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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

Case No. 4:14-md-02541-CW
Case No. 4:14-cv-02758-CW

JOINT CASE MANAGEMENT STATEMENT

Date: May 22, 2018
Time: 2:30 p.m.
Judge: Hon. Claudia Wilken

Pursuant to Northern District of California Local Rule 16-10(d) and the Court's Order Scheduling Case Management Conference and Hearing on Motion ("Order"),[1] counsel for all parties in the above-captioned actions submit this Joint Case Management Statement in advance of the hearing scheduled for May 22, 2018.

A. PLAINTIFFS' GENERAL STATEMENT

Defendants continue to rehash the same unfounded objections and arguments that were adjudicated on summary judgment. They effectively argue that the Court reconsider its summary judgment and *Daubert* rulings against them, but it is too late for Defendants to file such a motion, which would be baseless in any event. The Court's rulings are the law of the case. Defendants likewise recycle their contention that the trial cannot proceed until Plaintiffs identify which rules are challenged. In reality, as Defendants know, Plaintiffs have repeatedly provided them with this exact information: First, in an original and amended interrogatory response;[2] again in a chart of challenged rules submitted along with Plaintiffs' summary judgment motion;[3] and yet again in another chart of challenged rules and operative language submitted with Plaintiffs' summary judgment reply brief.[4] Defendants nonetheless persist in claiming that they do not know what rules are at issue, but on top of the fact that Plaintiffs have identified the specific rules over and over, the overarching premise of the legal challenge presented is well known to Defendants. Plaintiffs are challenging the specified NCAA (and corresponding Conference) rules to the extent that they, individually or in combination, constitute a cap on the amount of compensation or benefits that Class Members may receive for their athletic services. There is no mystery about this. While Defendants complain about having the burden to justify all the rules Plaintiffs have challenged, this is required because of the byzantine nature of their massive rule books and the fact that, as the Court has ruled, this case is now in a different time frame from *O'Bannon* with different claims and all of the challenged rules relate to the same core issue:

[1] ECF No. 816. All docket references are to the MDL docket, Case No. 4:14-md-02541-CW (NC).

[2] *See, e.g.*, Sept. 19, 2016 Consolidated Amended Complaint Plaintiffs' Responses to Defendant NCAA's Second Set of Interrogatories at 4-12; Feb. 7, 2017 Consolidated Amended Complaint Plaintiffs' Amended Responses to NCAA's Second Set of Interrogatories at 1-2.

[3] App'x A, Pls.' Mot. for Summ. J, ECF No. 657.

[4] App'x A, Pls.' Reply Mem. ISO Mot. for Summ. J., ECF No. 714.

limitations on the amount student athletes can be compensated or receive in benefits for their playing services. At trial, many of these rules can be easily grouped together for analysis so that it will be manageable to present all relevant evidence about these rules during the two weeks the Court has allotted. Thus, every ostensible question Defendants raise to manufacture a hollow claim that they do not have clarity about the forthcoming trial is answered by the summary judgment record, hearing transcript, and order.

B. DEFENDANTS' GENERAL STATEMENT

The combination of the Court's summary judgment ruling and the lack of clarity in what claims Plaintiffs assert that were not decided in *O'Bannon* make it impossible for the Defendants to commit to a definitive Case Management Statement with respect to trial. Notably, Plaintiffs have failed to identify what specific conduct by the Defendants and which of the 80 challenged NCAA rules identified in their interrogatory responses[5] and summary judgment briefing they intend to challenge at trial. In none of the charts listing the 80 rules they challenge have Plaintiffs identified which of those rules they claim were not addressed in *O'Bannon*, either because they post-date the final determination of *O'Bannon* or because they concern limits on benefits that Plaintiffs contend were not litigated in that case. If Plaintiffs' position is that none of the 80 NCAA rules they've identified were addressed in *O'Bannon* and that all of those rules must be tried in this case, a two-week trial schedule is plainly not feasible. Moreover, the lack of clarity in Plaintiffs' approach to their claims is demonstrated by Plaintiffs' position above, in which they assert they are challenging "specific rules … individually or in combination." It remains a mystery whether Plaintiffs believe Defendants will need to demonstrate that each specific rule is procompetitive, that the "current, interconnected set"[6] of rules are collectively procompetitive, or something altogether different.

[5] *See* CAC Plfs.' Resp. to NCAA's 2nd Set of Interrog., No. 1 (Sept. 19, 2016); Jenkins Plfs.' Resp. to NCAA's 2nd Set of Interrog., No. 1 (Sept. 19, 2016); CAC Plfs.' Am. Resp. to NCAA's 2nd Set of Interrog., No. 1 (Feb. 7, 2017); Jenkins Plfs.' Am. Resp. to NCAA's 2nd Set of Interrog., No. 1 (Feb. 7, 2017).

[6] *See* Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, ECF No. 804 ("Summary Judgment Order") at 13.

Further still, Plaintiffs apparently intend to offer at trial still-unspecified less restrictive alternatives that were not permitted by the Court in the Summary Judgment Order. Without Court guidance about how it intends to address Plaintiffs' unspecified claims, what issues of fact and law remain to be tried, which rules Plaintiffs are challenging, and which alternatives to those rules will be considered, Defendants cannot make informed decisions about which witnesses to call, what testimony may be relevant, or how the case can be structured for trial.

Defendants therefore respectfully submit that fairness, efficiency, and due process require that (1) Defendants be informed of the triable issues of fact that were not adjudicated by the *O'Bannon* decision and are to be tried in this action; and, (2) Plaintiffs be required to specify each NCAA or conference rule they challenge and, for each such rule, the particular, substantially less restrictive alternatives they claim would as effectively advance Defendants' procompetitive justifications. Subject to the foregoing, Defendants submit the following with respect to the specific issues identified in the Court's April 26, 2018 order.

C. TREATMENT OF *JENKINS* CASE PENDING TRIAL IN CONSOLIDATED CASE

Plaintiffs' Proposal: Plaintiffs believe that the *Jenkins* case should be stayed pending the trial and decision in the consolidated case. They do not believe there is any basis for dismissal of *Jenkins*, and, in fact, this Court has repeatedly recognized the independent existence of *Jenkins*.

Defendants' Proposal: The Defendants agree that the *Jenkins* action should be dismissed or stayed pending the trial of the consolidated action, which will adjudicate the claims of a class that entirely subsumes the narrower *Jenkins* class.[7]

[7] The later-filed *Jenkins* action contains only a subset of the consolidated action's classes and defendants. Thus, a trial in the consolidated action undoubtedly will bind the *Jenkins* Plaintiffs under the doctrines of *res judicata* and collateral estoppel, as "under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply."). Plaintiffs have no right to maintain separate, duplicative actions. *See, e.g., Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 688, 693 (9th Cir. 2007) (Plaintiffs generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant."). The later-filed, narrower *Jenkins* action should therefore be dismissed or stayed pending the trial of the consolidated action. *See, e.g., Peak v. Green Tree Fin. Servicing Corp.*, 2000 WL 973685 (N.D. Cal. July 7, 2000) (dismissing duplicative class action);

D. TRIAL SCHEDULES OF NECESSARY COUNSEL

Plaintiffs' Proposal: Plaintiffs' counsel do not have trial conflicts during the December dates earlier ordered by the Court, nor during the weeks of July 30, August 13, September 4, or September 24, 2018. Plaintiffs' counsel also are available during the week of September 17, 2018 with the exception of the Yom Kippur holiday on September 19, 2018.[8]

Defendants' Proposal: Defendants object to scheduling trial in this matter during the July, August, or September 2018 weeks that are identified in the Court's April 26, 2018 order. As the Defendants have separately addressed,[9] trial should be scheduled after resolution of the several trials that Defendants' trial counsel already have on their calendars through early 2019. And, for the reasons stated above, accelerating trial in this case to squeeze it into the gaps between those other trials before the end of September 2018 is likewise problematic.

To the extent the Court disagrees, overrules Defendants' objections, and schedules trial during the weeks identified in the April 26, 2018 order, Defendants believe that the weeks of September 4 and September 17 are less objectionable from a trial-conflict perspective than the other dates offered by the Court.[10]

Though Plaintiffs have sued twelve Defendants in these actions, they have chosen two firms, Wilkinson Walsh + Eskovitz LLP ("WW+E") and Proskauer Rose LLP ("Proskauer"), as lead trial counsel in the case. Defendants ask the Court to accommodate the schedules of two lawyers, the

Weinstein v. Metlife, Inc., 2006 WL 3201045 (N.D. Cal. Nov. 6, 2006) (staying duplicative class action).

[8] With respect to Defendants' objections to the trial schedule based upon the schedule of "Mr. Williams (lead trial counsel for the conference defendants)," Plaintiffs note that this is the first time Defendants have ever identified Mr. Williams as Conference Defendants' lead counsel, the first time Defendants have ever raised any objections concerning Mr. Williams's schedule, and if he appears at trial, it will be the first time Mr. Williams has assumed any visible role in this long-running matter. In addition, Plaintiffs note that Defendants' reasons for not wanting to proceed to trial during the weeks of August 13 or September 24 are not because of other trials scheduled for those weeks, but rather simply because defense counsel has trials near those dates.

[9] *See* Defs.' Notice of Motion and Motion to Continue Trial Date (Dkt. 810); Reply in Support of Defs.' Motion to Continue Trial Date (Dkt. 814).

[10] Defendants note that during each of these two weeks, however, a holiday occurs—Labor Day on September 3 and Yom Kippur on September 19—which means that additional days may be necessary in order to even have 10 trial days as the Court previously ordered.

respective lead trial counsel from WW+E (Beth Wilkinson) and Proskauer (Bart Williams).[11] In particular, Defendants note the following schedules of Ms. Wilkinson (lead trial counsel for the NCAA) and Mr. Williams (lead trial counsel for the conference defendants):

> **Week of July 30:** Mr. Williams has a trial that is scheduled to begin on or about June 18, 2018 in *Irene Delacruz and Julius Delacruz v. Brenntag North America, Inc., et al. (including Johnson & Johnson Consumer Inc.)*, Case No. JCCP 4674 / BC658576, (Cal. Super. Ct.). That case is likely to run through the end of the week of July 23, 2018—that is, through July 27—and possibly longer. While the conclusion date in the *Delacruz* trial is still uncertain, it would directly conflict with commencement of the trial of this case in the week of July 30. In addition to the potential overlap of the actual trials, and potential post-trial motions and briefing in *Delacruz*, setting the trial of this case to commence in the week of July 30 would prevent Mr. Williams from participating in virtually any of the pretrial preparation in this action, including among other things the pretrial conference which would presumably occur in early- to mid-July, during the *Delacruz* trial.
>
> Ms. Wilkinson has a trial scheduled to begin on October 8, 2018 in *City of New York and People of the State of New York v. FedEx Ground Package System, Inc.*, Case No. 13-cv-9173 (S.D.N.Y.) ("*FedEx*"). In connection with that case an August 1, 2018 case management conference will be held, at which trial counsel are to attend to address the specifics of pretrial exchange of information, designations of evidence for trial, and other final pretrial matters. Ms. Wilkinson could not both be in trial in this case the week of July 30 and attend the scheduled *FedEx* pretrial conference at which trial counsel are expected to attend.
>
> In addition, moving up the trial date to July 30 would make it extremely difficult from a practical standpoint for the parties to prepare properly for trial. A July 30 trial date, for instance, presumably would move up the date for the parties' exchange of exhibits and other

[11] Mr. Williams is a nationally-recognized trial specialist and member of Proskauer, which has been counsel for the Pac-12 Conference and had a leading role in these actions since their inception. Mr. Williams entered his appearance in this matter six months ago, has been deeply involved since, and appeared in his capacity as lead trial counsel at the January 16, 2018 summary judgment hearing.

trial material, briefs on all disputed issues of law including procedural and evidentiary issues, proposed findings of fact and conclusions of law, and statements designating excerpts from depositions and written discovery to within a few weeks of the Case Management Conference.

Week of August 13: Similarly, due to Mr. Williams' June and July trial, if trial were scheduled in this matter the week of August 13, he would be unable to participate meaningfully in most of the trial preparation for this action, including the critical process leading up to the pretrial conference, or the pretrial conference itself. And similarly, because of her existing pretrial conference in *FedEx*, Ms. Wilkinson would also be limited in her ability to fully participate in some of the final trial preparation for this case and the *FedEx* case.

Week of September 4: Neither Ms. Wilkinson nor Mr. Williams has an already-fixed date for trial proceedings in other matters during this week. As previously noted, however, Defendants object to scheduling trial the week of September 4 because Ms. Wilkinson has a trial scheduled to begin on October 8, 2018 in the *FedEx* case. The details of final pretrial proceedings in *FedEx* are to be discussed at the August 1, 2018 case management conference, and it is likely that final pretrial proceedings will take place in September 2018.

Week of September 17: Neither Ms. Wilkinson nor Mr. Williams has an already-fixed date for pretrial proceedings in other matters during this week. As previously noted, however, Defendants object to scheduling trial the week of September 17 because Ms. Wilkinson's October 8, 2018 trial in *FedEx* case will likely require final pretrial proceedings in September 2018.

Week of September 24: As previously noted, Ms. Wilkinson has a trial scheduled in *FedEx*, to begin October 8. A September 24 trial date in this case would necessarily conflict with final pretrial proceedings that will be required in the last two weeks before trial begins in the *FedEx* case.

In summary, while none of the weeks identified by the Court afford Defendants adequate time and opportunity to prepare and try the action, the weeks of September 4 and 17 are the least problematic in light of Defendants' lead trial counsel's other trial commitments.

E. PROPOSALS TO MAKE TRIAL EFFICIENT

Plaintiffs' Proposal: Plaintiffs believe that, within the ten trial days allocated by the Court, a trial can be efficiently completed in fifty total hours of live evidence presentation and propose that the Court allocate twenty-five hours for each side to present evidence, examine its own witnesses, and cross-examine witnesses called by the opposing parties. (Deposition testimony offered into evidence and expert declarations submitted to the Court by the parties prior to trial would not count toward the time allocations.) Putting the parties "on a clock" for twenty-five hours apiece will necessitate efficiency and motivate the parties to avoid cumulative testimony. In addition, Plaintiffs propose that the parties submit post-trial briefs along with proposed findings of fact and conclusions of law, and that closing arguments follow these submissions at a subsequent hearing set by the Court that will not count against the time allocations.

Plaintiffs further propose that, to promote efficiency, the trial should be divided into two phases. *Phase one* would begin with Defendants putting on their case with respect to the purportedly procompetitive effects of "amateurism" and integration. The Court ruled on summary judgment that "Plaintiffs have met their burden" to demonstrate that "the challenged restraints produce significant anticompetitive effects in the relevant market."[12] Accordingly, the burden of proof now shifts to Defendants to "come forward with evidence of procompetitive effects of the challenged restraints"[13] in the first phase of the trial. During this first phase, Plaintiffs would also present their expert testimony and other evidence rebutting the existence of procompetitive effects, and the necessity of the extant restraints to advance the purported procompetitive effects, both in response to Defendants' experts (which the Court has already ordered) and with affirmative expert testimony, lay testimony, and other evidence on this issue. After the first phase on procompetitive justifications is completed, the trial would turn to the *second phase* absent the Court granting a motion for judgment as a matter of law against Defendants at the conclusion of phase one. In this second phase, Plaintiffs would first

[12] Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, ECF No. 804, at 19. As summary judgment was granted on these issues, the evidence relating to them does not have to be separately submitted into the trial record. The summary judgment record will itself be part of the appellate record in the event that either party files such an appeal.

[13] *Id.*

present their evidence with respect to less-restrictive alternatives, on which Plaintiffs bear the burden of proof, to the extent that such evidence does not overlap with the evidence already presented in the first phase of the trial. Defendants would then present their evidence on this issue, subject to the Court's order on presentation of expert testimony. Any rebuttal presentations by either party in either trial phase would count against their respective time allocations. At present, Plaintiffs' best estimate is that out of ten trial days, eight days would comprise phase one, and two days would comprise phase two.

This two-phase approach comports with Ninth Circuit law and the Court's summary judgment ruling. As the Court has held, "In a rule-of-reason analysis, the Court must first define the relevant market within which the challenged restraints may produce significant anticompetitive effects."[14] Then, "The next element of the rule-of-reason analysis is whether the challenged restraints produce significant anticompetitive effects within the relevant market."[15] Having entered summary judgment on these two elements, "The next factor is whether Defendants have come forward with evidence of procompetitive effects of the challenged restraints,"[16] and, accordingly, that is where this trial should begin.

Moreover, the Court has ruled that "*O'Bannon*'s holding that there were procompetitive justifications for the rules challenged in that case would not necessarily require the Court to find that different rules, challenged in this case, also have the same procompetitive effects."[17] This is another reason why Defendants should put on their case first. To do so, Defendants must produce probative evidence that "the challenged NCAA rules serve Defendants' asserted procompetitive purposes of integrating academics with athletics and preserving the popularity of the NCAA's product by promoting its current understanding of amateurism."[18]

[14] *Id.* at 18.
[15] *Id.* at 18-19.
[16] *Id.* at 19.
[17] *Id.* at 21.
[18] *Id.* at 22.

Were Defendants to carry this burden, then the Court could take up less-restrictive alternatives, "[t]he final step in the rule-of-reason analysis."[19] Plaintiffs recognize that some witnesses will offer testimony that is relevant both to the issues of procompetitive justifications and less-restrictive alternatives. We do not intend to call each of these witnesses twice—but to instead make assessments about how to proceed most efficiently. This is precisely why Plaintiffs have estimated that the majority of witness testimony would occur in "phase one." Nonetheless, Plaintiffs believe the two-phase approach will assist the Court in providing for the most efficient presentation and consideration of the evidence on these two different legal issues.

Finally, with respect to the Court's question about taking measures to prevent duplication of the record in *O'Bannon*, Plaintiffs do not intend to rely upon evidence that is duplicative of the record in *O'Bannon*, and Plaintiffs respectfully submit that the *O'Bannon* record should not be part of the record in this case and is not admissible in this trial. Multiple witnesses from *O'Bannon*—expert and percipient—were disclosed and deposed by both Plaintiffs and Defendants in the present action. This was the proper way to introduce testimony from *O'Bannon* witnesses—pursuant to required disclosures under Rule 26 and an opportunity for cross-examination based on the record evidence present here, much of which did not exist at the time of the *O'Bannon* case. Plaintiffs would be severely prejudiced were the Court to accept portions of the *O'Bannon* record into evidence where Defendants failed previously to disclose any intention to use such excerpts, and Plaintiffs would be deprived of the opportunity to cross-examine the *O'Bannon* witnesses upon whom Defendants would try to rely. Indeed, this Court has already recognized that Plaintiffs have produced a different factual record to support different claims than those in *O'Bannon*, so the record in that case is outmoded and not relevant to the claims presented here.

The claims in this case arise out of ongoing anticompetitive conduct and challenge "the current, interconnected set" of rules that "generally limit financial aid to the cost of attendance yet also fix the prices of numerous and varied exceptions—additional benefits that have a financial value above the

[19] *Id.* at 25-26.

cost of attendance."[20] Lay or expert testimony from the trial record in *O'Bannon* would be inadmissible hearsay in this case, which involves different parties, different claims, and a different factual record. The *O'Bannon* trial record is inadmissible, inapt, and its introduction would be improper.

Defendants' Proposal: Defendants disagree with Plaintiffs' proposal to eliminate under the guise of "efficiency" the usual pretrial written submissions, which are intended to identify and clarify the disputed issues of fact and law. Defendants also oppose Plaintiffs' proposal to divide the trial into two phases and to require Defendants to put on their case before Plaintiffs begin theirs. Both proposals would have the same effect—to prevent Defendants from receiving fair notice of the claims Plaintiffs intend to pursue, and to obfuscate the disputed factual and legal issues to be tried. Taken together, Plaintiffs' proposals would allow the Plaintiffs to actively conceal the elements of their claims, require that Defendants put on their case without knowing what to defend, and result in a serious violation of Defendants' right to a fair trial in an important and potentially far-reaching case.

The Court's summary judgment order leaves uncertain what factual and legal issues remain for trial. The Court held that Plaintiffs' claims were not precluded because "Plaintiffs raise new antitrust challenges to conduct, in a different time period, relating to rules that are not the same as those challenged in *O'Bannon.*" Summary Judgment Order, at 15. But those new antitrust challenges and purportedly different rules have not been identified by the Court or the Plaintiffs, and so Defendants do not know what actual conduct they are intended to defend. The order also states that "Defendants also allow, but fix the amount of, benefits that a school may provide that are incidental to athletic participation, such as travel expenses and prizes. Some of the additional benefits limited by the rules at issue in this case were provided to student-athletes at the time of the *O'Bannon* trial, but neither this Court nor the Court of Appeals addressed them in that case and their scope has expanded since that time." *See id.* at 13-14 (citations omitted.) While Plaintiffs have repeatedly referred to the overbroad set of eighty rules listed in their interrogatory responses, Plaintiffs have never

[20] *Id.* at 11-13. *See also, e.g., id.* at 15 ("…Plaintiffs raise new antitrust challenges to conduct, in a different time period, relating to rules that are not the same as those challenged in *O'Bannon* . . .").

contended that all eighty relate to the so-called benefits they purportedly challenge. If the trial will include claims relating to the legality of rules pertaining to benefits incidental to participation in athletics, Plaintiffs at a minimum should be required to identify the specific rules and what makes them improper.

Plaintiffs' proposal that the trial be conducted in two phases and that Defendants be required to put on their case before Plaintiffs present theirs is equally unworkable and unfair. First, as discussed above, Defendants do not have the benefit of clarity about what restraints they need to defend and to which supposedly less restrictive alternatives they need to respond. Plaintiffs should be required to identify those bases of their claim before trial. And trial should begin with Plaintiffs putting in evidence in support of their claims, including the specific rules they challenge and what makes them improper. Beyond that, dividing the trial into two phases as Plaintiffs propose would not promote efficiency and would in fact have the opposite effect. Defendants' witnesses do not break down neatly between Plaintiffs' two proposed phases. Most of Defendants' witnesses who may testify about the procompetitive justifications of whatever rules Plaintiffs intend to challenge are likely also to testify about whatever purportedly less restrictive alternatives to those rules Plaintiffs seek to present and why those alternatives would not be as effective as the current rules. Indeed, it is hard to imagine it could be otherwise because of the close factual connection between procompetitive justifications for rules and supposedly less restrictive alternatives. "[T]o be viable under the Rule of Reason—an alternative must be 'virtually as effective' in serving the procompetitive justifications of the NCAA's current rules, and 'without significantly increased cost.'" *O'Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th. Cir. 2015) (quoting *Cnty of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)). Separating the presentation of evidence on the procompetitive justifications from the evidence on the supposedly less restrictive alternatives would involve an unnecessary attempt to divide closely related factual questions, resulting in the inefficient expenditure of time, calling the same witnesses more than once, and needless confusion in the record. Nor does Plaintiffs' effort to sound reasonable by suggesting they will "make assessments about how to proceed most efficiently" and their professed intent to call most of their witnesses during "phase one," resolve the problem inherent in their proposal.

After all, what Plaintiffs propose is that they are not even required to come forward to identify and prove less restrictive alternatives until after "phase one" is completed. Defendants therefore would still be required to recall many of their witnesses during "phase two"—after Plaintiffs have fully articulated their position on less restrictive alternatives—thereby lengthening the trial.

As noted above, Defendants need more clarity about what needs to be addressed at trial in this case, as well as the Court's intentions about avoiding duplication of evidence submitted in *O'Bannon*. Defendants believe that *O'Bannon* established and that it remains the case that pro-competitive justifications for NCAA rules include "integrating academics with athletics and 'preserving the popularity of the NCAA's product by promoting its current understanding of amateurism,'" Summary Judgment Order, at 19 (quoting *O'Bannon*, 802 F.3d at 1073), and that, pursuant to the Court's Summary Judgment Order, what remains for trial in this case is whether the particular rules Plaintiffs challenge here—whatever those are identified to be—further those justifications, not that the procompetitive justifications established in *O'Bannon* need to be reproved. Unless *O'Bannon* is treated as preclusive on all issues, however, Defendants must be permitted to submit further evidence to address whatever issues are to be addressed at trial. Defendants have not conceded or waived proof of any elements of the rule of reason analysis, including whether there is any substantial anticompetitive effect in a properly-defined relevant market resulting from whatever conduct Plaintiffs intend to challenge at trial. The rule of reason analysis requires weighing anticompetitive and procompetitive effects of the restraints at issue in this case—whatever those challenged restraints are ultimately identified to be—as well as justifications for and alternatives to those restraints. If *O'Bannon* does not have preclusive effect in this action, those issues must be tried in this action. Moreover, no such anticompetitive effects were proven for women's basketball, and the conference defendants were not parties in *O'Bannon*.

F. PERCIPIENT WITNESSES

Plaintiffs' Witnesses: To avoid cumulative testimony, Plaintiffs only intend to call as percipient witnesses up to five of the following nine named Plaintiffs across all cases: Shawne Alston, John Bohannon, Justine Hartman, Nigel Hayes, Alec James, Afure Jemerigbe, Martin Jenkins,

Nicholas Kindler, and D.J. Stephens. In addition, Plaintiffs intend to submit deposition testimony from certain Defendant officers, directors, managing agents, and/or 30(b)(6) designees,[21] as well as witnesses who are unavailable for live testimony at trial.[22] Plaintiffs do not intend to call any other percipient witnesses other than to cross-examine witnesses called live by Defendants.

With respect to Defendants' list of seventeen percipient witnesses that they "may" call, Holzman was never disclosed by Defendants in their respective Rule 26 disclosures. This is so despite Defendants' tactic of over-designating witnesses—109 witnesses in total,[23] *in addition to* disclosure of potentially dozens, if not hundreds, more unspecified witnesses by subject matter (*e.g.*, "current and former officers and employees of the NCAA, other conference defendants, current and former presidents, coaches, administrators, athletic directors, and financial aid officers";[24] "Presidents and Chancellors, Athletic Directors, Faculty Athletics Representatives, other Faculty members, and Financial Aid Officers" from thirteen different Big Ten member schools;[25] anyone who has ever served on one of eleven NCAA legislative committees since 2010[26]). Plaintiffs object to any of these undisclosed witnesses testifying at trial.[27]

Five more of Defendants' "may call" percipient witnesses were disclosed pursuant to Rule 26—Huchthausen, Hostetter, Rose, Petr, and White—but Plaintiffs did not depose them for the simple reason that, given the sheer volume of Defendants' witness disclosures, it was not feasible to depose everyone. If Defendants do in fact intend to call any of these witnesses at trial, Plaintiffs will seek leave to depose them prior to trial.

Defendants' Witnesses: Defendants have not finalized their decisions about witnesses who will be called to testify at trial, in part because, as noted above, it is still not clear what issues need to

[21] *See* Fed. R. Civ. P. 32(a)(3).
[22] *See* Fed. R. Civ. P. 32(a)(4)(B).
[23] *See* Jan. 9, 2018 Joint Case Management Statement at 4, ECF No. 773, at 4.
[24] Dec. 15, 2014 Big 12 Conference, Inc.'s Initial Disclosures at 3.
[25] Dec. 15, 2014 Big Ten Conference, Inc.'s Rule 26(a)(1) Initial Disclosures at 2.
[26] Dec. 15, 2014 NCAA's Initial Disclosures Pursuant to Federal Rule of Civil Procedure 26(a)(1) at 3.
[27] Defendants neglected to disclose several additional witnesses (McGlade, Smith, Blank, and McNeely), but because Plaintiffs happen to have deposed these individuals, we do not object to their testifying at trial notwithstanding Defendants' violation of Rule 26.

be addressed at trial. Nevertheless, as noted above, depending on what specific issues are to be addressed at trial, Defendants may call the following fact witnesses to provide testimony during trial:

(a) Amy Huchthausen, Commissioner, America East Conference.

(b) Bernadette McGlade, Commissioner, Atlantic 10 Conference.

(c) Brad Hostetter, Associate Commissioner for Compliance and Governance, Atlantic Coast Conference.

(d) Eugene Smith, Athletic Director, The Ohio State University.

(e) Greg Sankey, Commissioner, Southeastern Conference.

(f) Judy Rose, Athletic Director, University of North Carolina-Charlotte.

(g) Kathleen McNeely, CFO of the NCAA.

(h) Kevin Lennon, Vice President of Division I, NCAA.

(i) Larry Scott, Commissioner, Pac-12 Conference.

(j) Lynn Holzman, Vice President of Women's Basketball and former West Coast Conference Commissioner.

(k) Michael Aresco, Commissioner, The American Athletic Conference.

(l) Nathan Hatch, President, Wake Forest University.

(m) Rebecca Blank, Chancellor, University of Wisconsin.

(n) Ted Gumbart, Commissioner, Atlantic Sun Conference.

(o) Ted White, Executive Associate Athletic Director, University of Georgia.

(p) Todd Petr, Managing Director of Research, NCAA.

Defendants reserve the right to update this list as they finalize their decisions about witnesses who will testify at trial, including by way of final pretrial disclosures called for by the Court's standing order on pretrial preparation.

Defendants also submit that Plaintiffs should not be allowed to continue to obscure the witnesses they intend to rely on for their case, but should be required to identify now the deponents whose testimony they intend to submit in Plaintiffs' part of the case. Plaintiffs state above that they intend to submit deposition testimony from a number of unidentified "Defendant officers, directors,

managing agents, and/or 30(b)(6) designees,[28] as well as witnesses who are unavailable for live testimony at trial." Since the only other witnesses Plaintiffs intend to call are their three experts and not more than five of the named Plaintiffs, the testimony of those unidentified deponents constitute a large proportion of Plaintiffs' intended evidence to which Defendants will need to respond. Those deponents constitute the bulk of Plaintiffs' fact witnesses and should be disclosed to the Defendants now, when the other witnesses are being disclosed.

There is no basis for Plaintiffs' objections to Defendants calling Ms. Holzman at trial. She was known to Plaintiffs during discovery as potential witnesses in this litigation. Indeed, Plaintiffs requested and received a date for the deposition of Ms. Holzman whose examination was confirmed for December 14, 2016 but ultimately cancelled by Plaintiffs.[29]

Defendants also object to Plaintiffs' request to seek the belated depositions of five individuals who were previously disclosed by Defendants—Huchthausen, Hostetter, Rose, Petr, and White. Plaintiffs could have deposed any or all of them, but unilaterally decided not to do so.

G. INTENDED EXPERT WITNESSES

Plaintiffs' Experts: Plaintiffs intend to present testimony at trial from the following experts:[30]

- **Daniel Rascher**: Dr. Rascher's testimony will present affirmative expert evidence with respect to Defendants' two remaining purportedly procompetitive justifications and the separate issue of less-restrictive alternatives. Dr. Rascher also will present his economic analyses of Division I basketball and FBS football in support of his opinions.

[28] *See* Fed. R. Civ. P. 32(a)(3).

[29] We note in addition that Ms. Holzman was a negotiated custodian for the NCAA in this matter and her prior declarations and testimony from the *White, et al. v. NCAA* litigation (No. CV06-0999 C.D. Cal.) and *Rock v. NCAA* litigation (No. 12-cv-01019 S.D. Ind.) are relied upon by Plaintiffs' experts Daniel Rascher and Dr. Roger Noll. *See* Expert Report of Daniel A. Rascher on Damages Class Certification at 26 n.54, 62, 63, 63 n.186, 146, 153, 153 n.342 (Feb. 16, 2016); Expert Report of Daniel A. Rascher on Economic Liability Issues for the Injunctive Classes at 119 n.306, 121, 121 n.317 (Mar. 21, 2017); Declaration of Roger G. Noll at 15 n.19 (May 16, 2017).

[30] Plaintiffs would have designated experts to counter the testimony of Defendants' expert Dr. Kenneth Elzinga, but the Court has already excluded Dr. Elzinga's proposed testimony from this case. *See* Order on Motions to Exclude Proposed Expert Testimony, ECF No. 815.

- **Roger Noll**: Dr. Noll's testimony will rebut the expert testimony of Dr. James Heckman to the extent he offers testimony purportedly supporting the "amateurism" or integration procompetitive justifications. Dr. Noll also will offer testimony concerning less-restrictive alternatives that was reflected in his expert report and would have been offered in response to Professor Elzinga but now will be affirmative testimony. Because Dr. Elzinga's testimony has been excluded, Dr. Noll will not need to rebut it.
- **Hal Poret**: Mr. Poret's testimony will present affirmative evidence with respect to the consumer survey that he conducted for this case, including his opinions about consumer demand for Division I basketball and FBS football and his studies concerning possible less-restrictive alternatives. In addition, Mr. Poret will testify to rebut the expert opinions of Dr. Bruce Isaacson.

Plaintiffs do not intend to call Dr. Edward Lazear as a trial witness because the expert issues he addressed were determined on summary judgment in Plaintiffs' favor, and his expert opinions are already included in the summary judgment record.

Plaintiffs object to Defendants' proposal that Dr. Elzinga testify at trial. The Court has already excluded his testimony in its entirety, and Defendants' suggestion that he can still testify is tantamount to seeking a rehearing on the Court's *Daubert* ruling when it is too late for such a motion, and it would be without merit. Moreover, Defendants have not presented any proper ground for the Court to reverse its ruling that all of Elzinga's testimony is irrelevant because he based all of his opinions on a relevant market definition that has been rejected by the Court on summary judgment and abandoned by Defendants during oral argument on the summary judgment motions.[31]

Pursuant to the Court's Order, Plaintiffs will submit direct expert testimony in written declarations. Plaintiffs' propose that for efficiency, experts offering testimony in rebuttal to another expert file rebuttal declarations after they have reviewed the respective declarations that they are rebutting. Accordingly, Plaintiffs propose that the first set of expert declarations be filed by Dr.

[31] *See* Jan. 16, 2018 Hr'g Tr. at 6-9.

Rascher, Mr. Poret, Dr. Isaacson, and Dr. Heckman. The second set of expert declarations would then be filed by Dr. Noll, Mr. Poret, and Dr. Isaacson on a schedule to be ordered by the Court. Defendants' proposal for live rebuttal direct testimony is inconsistent with the Order of the Court regarding the presentation of expert testimony and would prolong the trial unnecessarily.

Defendants' Experts and Response Regarding Plaintiffs' Experts: Defendants may call the following expert witnesses to provide testimony during trial:

- **Professor James Heckman**: Professor Heckman will testify on the subject matters disclosed in his expert reports and deposition in this matter, including, *inter alia*, the human capital and other economic benefits achieved by student-athletes participating in intercollegiate athletics, the economic effects of such participation on their schools, communities, and society, and the equilibrium effects of Plaintiffs' proposed rule changes. Professor Heckman intends to counter the testimony of Plaintiffs' expert, Dr. Roger Noll, and may respond to testimony from Dr. Rascher, depending on the scope of his testimony.[32]
- **Dr. Bruce Isaacson**: Dr. Isaacson will testify on the subject matters disclosed in his expert report and deposition in this matter, including, *inter alia*, consumer behavior and the parties' survey work performed concerning the procompetitive justification of amateurism for the challenged restraints and Plaintiffs' proposed rule changes. Dr. Isaacson intends to counter the testimony of Plaintiffs' expert, Mr. Hal Poret.
- **Professor Kenneth G. Elzinga**: Professor Elzinga will testify in rebuttal to Plaintiffs' experts, Dr. Rascher, and Dr. Noll. Defendants believe they also should be allowed to offer Dr. Elzinga's testimony on the subject matters disclosed in his expert reports and deposition in this matter, including, *inter alia*, the impact of the

[32] Dr. Heckman and Elzinga both were expected to offer testimony in rebuttal to Dr. Lazear's opinions as well. Plaintiffs state above that they do not intend to call Dr. Lazear at trial "because the expert issues he addressed were determined on summary judgment in Plaintiffs' favor, and his expert opinions are already included in the summary judgment record." Defendants would of course object to the reference at trial to any opinions or testimony by Dr. Lazear whether or not it is "in the summary judgment record" if he is not identified now and available for cross-examination at trial.

market definition accepted by the Court on the procompetitive justifications of preserving demand for college athletics and fostering integration of academics and athletics in the college or university and the ineffectiveness of Plaintiffs' proposed rule changes at achieving those procompetitive justifications. Although the Court's order on *Daubert* motions concludes that Professor Elzinga's affirmative testimony will be irrelevant, we respectfully submit that his testimony would be directly relevant and probative of issues at trial. The Court's contrary suggestion was based in part on the view that (1) Defendants concede the market definition from *O'Bannon* would apply regardless of whether the Ninth Circuit's determinations in *O'Bannon* are preclusive of Plaintiffs' claims in this case, and (2) Professor Elzinga's opinions relate only to an alternative market definition and not to the procompetitive justifications remaining at issue in this case. Neither of those conclusions is correct. Defendants did urge that *O'Bannon* precludes Plaintiffs' claims, but they did not and do not concede that, if changed circumstances justify Plaintiffs to challenge the NCAA's amateurism rules anew, a piecemeal application of *O'Bannon* nonetheless bars Defendants from addressing the market definition. Accordingly, Defendants respectfully submit that the Court's decision to exclude Dr. Elzinga's testimony and a portion of Dr. Heckman's testimony rested on a misunderstanding of Defendants' position and therefore was erroneous. Moreover, even if the definition of the product market in *O'Bannon* governs in this case, Dr. Elzinga's opinions and testimony, like Dr. Heckman's, would nonetheless be relevant and admissible for at least two reasons: (1) he explains how the realities of that market impact the procompetitive justifications of preserving demand for college athletics and fostering integration of academics and athletics in the college or university; and (2) he rebuts the opinions offered by Plaintiffs' experts Dr. Rascher and Dr. Noll on issues that do not depend on market definition, including the existence of procompetitive justifications and less restrictive alternatives. Defendants note that Plaintiffs' position about the testimony

of Dr. Noll supports this view. Specifically, Plaintiffs admit that Dr. Noll's testimony concerning purportedly less restrictive alternatives "was reflected in his expert report and would have been offered in response to Professor Elzinga," but nonetheless claim that this testimony "offered in response to Professor Elzinga … now will be affirmative testimony." This does not make sense unless Dr. Elzinga's testimony itself bears on the relationship between procompetitive justifications and whether they are served by Plaintiffs' supposedly "less restrictive alternatives."

H. PROPOSED MODIFICATIONS TO STANDING ORDER

Plaintiffs' Proposals: Plaintiffs propose the following modifications to the Court's trial preparation procedures:

- **Expert Testimony**: Plaintiffs propose that the parties (i) submit direct expert testimony five weeks before the start of trial; and (ii) submit rebuttal expert testimony three weeks before the start of trial. The "rebuttal" testimony would, in practice, be part of each expert's direct testimony if they were to testify live at trial (*e.g.*, Mr. Poret would testify under direct examination about his opinions concerning Dr. Isaacson's previously disclosed consumer survey). By staging the exchange of declarations, however, each expert can more efficiently respond to whatever testimony his counterpart actually intends to offer rather than anticipating a response to the expert's entire report.
- **Deposition Excerpts**: Pursuant to L.R. 16-10(b)(10), Plaintiffs propose that the parties (i) exchange intended designated excerpts from depositions four weeks before the start of trial; (ii) exchange any objections or amendments two weeks before the start of trial; and (iii) serve and file final deposition designations three days before the start of trial. Defendants seem to be proposing that the exchanges of deposition excerpts occur sooner, and Plaintiffs are open to scheduling such an earlier exchange once the trial date is set.

- **Trial Briefs**: Pursuant to L.R. 16-10(b)(8) and the Court's Order for Pretrial Preparation §§ 3(a)(6)(e) and (j), Plaintiffs propose that the parties submit briefs, along with proposed findings of fact and conclusions of law, to address all disputed areas of fact and law three weeks after the conclusion of the trial, with the Court to set a subsequent hearing for closing arguments. Due to the extensive briefing on the central issues in the case that the parties previously submitted for summary judgment, Plaintiffs believe that the Court is already familiar with the parties' arguments and that a pretrial submission of disputed issues of fact and law is not necessary or efficient in this particular case.
- **Injunction:** With respect to Defendants' request, Plaintiffs are amenable to submitting the specific injunction they seek if it would assist the Court and at a time determined by the Court.

Defendants' Position: Defendants respectfully suggest that in connection with pretrial exchanges and submissions, Plaintiffs should be required to include the form of the specific injunction they propose be entered.

Defendants' Responses to Plaintiffs' Proposals:

- **Expert Testimony**: Defendants disagree with Plaintiffs' proposal that rebuttal expert testimony be proffered in writing in a second round of expert testimony submissions. Rebuttal testimony customarily and properly is offered after, and with the benefit of, cross-examination of the expert whose opinions are being rebutted. Since the cross-examination of experts must occur live at trial, the rebuttal testimony of experts also should occur live. Defendants do not believe anything in the Court's April 26, 2018 order explicitly or implicitly suggests that trial should invert this standard practice and submit expert "rebuttal" before the cross-examination to which it responds has even occurred.
- **Deposition Excerpts**: Given Plaintiffs' apparent intention to seek to submit deposition testimony from a significant number of Defendants' representatives as a

significant part of Plaintiffs' case, Defendants do not believe it is appropriate to delay the parties' exchange of their intended designated excerpts from depositions until four weeks before commencement of trial. The usual date for such exchanges pursuant to the Court's standing Order for Pretrial Preparation is four weeks before the Pretrial Conference. Defendants do not believe that a departure from the usual practice is warranted here.

- **Trial Briefs**: For the reasons explained above, Plaintiffs' proposal that the pretrial submission of the pretrial conference statement, proposed findings of fact and conclusions of law, and trial briefs be eliminated or truncated should be rejected. This is a case in which the Court and the Defendants require and are entitled to plain and detailed statements by the Plaintiffs of all of the claims and positions Plaintiffs intend to assert, including in particular a complete pretrial submission of all disputed issues of fact and law.

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Respectfully submitted,

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatories above.

/s/ *Jeffrey L. Kessler*
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