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13 *Plaintiffs' Class Counsel with Principal  
 Responsibility for the Antitrust Claims*

14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 OAKLAND DIVISION  
 17

18  
 19 EDWARD C. O'BANNON, JR. on behalf  
 of himself and all others similarly situated,

20 Plaintiffs,

21 v.

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

25 Defendants.  
 26  
 27  
 28

Case No. 4:09-cv-3329 CW

**ANTITRUST PLAINTIFFS' TRIAL BRIEF**

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

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1           **I. INTRODUCTION**

2           The Antitrust Plaintiffs (“APs”) hereby submit their trial brief in response to the Court’s  
3 request at the May 15, 2014 telephonic hearing and the Court’s May 23, 2014 order (Case No. 09-  
4 1967, Dkt. No. 147 (hereafter, “Dkt. \_\_\_”).

5           **II. OVERVIEW**

6           The APs will prove at trial that the National Collegiate Athletic Association (“NCAA”),  
7 its member schools, its conferences, and its vertical business partners have conspired to deprive  
8 college athletes in Division I men’s basketball and football<sup>1</sup> of any portion of the revenues earned  
9 through the licensing of those athletes’ names, images, and likenesses (“NILs”) in television  
10 broadcasts, rebroadcasts, game clips, and videogames. This anticompetitive conduct is sacrosanct  
11 to the NCAA—it is a condition of NCAA membership, a condition of eligibility for college  
12 athletes, a condition of doing business with the NCAA, and codified in the NCAA rules  
13 prohibiting payment or the promise of future payment to college athletes for any purpose.  
14 Predictably, the world’s leading economists—including even the NCAA’s chief expert—agree  
15 that the NCAA is a textbook cartel. And the evidence of conspiracy gathered during discovery is  
16 overwhelming.  
17  
18

19           This longstanding restraint, all the more oppressive as broadcast revenues have exploded,  
20 causes significant harm to competition in two distinct but related markets: (1) the “college  
21 education” market, in which Division I colleges and universities compete to recruit the best  
22 athletes to play football or basketball; and (2) the “group licensing” market, in which broadcasters  
23 and videogame developers compete for group licenses to use the NILs of all athletes on particular  
24 Division I football and basketball teams in live game broadcasts, archival footage, and  
25 videogames. The conspiracy limits competition for college athletes; increases the price of school

26  
27 <sup>1</sup> For the sake of brevity, APs will refer to Division I men’s basketball and football to mean  
28 Division I men’s basketball and Football Bowl Subdivision men’s football.

1 for college athletes; facilitates early exit by some athletes; limits consumer choice by restricting  
2 the number and quality of licensed products; and spurs inefficient substitution, including  
3 excessive expenditures on other inputs such as recruiting, coaches, and facilities.

4 The NCAA, meanwhile, insists that the restraint actually aids competition because it is the  
5 linchpin of consumer demand, “competitive balance,” college athletes’ educational experience,  
6 and uninterrupted output. But those dubious arguments rest on a shaky foundation: the  
7 speculation of self-interested declarants who benefit from the conspiracy and a flawed survey  
8 conducted at a moment when college sports fans’ sympathies are rapidly shifting. Absent from  
9 the NCAA’s defense is any empirical analysis supporting its assertions.  
10

11 In any event, the NCAA candidly admits that it has not considered the possibility of less  
12 restrictive alternatives to the restraint. The APs have probed this question at length and  
13 discovered a host of alternatives already found in amateur sports and professional sports. Chief  
14 among them is the simplest solution: deferred compensation. By placing in trust any revenues that  
15 college athletes might earn through the licensing of their NILs—and releasing those funds upon  
16 expiration of athletic eligibility—the NCAA and its member schools could easily preserve any  
17 purported procompetitive benefits that the current status quo might yield.  
18

19 At the conclusion of trial, the APs will ask the Court for a modest remedy consisting of (i)  
20 declaratory relief clarifying that the collective conduct proven at trial violates the Sherman Act  
21 and (ii) injunctive relief prohibiting the NCAA and its members schools from colluding further to  
22 deny college athletes the ability to license their NILs or receive a share of revenue associated with  
23 the licensing of their NILs. Notwithstanding the NCAA’s conjecture that the sky will fall, an  
24 unfettered market *will not* bring college athletics to a halt.  
25

### 26 **III. LEGAL FRAMEWORK**

27 At trial, the APs must prove “(1) that there was a contract, combination, or conspiracy; (2)  
28

1 that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of  
2 reason analysis; and (3) that the restraint affected interstate commerce.” *Tanaka v. Univ. of S.*  
3 *California*, 252 F.3d 1059, 1062 (9th Cir. 2001) (“*Tanaka*”) (citation and quotation marks  
4 omitted); see *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-1967, 2014  
5 WL 1410451, at \*3 (N.D. Cal. Apr. 11, 2014) (“*NCAA I*”). This Court has previously determined  
6 that the rule of reason is the appropriate analytical framework for this litigation. *Id.*

7  
8 The rule of reason asks whether a restraint’s harm to competition outweighs any  
9 procompetitive effects. *Tanaka*, 252 F.3d at 1063; *NCAA I*, 2014 WL 1410451, at \*3. In the first  
10 step of this framework, the plaintiff must satisfy his or her burden by demonstrating that the  
11 restraint produces significant anticompetitive effects within a relevant market. *Tanaka*, 252 F.3d  
12 at 1063; *NCAA I*, 2014 WL 1410451, at \*3. If the plaintiff satisfies this burden, the defendant  
13 must furnish evidence of the restraint’s procompetitive effects for the court’s consideration.  
14 *Tanaka*, 252 F.3d at 1063; *NCAA I*, 2014 WL 1410451, at \*3. And if the defendant produces such  
15 evidence, the burden shifts to the plaintiff to show that any legitimate objectives of the restraint  
16 can be achieved in a substantially less restrictive manner. *Tanaka*, 252 F.3d at 1063; *NCAA I*,  
17 2014 WL 1410451, at \*3. At the conclusion of this burden-shifting process, the Court must  
18 determine the net competitive effect of the restraint. See *Cont’l T. V., Inc. v. GTE Sylvania Inc.*,  
19 433 U.S. 36, 49-50 (1977); *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1156 (9th  
20 Cir. 2003) (“*Paladin*”) (“The rule of reason weighs legitimate justifications for a restraint against  
21 any anticompetitive effects. . . . We review all the facts, including the precise harms alleged to the  
22 competitive markets, and the legitimate justifications provided for the challenged practice, and we  
23 determine whether the anticompetitive aspects of the challenged practice outweigh its  
24 procompetitive effects.”).

**IV. THE NCAA’S CONTRACT, COMBINATION, OR CONSPIRACY**

1  
2 After five years of litigation, the NCAA has all but conceded the existence of the restraint,  
3 which emanates principally from the NCAA’s constitution, bylaws, regulations, rules, rules  
4 interpretations, and policies—and the NCAA’s insistence that vertical business partners agree to  
5 be bound by the same. Together, current NCAA Constitution Articles 2.8; 3.2.4.6, and NCAA  
6 Operating Bylaws 12.02.2; 12.02.3; 12.1.2; 12.1.2.1; 12.5.1.1.1; 12.5.1.7; 12.5.1.8; 12.5.2.1;  
7 12.5.2.2; 13.2.1; 14.1.3.1; 14.1.3.2; 16.01; 16.02.5; 18.4.2.1; 22.2.1.2; 31.6.4; 31.6.4.3; as  
8 interpreted by the NCAA “Membership Services” office, ensure that no member school or  
9 vertical business partner will pay or promise to pay at some later point in time a college athlete  
10 for the licensing of his NIL. Antitrust Plaintiffs’ Trial Exhibit (“PX”) 2340 (2013-2014 NCAA  
11 Division I Manual). The NCAA argues that its rules have no applicability after graduation, but it  
12 has admitted to the Court that “[w]e have bylaws that prohibit current enrolled students from  
13 cashing in on their name, image and likeness” and further that a promise of compensation for NIL  
14 licensing after graduation “would be a violation of the eligibility rules.” PX 2446 at 9.

15  
16 For example, NCAA Operating Bylaw 12.5.1.1 authorizes member institutions (or an  
17 entity thereof) to use a college athlete’s name, picture, or appearance to promote activities  
18 “incidental” to the athlete’s participation in intercollegiate athletics with “all monies” going to the  
19 institution or its conference. Other NCAA bylaws—3.2.1.2, 14.01.3, 18.4.2.1, 22.2.1.2—require  
20 certification of compliance with NCAA legislation or adherence to NCAA rules. Of particular  
21 note, NCAA Constitution Article 12.1.2 dictates:

22  
23 An individual loses amateur status and thus shall not be eligible for intercollegiate  
24 competition in a particular sport if the individual . . . [u]ses his or her athletics skill  
25 (directly or indirectly) for pay in any form in that sport [or] [a]ccepts a promise of  
26 pay even if such pay is to be received following completion of intercollegiate  
athletics participation.

27 *Id.* In addition, NCAA Operating Bylaw 12.5.1.1.1 purportedly authorizes the NCAA and its  
28 members to use college athletes’ NILs liberally: “The NCAA [or a third party acting on behalf of



1 the NCAA (*e.g.*, host institution, conference, local organizing committee)] may use the name or  
2 picture of an enrolled student athlete to generally promote NCAA championships or other NCAA  
3 events, activities or programs.” *Id.*

4 The NCAA contends that its rules and interpretations are fundamental to “amateurism,” an  
5 ambiguous and shifting term that it uses to defend the restraint. Under the NCAA’s current  
6 conception of amateurism, Division I men’s football and basketball are professional in every  
7 respect, with one exception: payments or agreements to pay players (beyond concerted limits on  
8 scholarships) are prohibited. PX 2293 at 5 (“If the student athlete were asked for permission to  
9 use or his or her image or reputation for this commercial purpose, he or she would be compelled  
10 by NCAA rules to deny granting permission”). Accordingly, it is the NCAA’s position that  
11 “[a]mateur defines the participants, not the enterprise.” PX 2011 at 35. “To be clear, student-  
12 athletes are amateurs. Intercollegiate athletics is not.” PX 2292 at 14.

14 The NCAA Presidential Task Force on Commercialism, tasked with resolving the  
15 controversy over and criticism of commercial activity in college sports (PX 2034) surveyed the  
16 use of player NILs by member institutions in 2008 and found widespread commercial use and  
17 extensive agreements with commercial sponsors. PX 2033. These uses were distinct from the use  
18 of NILs in broadcasts of games and non-game events and photos where athletes are displayed  
19 next to (or wear) corporate-sponsor logos. PX 424 at 3 (“contrived, non-game photos or video  
20 that put student-athletes in close proximity of commercial products”); PX 2037 at 1 (“To say that  
21 CBS is using names and stats to sell advertising to make money and therefore is against the rules  
22 seems to cast a blind eye on all the other ways CBS and ESPN and NCAA.com etc. all use  
23 student-athlete images, footage, stats, names, news on TV, online etc. to sell advertising”). The  
24 Task Force ultimately concluded in 2009 that commercialism “should be embraced” and that  
25 “[w]hile participating is to be an avocation for students, college sports as an enterprise is a  
26 professional undertaking for everyone else.” PX 2047 at 5.

1 A wealth of deposition testimony and documentary evidence further confirms the  
2 existence of the restraint,<sup>2</sup> and the NCAA has admitted as much in recent comments to the Court  
3 and the joint Pretrial Conference Statement. PX 2446 at 3; Dkt. 1071 at 6.

4 The NCAA clings to the notion that its eligibility rules do not affect *former* college  
5 athletes, however, blinding itself to the undisputed evidence that the relevant NIL licensing  
6 occurs before or during each college athlete's period of eligibility. PX 2101-2232 (collected  
7 media contracts). Once a college athlete graduates, his NIL rights with respect to television  
8 broadcasts, archival footage, and videogames have *already* been sold—included in contracts  
9 executed years before in which the NCAA or its constituent entities purport to have obtained all  
10 necessary rights clearances for participants in the game to be telecast or, in some instances,  
11 expressly purport to convey the right to use athletes' NILs to the broadcasters.<sup>3</sup> Beebe Dep.  
12 56:18-58:13 (Big 12 represents interests of athletes in negotiating broadcast contracts). At his  
13 deposition, NCAA expert Neal Pilson testified about his experience at CBS in negotiating  
14 broadcast contracts with the NCAA and acknowledged: "In our television industry, when a  
15 broadcaster and rights holder negotiate a deal, the NILs of the people whose – who are in the  
16 event are part of the broadcast agreement." Pilson Dep. 79:4-22. "The practice in the industry is  
17 that the NIL of the people participating in the sports event are included within the broadcast  
18 agreement." *Id.* at 81:10-23.

19 The Court acknowledged the Catch-22 that college athletes face in denying the NCAA's  
20 motion for summary judgment:  
21  
22  
23

24  
25 <sup>2</sup> *E.g.*, Emmert Dep. 29-31; LeCrone Dep. 61; PX 2016; PX 2060 (Big 12 Commissioner Dan  
26 Beebe: "As background: [then-]NCAA Bylaw 12.5 permits the member schools to use player  
27 likenesses and names for specific purposes, ostensibly not crossing the line of commercialism.");  
28 2067 (Final Report of the NCAA Task Force on Commercial Activity in Division I Intercollegiate  
Athletics); 2488; 2290 (2006 NCAA State of Association Speech); Dkt. No. 898-1 at 2-4.

<sup>3</sup> For various representative examples, *see* PX 2104, 2122, 2148, 2150, 2162, 2165, 2170, 2218,  
2222, 2225, and 2229.

1 [S]tudent-athletes are prevented from selling or negotiating licenses for the use of  
2 their names, images, and likenesses at the exact moment when those licenses are  
3 most valuable. By the time these student-athletes have stopped participating in  
4 college sports—and are no longer bound by NCAA rules—they have effectively  
lost whatever bargaining power they once had in the group licensing market  
because the NCAA has already sold the recording and broadcasting rights for the  
games in which they played.

5 *NCAA I*, 2014 WL 1410451, at \*5.

6 As the APs will also show, the restraint is also manifest in the various eligibility forms  
7 that the NCAA has previously claimed operate as consents to, or waivers of, the anticompetitive  
8 practices challenged in this litigation. PX 2233-77. To the extent that the NCAA persists with this  
9 argument, the APs will show that the forms are contracts of adhesion, signed without informed  
10 consent, under duress, and typically after being told a signature is required to play. PX 2060 at 4;  
11 2248; 2266 at 15 (Vanderbilt “Student Image Consent” form signed by Chase Garnham with  
12 handwritten note: signed “w[ith] the understanding that I had to sign in order to play (by play I  
13 mean [pa]rticipating in practice, games, and interviews”); 2046 at 1 (Faculty Athletic  
14 Representative Dr. Betsy Altmaier: “I also think the likelihood of a student-athlete not approving  
15 his or her own image use is low. Student athletes don’t have much discretion as it is, and they sign  
16 these ‘release’ forms in a single meeting with literally a stack in front of each of them.”).  
17 Moreover, as the APs have noted throughout this litigation, an otherwise legal consent obtained as  
18 “part and parcel” of an antitrust violation is void. *See, e.g., Radio Corp. of Am. v. Raytheon Mfg.*  
19 *Co.*, 296 U.S. 459, 462 (1935) (stating that the purported release of antitrust claims is  
20 unenforceable “when it is so much a part of an illegal transaction as to be void in its inception”);  
21 *Redel’s Inc. v. General Elec. Co.*, 498 F.2d 95, 100-01 (5th Cir. 1974) (holding that a release is  
22 invalid if “the release itself was an integral part of a scheme to violate the antitrust laws”);  
23 *California Concrete Pipe Co. v. Am. Pipe & Constr. Co.*, 288 F. Supp. 823, 827 (C.D. Cal. 1968)  
24 (affirming that “[a]cts which normally are legal may become illegal if part of, or in furtherance of,  
25 an illegal conspiracy. A release, if it be an illegal contract, or a contract to achieve an illegal  
26  
27  
28

1 purpose, is void. A release even though valid, if secured as part of or in furtherance of an illegal  
2 conspiracy becomes tainted thereby and becomes void.”).

3 The experience of Electronic Arts, Inc. (“EA”) demonstrates the restraint at work. The  
4 APs will present documentary evidence and testimony from Joel Linzner of EA at trial that while  
5 EA abided by the prohibition on paying college athletes for the use of their NIL in NCAA-  
6 licensed videogames, it nonetheless wanted to obtain the rights for more precise likenesses and  
7 the names<sup>4</sup> of every college athlete on each roster, for which EA was willing to pay more to the  
8 NCAA and the college athletes themselves. EA knew that consumers wanted those improvements  
9 to the videogames, and increased sales would result. But the NCAA remained steadfast in its  
10 prohibition against sharing revenues with players and worried that any additional similarities  
11 between the athletes and the videogames would further expose the fiction that the videogame  
12 “avatars” did not represent real people. As a result of the NCAA’s intransigence, EA cancelled  
13 the NCAA Basketball videogame series in 2010 following languishing sales. The NCAA Football  
14 series met a similar fate in 2013 after the NCAA and various conferences (but not member  
15 schools) refused to renew their licensing contracts with EA, blaming the uncertainty caused by  
16 this and other litigation. This evidence (some of which was placed under seal for pretrial  
17 purposes, but which should be unsealed for use at trial) is discussed in greater detail at Dkt. 748 at  
18 35-40; *see also* PX 305; 785; 794; 826; 1127; 2001; 2012; 2023; 2031; 2055; 2389-443.  
19  
20

21 That episode is just one demonstration of how the restraint limits consumer choice and  
22 licensing opportunities for Division I college basketball and football players. Further, the  
23 evidence concerning EA shows that the prohibition on sharing of licensing revenues with players  
24 is not justified on any principled basis. The NCAA cancelled the licenses with EA for videogames  
25 that featured actual players, in part out of fear that preserving the game might require sharing  
26

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27 <sup>4</sup> Rather than relying on a user download that inserted the player names into the videogame after  
28 release.

1 revenue with players for use of the NILs. PX 2028 at 49 (“potential need to provide additional  
2 benefits for the student-athletes given more permissive use of their likenesses?”). In the  
3 meantime, license agreements for broadcast games and other products displaying the NILs of  
4 players continue, with the NCAA taking all monies from those licensing agreements. PX 2012  
5 (“here is a good example of the double standard not making a whole lot of sense as TV and  
6 videogame worlds converge”); 2023 at 4 (“the use of the student-athlete names or likenesses . . .  
7 If we are allowing it in broadcast, video games are literally no different now”).

8  
9 The restraint is thus a bundle of contradictions: the NCAA, its member schools, and its  
10 conferences enter billion-dollar contracts that include the rights of players, while at the same time  
11 limiting other commercial opportunities and excluding college athletes from the financial  
12 bonanza. As former NCAA President Myles Brand put it: “The presidents want it both ways: they  
13 want to be able to rail against commercialism and they want the revenue that comes with  
14 corporate ads.” PX 2026 at 2; 2291.

## 15 **V. THE RELEVANT MARKETS**

16  
17 The APs allege that the NCAA’s anticompetitive conduct restrains two markets: (1) the  
18 “college education” market, in which Division I schools compete to recruit the best college  
19 athletes to play football or basketball; and (2) the “group licensing” market, in which broadcasters  
20 and videogame developers, *e.g.*, compete for group licenses to use the NILs of all college athletes  
21 on particular Division I football and basketball teams in live game broadcasts, archival footage,  
22 and videogames. *See NCAA I*, 2014 WL 1410451, at \*4. APs’ expert, Dr. Roger Noll, will testify  
23 at trial about his lengthy investigation of these markets. As detailed in his expert report on  
24 liability, Dr. Noll has carefully scrutinized whether “colleges have . . . plausible substitutes for  
25 college athletes who want to attend college and who have the ability to play on a DI men’s  
26 basketball team or an FBS football team” and whether “college athletes who want to attend  
27 college and . . . participate at the highest level in men’s basketball or football have . . . plausible  
28

1 alternative[s] to attending a school that plays DI men’s basketball or FBS football.” Dkt. 898-15  
2 at 3. Dr. Noll’s empirical analysis shows the absence of reasonable substitutes, which in turn  
3 affirms that the college-education market exists. *Id.* at 3-4, 18-59. As for the second market, Dr.  
4 Noll has determined that “there is enough commonality among [prevalent collegiate] licensing  
5 activities to justify defining the relevant product market as all collegiate licensing, with several  
6 different types of licenses as separate submarkets.” *Id.* at 62. Among those is a group-licensing  
7 submarket for purposes of creating products that contain the NILs of one or more players, which  
8 “is more efficient than a group of separate transactions for the rights to each component of the  
9 bundle” and the norm in professional sports. *Id.* at 62-70. Moreover, there is “no substitute for the  
10 rights to the NILs of the players,” further corroborating the existence of the markets.

12 Dr. Noll and the various sources he has consulted are not alone. Various NCAA  
13 correspondence, speeches, and reports also confirm the existence of these relevant markets. *E.g.*,  
14 PX 2001, 2006, 2007, 2012, 2020, 2025, 2029, 2038, 2495. Not surprisingly, and as the Court has  
15 noted, the NCAA has yet to advance *any* competent evidence to refute the existence of these  
16 relevant markets. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-1967,  
17 2014 WL 1949804, at \*2-4 (N.D. Cal. May 12, 2014) (“*NCAA II*”).

## 20 **VI. THE RESTRAINT’S SIGNIFICANT ANTICOMPETITIVE EFFECTS**

21 Dr. Noll will also testify about the various ways the restraint harms competition in both  
22 markets. In the college-education market, for example, the restraint harms competition by  
23 reducing the price of college athletes’ NILs to zero, thereby increasing the net price of college  
24 attendance. Dkt. 898-15 at 84-93. Dr. Noll captions this as the “transfer of wealth” harm to  
25 competition. *Id.* As for the group-licensing market, the restraint significantly limits the number  
26 and quality of licensed products, such as EA’s NCAA-licensed videogames, and eliminates  
27 college athletes’ ability to license their NIL rights. *Id.* at 98. This loss of choice results in inferior  
28

1 products despite considerable consumer demand and corporate interest. Finally, the restraint  
2 compels various forms of inefficient substitution, in which, *e.g.*, entities struggle to “work  
3 around” the restraint in ways that prove costly and imperfect, as with EA’s inability to include  
4 player names in the videogame titles at the time of shipment (later integrated through user  
5 downloads). *Id.* at 103-04.

6 The most glaring form of inefficient substitution, however, is the massive expenditure by  
7 NCAA member schools on inputs *other than college athletes* in an attempt to recruit those same  
8 college athletes. *Id.* at 105-114. While NCAA rules impose a ceiling on the total number of  
9 scholarships and the amount of each scholarship, they do not restrict member spending on other  
10 items that might conceivably attract college athletes, however flawed the substitution. *Id.* In an  
11 effort to recruit college athletes while preserving the restraint, member schools spend  
12 considerably more on recruiting expenses, coaching salaries, and facilities than if some portions  
13 of NIL revenues could be paid directly to college athletes. *Id.*; *see also, e.g.*, PX 2480.

14  
15  
16 **VII. THE NCAA’S PURPORTED PROCOMPETITIVE JUSTIFICATIONS ARE**  
17 **ILLUSORY**

18 Once the APs have shown the existence of a restraint in a relevant market, it falls to the  
19 NCAA to furnish evidence of procompetitive justifications. The NCAA initially identified five  
20 proposed justifications: (1) “amateurism”; (2) competitive balance; (3) integration between  
21 athletics and education; (4) viability of sports other than men’s football and basketball; and (5)  
22 enhanced output of men’s football, basketball, and other sports. Dkt. 926 at 10-25.

23 The Court rejected as illegitimate the fourth of these proffered justifications because it  
24 concerns an unrelated benefit in *another* market and could be achieved through less restrictive  
25 means in any event. *NCAA I*, 2014 WL 1410451, at \*16-17; *see United States v. Topco Assoc.,*  
26 *Inc.*, 405 U.S. 596, 610 (1972); *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1112 (1st Cir.  
27 1994). In granting summary judgment for the APs on that procompetitive justification, the Court  
28

1 made clear that “the NCAA may not rely on this justification [(‘increased support for women’s  
2 sports and less prominent men’s sports’)] at trial.” 2014 WL 1410451, at \*20. The Court has  
3 reiterated that “the NCAA may not argue that the challenged restraint helps promote women’s  
4 sports or less prominent men’s sports.” Dkt. 1105 at 5.

5  
6 **A. Consumer Demand Will Persist, and Even Increase, Absent the Restraint.**

7 The NCAA insists that “amateurism”—by which it must mean the prohibition on sharing  
8 revenues earned through the licensing of college athletes’ NILs, at any time—is vital to consumer  
9 demand. That extreme position is not warranted by the evidence.

10 As a threshold matter, the NCAA’s foundational assumption that college athletes in men’s  
11 Division I basketball and football are “amateurs” is fallacious. As APs will establish at trial  
12 through NCAA documents and the testimony of the named plaintiffs and Dr. Ellen Staurowsky,  
13 among others, today’s college athletes in Division I football and basketball do not participate in  
14 sports as an avocation but rather as a full-time pursuit, often expending 40-50 hours a week  
15 honing their athletic abilities. Winning is paramount, and the time commitment required  
16 frequently drives academic schedules and choices and adversely affects graduation rates, which  
17 lag behind those of their peers in the larger student body. *See, e.g.*, PX 2019, 2077, 2078.

18  
19 Moreover, the NCAA admits that the “amateurism” moniker does not preclude it, its  
20 conferences, or its member schools from engaging in lucrative business activities, signing multi-  
21 billion-dollar media contracts, paying ever-increasing coaching salaries, and building sumptuous  
22 facilities, all of which are, the NCAA tells us, consistent with the amateur nature of college sports.  
23 That is only possible through the NCAA’s selective and inconsistent application of the amateur  
24 designation. Again, as it is quick to remind the public, “student-athletes are amateurs.

25  
26 Intercollegiate athletics is not.” PX 2292; *see* PX 2011 at 35 (“Amateur defines the participants,  
27 not the enterprise.”); 2047 at 5 (“[W]hile participating is to be an avocation for students, college  
28



1 sports as an enterprise is a professional undertaking for everyone else.”); *see also* PX 283; 424;  
2 2065; 2290; 2293; 2294. The NCAA even admits internally that “[t]here is a general sense that  
3 intercollegiate athletics is as thoroughly commercialized as professional sports.” PX 424 at 2.

4 Acknowledging this definitional morass, the NCAA has changed the formal definition of  
5 amateurism numerous times—without any effect on consumer demand—and lately adopted the  
6 term “collegiate model.” PX 2027, 2028, 2074. Elsewhere, the NCAA has adopted *different*  
7 amateurism rules for various sports and for its three divisions, even permitting, *e.g.*, college  
8 athletes to play one sport professionally only to return as an “amateur” in a second sport.  
9  
10 Regardless of these inconsistencies, the NCAA cannot explain how consumer demand for college  
11 sports turns on denying players any portion of the soaring revenues while everyone else benefits.

12 Lacking any coherent intellectual response or support from the discovery record, the  
13 NCAA turns to a handful of irrelevant and dated surveys in support of its argument that  
14 viewership would wane if college athletes received compensation, at any time, for the use of their  
15 NILs in television broadcasts, archival footage, and videogames. The NCAA attempts to show the  
16 impossible from this evidence: that if the NCAA ever agrees to share licensing revenues with  
17 college football and basketball players, sports fans would simply stop watching and alumni would  
18 turn their backs on their schools.

19  
20 As APs’ expert Hal Poret will testify at trial, the NCAA surveys provide no reliable  
21 indication of future consumer behavior, much less consumer abandonment of college sports. Each  
22 survey that NCAA expert Dr. Daniel Rubinfeld cited in his opening merits report concerns  
23 whether schools should pay college athletes *a salary* in exchange for their athletic contributions.  
24 Yet that scenario—commonly known as “pay-for-play”—is not at issue in this litigation. As Mr.  
25 Poret will testify, there is no indication that survey respondents were asked, *e.g.*, about  
26 contemporaneous or deferred remuneration for the use of college-athlete NILs in television  
27 broadcasts, archival footage, and videogames. Moreover, those surveys did not probe the reasons  
28

1 for opposing college-athlete salaries; were not directed at college sports fans (the actual  
2 consumers); and do not provide any reason to believe that consumers' actual behavior would  
3 track the preferences articulated in response to the surveys.

4 Even if the surveys could yield relevant information in principle, there are far too many  
5 lingering questions about their reliability. The Court and the parties know almost nothing about  
6 the survey methodologies, including the target population, the sampling design used in  
7 conducting the survey, the survey instrument (screening questions and main questionnaire),  
8 interviewer training and instruction, the results, including rates and patterns of missing data, and  
9 the statistical analyses used to interpret the results.  
10

11 Implicitly conceding the irrelevance of earlier surveys, the NCAA commissioned a new  
12 litigation-driven survey from J. Michael Dennis last fall, purportedly in rebuttal, on which the  
13 NCAA now appears to rely. But the Dennis survey suffers from the very same problems as the  
14 earlier surveys, as Mr. Poret will again testify. Astoundingly, the Dennis survey inquires only  
15 generally about "paying money to student-athletes"—without even mentioning NIL, much less  
16 the idea of deferred compensation. And, again, any dissatisfaction expressed in response to the  
17 Dennis survey does not govern future consumer behavior; as Mr. Poret will testify, a survey  
18 response is costless, not so discontinuing a cherished pastime. What is more, the Dennis survey  
19 does not account for the obvious, that at least some of what drives fan interest in college football  
20 and basketball is the enduring connection between the university and its students, alumni, and  
21 area residents (particularly in many areas of the country without professional franchises). The  
22 injunction that APs seek would not disrupt that connection in any way. Finally, like the earlier  
23 surveys, the Dennis survey did not target college sports fans, as one would expect. Nor did the  
24 Dennis survey balance participation to reflect a representative mix of sports-fan demographics.  
25  
26

27 Dr. Noll and Dr. Daniel Rascher will also address the predictive value of public-opinion  
28 surveys in the sports arena. As they will show, public outcry over the prospect of athlete

1 compensation in other amateur sports, such as the Olympics, has not been a reliable indicator of  
2 subsequent consumer withdrawal. On the contrary, the Olympics have thrived since loosening the  
3 restriction on professional athletes. Likewise, the NCAA cannot reconcile its prediction that  
4 compensation in any form will extinguish consumer interest with its recent experience. Despite a  
5 steady drumbeat of well-publicized rules violations in which college athletes have accepted  
6 compensation from boosters and the like in the last few years, the growth of Division I men's  
7 basketball and football has not slowed. Fans still flocked to watch Ohio State play in the 2011  
8 Sugar Bowl although six of its athletes had violated NCAA rules by selling signed memorabilia.  
9 Likewise, in 2013, although Texas A&M's quarterback Johnny Manziel was suspended for the  
10 first half of the season opener for allegedly selling autographs, that game, which featured Manziel  
11 in the second half, finished 61% above the average ESPN rating for comparable telecasts.  
12

13  
14 **B. The Restraint Is Unnecessary to Preserve Whatever Competitive Balance  
Might Presently Exist.**

15 The NCAA advances "competitive balance" as its second procompetitive justification,  
16 even though NCAA internal documents produced in discovery confirm that competitive balance  
17 is a fiction. At summary judgment, the NCAA relied on a raft of declarations from conference  
18 commissioners and university administrators to support this justification, which the Court found  
19 wanting for three reasons. *NCAA I*, 2014 WL 1410451, at \*13-15. First, none of that material "is  
20 based on empirical evidence, factual data, or expertise in economic analysis."<sup>5</sup> *Id.* at \*14.  
21 Moreover, "all of these declarations are self-serving because Division I conferences and  
22 universities stand to lose a significant portion of their current licensing revenue should Plaintiffs  
23 ultimately prevail in this suit." *Id.* Of particular significance, none of the declarants even  
24 attempted to ascertain what measure of competitive balance might be necessary to preserve  
25  
26

27 \_\_\_\_\_  
28 <sup>5</sup> Even Dr. Rubinfeld's assertions regarding competitive balance lack statistical support. *Id.* at \*14.

1 existing consumer demand, much less determine how the restraint might assist in preserving that  
2 level of competitive balance. *Id.* In light of these deficiencies, the Court stated that it will require  
3 the NCAA to present at trial “evidence that the challenged restraint promotes a level of  
4 competitive balance that (1) contributes to consumer demand for Division I football and  
5 basketball and (2) could not be achieved through less restrictive means.” *Id.* at \*15.

6 Again, the NCAA apparently plans to disregard this ruling. It intends to present *more*  
7 testimony from conference and university personnel (including some of the *same* people who  
8 provided declarations in connection with summary judgment) of the very type the Court has  
9 rejected. Dkt. 1070-2 at 2-6. If there is a failure of proof by the NCAA, this procompetitive  
10 justification will fall by the wayside. If the NCAA does come forward, finally, with some  
11 competent evidence, the APs intend to respond by presenting statistical evidence through Drs.  
12 Noll and Rascher confirming what every college sports fan already knows: a few colleges  
13 dominate college football and basketball by consistently recruiting the best players and fielding  
14 the strongest teams—and removing the restraint will not exacerbate this imbalance. Dkt. 898-15  
15 at 141. Dr. Noll will also testify to the near-consensus among economists that the NCAA’s  
16 eligibility rules do not ensure competitive balance and may actually impede it.

17  
18  
19 The APs will also present evidence that the NCAA does not actually subscribe to the  
20 competitive-balance myth. Internally, it has readily acknowledged that competitive balance does  
21 not exist, necessitating yet more terminology changes—from “competitive balance” to  
22 “competitive equity” to “commitment to fair competition.” PX 424 at 4 (“The top 25 percent of  
23 Division I is setting the spending pace for the rest of the division, although the bottom 25 has  
24 largely stopped trying to compete and is content with the prestige that comes with being in the  
25 same neighborhood. . . . So, what we really see are the ‘haves’ the ‘have-nots’ and the ‘forget-  
26 about-its.’”); 425; 2049 at 1 (“competitive advantage or disadvantage doesn’t appear to have any  
27 rational connection to the principle of amateurism”); 2080 at 4 (“the data would indicate that there  
28

1 is already significant disparity in competition, with the teams from the six FBS AQ conferences  
2 dominating competition on the field”); 2096; 2284. An “impartial observer would likely conclude  
3 that even with the emphasis given and number of attempts to legislate it across a broad spectrum  
4 of institutions, ‘competitive equity’ has failed.” PX 2083 at 4-5.

5  
6 **C. The Restraint Is Not Essential to the Integration of Athletics and Education,  
7 Nor Can the NCAA Demonstrate that the Integration of Athletics and  
8 Education Stimulates Competition in the Relevant Markets.**

9 The NCAA’s third justification—dubbed the integration of athletics and academics—will  
10 fare no better. The NCAA cannot demonstrate that Division I men’s basketball and football  
11 players are “students first, athletes second,” as it maintains, nor can the NCAA explain how the  
12 restraint actually stimulates competition in the relevant markets by “integrating” college athletes  
13 into the academy. The Court expressed similar skepticism at summary judgment. However  
14 laudable the educational mission of member schools may be, social welfare goals cannot  
15 immunize anticompetitive conduct under the Sherman Act. *NCAA I*, 2014 WL 1410451, at \*15  
16 (citing *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 424 (1990); *Nat’l Soc’y of*  
17 *Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978)). And a cartel may not divert price-  
18 fixing profits to charitable pursuits in an effort to evade antitrust liability. After five years of  
19 litigation, “the NCAA has not provided evidence that improving the educational experiences of  
20 student-athletes or advancing the educational mission of colleges ultimately promotes its product:  
21 namely, college sports.” *NCAA I*, 2014 WL 1410451, at \*15. The Court noted further:

22  
23 [T]he NCAA has not explained how the challenged restraint in this case—which  
24 limits, rather than increases, the financial benefits provided to college students—  
25 would enhance consumer choice in the markets Plaintiffs have identified. It has  
26 also failed to present any evidence showing that the integration of athletics and  
27 education actually benefits Division I college sports fans or student-athletes.  
28 Instead, it has submitted a collection of declarations from university administrators  
describing how the challenged restraint benefits *other* college students.

1 *Id.* (emphasis in original). Accordingly, the Court instructed the NCAA that if it persists with this  
2 argument at trial, it must introduce evidence demonstrating that the restraint “actually  
3 contributes” to the integration of athletics and education—and that the integration of athletics and  
4 education in turn enhances competition in the markets identified by the APs. *Id.*

5       Once again, the NCAA apparently intends to ignore this ruling and present the same  
6 discredited speculation from university and conference personnel. *See* Dkt. 1070-2 at 6-8. If the  
7 NCAA can finally muster competent evidence on this point, the APs intend to respond through  
8 the testimony of fact witnesses, including the named plaintiffs, who will confirm through  
9 experience and empirical data that academics are frequently subordinate to athletics for Division I  
10 men’s football and basketball players. The APs will also respond with NCAA documents and the  
11 testimony of Dr. Staurowsky, who will establish that the restraint *does not* contribute to the  
12 integration of athletics and education, as evidenced by a mountain of scholarship, NCAA-  
13 generated reports, authoritative third-party studies, and internal NCAA documents, and that the  
14 integration of athletics and education grows more tenuous each day as academic priorities give  
15 way to business imperatives.  
16  
17

18       The evidence will show that Division I football and basketball players are simply not  
19 receiving the same education as their peers in the student body. Unlike their counterparts, college  
20 athletes are not “students first,” as evidenced by, *inter alia*, the substantial time commitment  
21 required of their sports, the attendant prioritization of athletic endeavors above academic pursuits,  
22 scholarships contingent on athletic performance, differing admissions standards, and lagging  
23 graduation rates. Outside of this litigation, the NCAA and its member schools are quick to  
24 acknowledge the persistent problem. PX 424 at 2 (“We know from a couple of surveys [the  
25 NCAA has] done . . . that student-athletes spend as much as 45 hours a week on their sport. . . .  
26 We have a 20-hour rule for structured [athletic] activity. We have a wink-and-a-nod approach to  
27 voluntary [athletic] activity.”); 2017 at 25 (“One of the more damaging results of such increased  
28

1 pressure on intercollegiate athletics has been to isolate the activity from the academic mission of  
2 the university at exactly the moment when better integration of athletics and academics is  
3 needed”); 2019, 2057, 2087-89, 2281, 2282, 2297, 2487 (“Academics/Athletics Balance: There is  
4 extremely strong sentiment that this is far out of balance in favor of athletics . . . . In terms of  
5 numbers of games played, many are concerned that there are simply too many games . . . that too  
6 much time away from academics”).

7           Even assuming *arguendo* that the NCAA could prove at trial that Division I athletics and  
8 academics are integrated, it cannot show that the restraint is responsible for that integration.  
9 Moreover, the NCAA cannot demonstrate that the restraint promotes competition in either market  
10 in this respect. At summary judgment, the NCAA suggested in passing that the college-education  
11 market is an obvious fit because of its name. Dkt. 926 at 20. But that assumption ignores the  
12 nature of this particular market, which is not some nebulous market for the education of college  
13 athletes but rather the market “in which Division I colleges and universities *compete to recruit* the  
14 best student-athletes to play football or basketball,” as the Court has recognized. *NCAA I*, 2014  
15 WL 1410451, at \*2 (emphasis added). The NCAA has never suggested that colleges and  
16 universities successfully compete for and recruit college athletes by touting how the deprivation  
17 of NIL revenue nevertheless will enhance their educational experience. Nor can it do so now. The  
18 restraint is common to all member schools. There can be no differentiation on this point  
19 *attributable to the restraint* that might facilitate recruitment.

#### 22 23 **D. Extinguishing the Restraint Will Increase Output**

24           Finally, the NCAA predicts that certain member schools—which it cannot say—will exit  
25 Division I or shutter operations absent the restraint, thereby diminishing output as measured by  
26 the total number of teams, players, scholarships, and games. That is rank speculation, supported  
27 thus far by only a handful of self-serving declarations that suggest four schools “*could leave*  
28

1 Division I’ in a post-injunction world and Dr. Rubinfeld’s contention that member schools “*may*”  
2 operate differently absent the restraint. *See* Dkt. 925-8 at ¶¶148-49, 151-53; Dkt. 925-15 at ¶¶67-  
3 71. Equivocation of that sort is not proof of a procompetitive benefit.

4 The NCAA’s argument is truly incredible. Major Division I sports programs and  
5 conferences—which are locked in an arms race to build towering sports facilities and spend  
6 millions on coaches, all with the encouragement of alumni and fans—will not abandon a multi-  
7 billion-dollar sport because of the possibility of sharing certain revenues with players.

8 Moreover, the NCAA has an uphill battle in establishing this justification, given Dr.  
9 Noll’s determination that the restraint actually *restricts* output in various ways. The NCAA  
10 cannot explain why schools would exit Division I before trimming inefficient-substitution  
11 expenditures on facilities, recruiting, and coaching and staff salaries, all of which have grown  
12 exponentially in the last decade. Nor can it explain why other schools from Division II and III  
13 would not take the place of any schools that exit Division I, as recent trends would suggest.

14 The Court need not look to expert testimony alone. Real-life examples of how the restraint  
15 actually *decreases* output abound. But for the restraint, EA would still be producing  
16 videogames—better videogames that consumers crave. *See, e.g.*, PX 1133, 2004, 2013, 2020,  
17 2006 (Myles Brand (NCAA): “[I]t is far from certain that the presidents will agree to providing  
18 names and [better] likenesses in video games. They may decide to leave the money on the  
19 table.”); 2007; 2023; *see generally* PX 2013 at 2 (“I know there are some parameters that might  
20 still prevent using a current student-athlete’s name/likeness on products, but once they are lifted  
21 there could be some huge revenue opps for Texas and Vince [Young].”). But for the restraint, the  
22 NCAA would still sell jerseys tethered to actual players, likely even with names attached.

## 23 **VIII. LESS RESTRICTIVE ALTERNATIVES**

24 In the event that the NCAA satisfies its burden of establishing procompetitive benefits, the  
25 APs will show that the very same goals could be achieved through less restrictive alternatives.



1 For his part, Dr. Rubinfeld acknowledges that less restrictive alternatives exist, but he has chosen  
2 not to investigate them. *NCAA II*, 2014 WL 1949804, at \*4 (“[T]here are changes in the rules that  
3 could be made that would still achieve the pro-competitive purposes that the NCAA has set out,  
4 but I have not seen my charge by the NCAA as advising them as to how to change their  
5 regulations.”).

6 As discussed earlier, one possibility is payment for use of a college athlete’s NIL into a  
7 trust fund that would only be disbursed to the college athlete after graduation or expiration of  
8 eligibility. Other alternatives include those actually raised by the NCAA, EA, or Collegiate  
9 Licensing Company, such as mandating or encouraging member schools to share revenues  
10 derived from NIL licensing with college athletes through the creation of a fund. PX 257, 1133,  
11 2001, 2045. So too could the NCAA revise its definition of “pay” (NCAA Operating Bylaw  
12 Article 12.02.7), to permit remuneration for some or all forms of NIL licensing. Additionally, the  
13 NCAA could abolish the restraint at the national level, leaving it to individual conferences—in  
14 consultation with their member schools—to authorize or prohibit sharing NIL licensing revenues  
15 with college athletes. Finally, the NCAA is currently exploring legislative proposals that would  
16 “[i]ncrease [f]lexibility for [u]se of [l]ikeness” by permitting college athletes “to use his or her  
17 likeness to advertise their business or place of employment, even if they received the position  
18 because of their athletic[] ability,” yet another less restrictive alternative. *See* PX 2093.

19  
20  
21 **IX. WEIGHING OF PROCOMPETITIVE BENEFITS AND ANTICOMPETITIVE**  
22 **EFFECTS**

23 To the extent that the NCAA is able to substantiate any of its procompetitive benefits at  
24 trial, the Court will need to weigh those benefits against the significant competitive harms caused  
25 by the restraint and the less restrictive alternatives available to the NCAA and its member  
26 schools. *See Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977); *Paladin*, 328 F.3d  
27 at 1156. Again, Drs. Noll and Rascher will testify on this topic and aid the Court in determining  
28

1 the net competitive effect of the restraint.

2 **X. INJUNCTIVE AND DECLARATORY RELIEF**

3 This Court certified a class for injunctive and declaratory relief under Fed. R. Civ. P.  
4 23(b)(2). *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-01967 CW,  
5 2013 WL 5979327, at \*30 (N.D. Cal. Nov. 8, 2013) (“*NCAA III*”). The Court subsequently  
6 modified the class definition to conform to Antitrust Plaintiffs’ pleading in the Third  
7 Consolidated Amended Complaint (“TCAC”) (Dkt. 832). *NCAA I*, 2014 WL 1410451, at \*17-20.

8 That class is defined as:

9  
10 All current and former student-athletes residing in the United States who compete  
11 on, or competed on, an NCAA Division I (formerly known as “University  
12 Division” before 1973) college or university men’s basketball team or on an  
13 NCAA Football Bowl Subdivision (formerly known as Division I–A until 2006)  
14 men’s football team and whose images, likenesses and/or names may be, or have  
15 been, included or could have been included (by virtue of their appearance in a  
16 team roster) in game footage or in videogames licensed or sold by Defendants,  
17 their co-conspirators, or their licensees.

18 *Id.* at \*20.

19 The APs have withdrawn their individual claims for antitrust damages, unjust enrichment,  
20 and an accounting contained in the TCAC. Dkt. 1076 at 1. Thus, the only remaining claims to be  
21 tried in the upcoming bench trial are those brought under 15 U.S.C. § 26 and 28 U.S.C. § 2201 *et*  
22 *seq.* for injunctive and declaratory relief.

23 To prevail on a motion for permanent injunction, a plaintiff must show: (1) the likelihood  
24 of substantial and immediate irreparable injury; and (2) the inadequacy of remedies at law. *See*  
25 *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999); *Easyriders Freedom*  
26 *F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996). In issuing a permanent injunction,  
27 the Court must balance the equities between the parties and give due regard to the public interest.  
28 *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002).

Those requirements are satisfied here. There is a substantial, immediate, and irreparable

1 injury arising from the actions of the NCAA and its member schools and conferences in enforcing  
2 rules that prohibit Division I men’s football and basketball players from receiving compensation  
3 for the use of their NILs in live broadcasts, rebroadcasts, video clips, and videogames. To  
4 establish the right to injunctive relief under 15 U.S.C. § 26, a showing of threatened, not actual,  
5 injury is all that is needed (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 139  
6 (1969)), and here the APs have surpassed this test. This Court has already ruled that the claims  
7 based on videogames are not mooted by the current hiatus of NCAA-licensed videogames and  
8 that the First Amendment is no bar to claims based on live broadcasts. *NCAA I*, 2014 WL  
9 1410451, at \*6-11. The injury cannot be remedied at law because the proposed injunction  
10 addresses future conduct and because the damage claims of many of the class members are  
11 sufficiently small to deter the filing of individual actions (at least in sufficient quantity for the  
12 NCAA to abandon the restraint). The balancing of the equities and consideration of the public  
13 interest are already subsumed in the rule of reason analysis described above.<sup>6</sup>

14  
15 The APs are seeking only a prohibitory injunction—not a mandatory injunction. That  
16 injunction would merely prevent the NCAA and its members from agreeing not to compensate  
17 college athletes for use of their NIL. Free market forces would then determine whether schools  
18 decide unilaterally to compensate college athletes for use of their NILs and whether to do so by  
19 group license. Thus, the APs will not burden the Court with a request for ongoing supervision of  
20 the injunction; there is no need. APs’ requested relief is simple, and the injunction would have  
21 immediate effect.  
22  
23  
24  
25

26 <sup>6</sup> Likewise, declaratory relief is also appropriate here. When there is an “actual controversy”  
27 between parties, a federal court may “declare the rights and other legal relations” of the parties.  
28 28 U.S.C. § 2201. The standard used to determine whether there is an actual controversy is the  
same as the “case or controversy” requirement of the United States Constitution. *American States  
Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994).

**XI. DEFENSES****A. Joint Venture**

1  
2  
3 The NCAA intends to argue at trial that the restraint is the product of a joint venture, and  
4 therefore entitled to a presumption of reasonableness and deference from the courts. But that  
5 argument assumes a disputed fact issue—whether the restraint is *essential* for the existence of  
6 college sports. And it is squarely at odds with the Court’s previous rulings on this very issue.

7  
8 The Court has rejected at least twice the NCAA’s argument that *NCAA v. Bd. of Regents*  
9 *of Univ. of Oklahoma*, 468 U.S. 85 (1984)—a case in which the Supreme Court condemned the  
10 NCAA’s rules “curtailing output and blunting the ability of member institutions to respond to  
11 consumer preference,” *id.* at 120—somehow immunizes the NCAA’s conduct here. *NCAA I*,  
12 2014 WL 1410451, at \*4 nn.3-4 (“This Court has previously explained why *Board of Regents*—  
13 which does not examine the NCAA’s ban on student-athlete compensation under the rule of  
14 reason—does not control the outcome of this case.”); *In re NCAA Student-Athlete Name &*  
15 *Likeness Licensing Litig.*, No. 09-1967, 2013 WL 5778233, at \*6 (N.D. Cal. Oct. 25, 2013)  
16 (“Thus, while *Board of Regents* gives the NCAA ‘ample latitude’ to adopt rules preserving ‘the  
17 revered tradition of amateurism in college sports,’ . . . it does not stand for the sweeping  
18 proposition that student-athletes must be barred, both during their college years and forever  
19 thereafter, from receiving any monetary compensation for the commercial use of their names,  
20 images, and likenesses.”).

21  
22  
23 The NCAA now cloaks itself in *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010) to  
24 again insist that its concerted activity should be upheld in “twinkling of an eye.” *Id.* at 203  
25 (quotation marks and citation omitted). Yet *American Needle* makes clear that the truncated rule-  
26 of-reason analysis the NCAA seeks is appropriate only if the restraint is necessary for “‘the  
27 product . . . to be available at all.’” *Id.* at 203 (quoting *Board of Regents*, 468 U.S. at 101); *see*  
28

1 *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (“Joint ventures and other  
2 cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes,  
3 *where the agreement on price is necessary to market the product at all.*”) (emphasis added).<sup>7</sup>  
4 Despite numerous attempts, the NCAA has not yet demonstrated that the restraint is vital for  
5 college sports to endure—and trial will be no different. The evidence on this point is actually  
6 getting worse for the NCAA, as the APs will show. In recent months, NCAA member schools  
7 have been urging sweeping changes to the no-compensation rules, without a hint that any of these  
8 measures might extinguish college sports altogether. PX 2093.  
9

## 10 **B. Consent**

11 The NCAA’s proposed consent defense also turns on college athletes’ decision to take the  
12 field despite awareness of the restraint. According to the NCAA, participation in college sports  
13 alone “eliminates any claim that their purported [NIL] rights have been misappropriated and thus  
14 any claim that there has been an antitrust violation.” Dkt. 149 at 23-24. This has been the subject  
15 of exhaustive briefing, and APs need not belabor the point further here. In summary, a victim’s  
16 consent to an antitrust conspiracy—hotly disputed here in any event—cannot shield a defendant  
17 from liability under the Sherman Act. *See, e.g., Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392  
18 U.S. 134, 143-48, 154 (1968) (White, J., concurring) (Harlan, J., Stewart, J., concurring in part  
19 and dissenting in part), *overruled in part on other grounds by Copperweld Corp. v. Independence*  
20 *Tube Corp.*, 467 U.S. 752 (1984); *see also* EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND  
21 ECONOMICS 17 (2008) (“[E]ven a plaintiff that voluntarily agreed to an anticompetitive restraint  
22 can bring an antitrust claim, if it was injured by the anticompetitive aspects of that restraint or by  
23 its enforcement against it and was not equally responsible for the restraint.”).  
24  
25

26 <sup>7</sup> The NCAA’s reliance on *American Needle* is also misplaced because, unlike the NFL  
27 and the NHL, *see Laumann v. National Hockey League*, 907 F.Supp.2d 465, 485 (S.D.N.Y. 2012),  
28 the NCAA is not a lawful joint venture. Its member schools are independent economic entities  
that compete for athletes and make unilateral decisions about licensing.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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I hereby certify that on June 3, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to the e-mail addresses registered.

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