non-athlete students. Tr. 1963:13-1968:6. The NCAA has thus failed to prove that paying Players for their NIL rights will have any adverse effect on integration of education and athletics. It has further failed to prove that permitting NIL payments to Players would deteriorate the integration of education and athletics, much less that any deterioration could have any effect on competition within either of the relevant markets.

III. LESS RESTRICTIVE ALTERNATIVES EXIST.

The APs presented several less restrictive alternatives.[21] The NCAA argues that the alternative of group licensing of NIL has no valid precedents. DB at 32. The case law belies that claim, as does trial testimony. *Dryer v. NFL*, Civil No. 09-2182 (PAM/AJB), 2013 WL 5888231, at *7 (D. Minn. Nov. 1, 2013); *Parrish v. NFL Players Ass'n*, No. C 07-00943 WHA, 2007 U.S. Dist. LEXIS 86833, at *8 (N.D. Cal. Nov. 14, 2007); Tr. 176:12-177:11, 294:8-10.

The NCAA also contends that Noll never presented deferred compensation in his expert reports and therefore cannot be cited. DB at 33. But the NCAA questioned Emmert about this

[21] The NCAA cites *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) for the proposition that any less restrictive alternative must be "virtually as effective" as the restraint "without significantly increased cost." DB at 32. There is some doubt whether the standard expressed in *Tuolomne* reflects the current state of the law in the Ninth Circuit. The language from *Tuolumne* has not been cited in later opinions of the Ninth Circuit and was not followed in *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001). Moreover, *Tuolumne* is distinguishable. It involved hospital accreditation procedures, not a cartel's refusal to pay for a labor input. The latter scenario can only be remediated through some costly alternative. Here, the competitive market will decide what the level of that cost is and if each NCAA conference elects to cap that level, the cost may not be significant, given the totality of each conference's revenues and expenditures. Requiring a less restrictive alternative that does not increase costs would contravene the well-established rule that "cost savings have not qualified as a defense under the antitrust laws." *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

alternative (Tr. 1791:22-1792:21), so the issue was tried by consent under Rule 15(b)(2). Moreover, Rascher also testified about it (Tr. 919:10-16), and it was discussed at pages 43-44 of his expert merits report.

The NCAA presented no evidence that the Olympic model of permitting Players to exploit their NILs for endorsements is not a valid less restrictive alternative, other than offering speculative concerns about abuses by boosters, which can be (and currently are) restricted through tailored rules and advance approval requirements.

Other less restrictive alternatives have been presented by the conferences and, at the Court's suggestion, in *O'Bannon* Dkt. 252-1. Noll also testified about recent proposed changes in GIAs that support some of these alternatives. Tr. 208:7-216:25. All of them are well within the Court's equitable powers to enforce.[22]

IV. CONCLUSION.

For all of the foregoing reasons as well as those set forth in previous briefing, the APs' request for injunctive relief should be granted.

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[22] The NCAA raises new arguments for the first time that the proposed injunctive relief is (a) barred by state statutes limiting GIAs and (b) as to state universities, barred under the Eleventh Amendment because they are arms of sovereign states. DB at 35 n.30. Neither argument is sound. On the first point, the statutes that the NCAA cites do not prevent colleges from compensating Players for use of their NILs. They are aimed at payments to college athletes by third-party agents, not at compensation by the colleges themselves pursuant to official written policies. *See, e.g.*, Iowa Code § 722.11(1) (excluding " institution[s] of higher education or any of [their] officers or employees if the institution, officer, or employee is acting in accordance with an official written policy of the institution); Mich. Comp. Laws Ann. § 390.1502 (same); Cal Educ. Code § 67360(b) and Ga. Code Ann. § 20-2-317(c) (excluding "public or private institution of postsecondary education or to any officer or employee of such institution when the institution, officer, or employee of such institution is acting in accordance with an official written policy of such institution which is in compliance with the bylaws of the [NCAA]"); 720 ILCS 5/29-1 (prohibiting "[o]ffering a bribe" to student athletes); Tex. Civ. Prac. & Rem. Code Ann. § 131.002 (adopting NCAA rules). On the second point, even if public universities were acting as instrumentalities of the state, Eleventh Amendment immunity does not apply to prospective injunctive relief. *Green v. Mansour*, 474 U.S. 64, 71-73 (1985); *Indep. Living Center of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1064 (9th Cir. 2008); *Wells v. Board of Trustees of Cal. State Univ.*, 393 F.Supp.2d 990, 995 (N.D. Cal. 2005); *Warwick v. Univ. of Pacific*, No. 08–03904 CW, 2008 WL 5000218, at *5 (N.D. Cal. Nov. 21, 2008). None of the NCAA's cases support a contrary conclusion. Indeed, one of them—*Pharm. & Diagnostic Servs., Inc. v. Univ. of Utah*, 801 F. Supp. 508, 513 (D. Utah 1990)—held that "[i]t is well-settled that the Eleventh Amendment does not bar federal courts from issuing injunctive relief against a state based upon violations of federal law."

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sathya S. Gosselin, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am a partner in the law firm of HAUSFELD LLP, and my office is located at 1700 K Street NW, Suite 650, Washington, DC 20006.

On July 10, 2014, I caused to be filed the following **PLAINTIFFS' POST-TRIAL REPLY BRIEF** with the Clerk of Court using the Official Court Electronic Document Filing System, which served copies on all interested parties registered for electronic filing.

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

/s/ Sathya Gosselin
Sathya S. Gosselin