

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

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

MARTIN JENKINS et al.,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION et al.,

Defendants.

ORDER GRANTING
MOTION FOR RULE
23(b)(2) CLASS
CERTIFICATION

Consolidated Plaintiffs and Jenkins Plaintiffs, current and former collegiate athletes, jointly move for certification of injunctive relief classes. Defendants, the National Collegiate Athletic Association (NCAA) and a group of Division I conferences, oppose the motion. After considering the parties' submissions, arguments at the hearing and supplemental filings, the Court GRANTS the joint motion for class certification.

BACKGROUND

Plaintiffs are student-athletes who played NCAA Division I Football Bowl Subdivision football¹ and men's and women's basketball between March 5, 2014 and the present.

¹ The NCAA organizes member schools into Divisions I, II and III. Division I football includes two subdivisions: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS).

1 Plaintiffs' challenges relate to NCAA restrictions on the
2 compensation of student-athletes for their athletic performance.
3 The NCAA sets a cap on the grant-in-aid (GIA) that student-
4 athletes may receive.² At the time these complaints were filed,
5 the GIA was capped at the value of tuition, fees, room and board
6 and required course books. After Plaintiffs initiated this
7 litigation, the NCAA permitted conferences to allow schools to
8 compensate student-athletes with GIAs for up to their cost of
9 attendance.

10 Consolidated Plaintiffs and Jenkins Plaintiffs allege in
11 their complaints that the NCAA and its member institutions³
12 violate federal antitrust law by conspiring to impose the cap on
13 the amount of compensation a school may provide a student-athlete.
14 Plaintiffs assert that, without the NCAA's cap on GIAs, schools
15 would compete in recruiting student-athletes by providing more
16 generous GIAs. Plaintiffs seek an injunction against the GIA cap.
17 Consolidated Plaintiffs seek, in addition to an injunction,
18 damages for the difference between the GIAs awarded and the cost
19
20

21 ² A grant-in-aid is a scholarship or form of financial aid
22 that the NCAA does not consider "pay or the promise of pay for
23 athletics skill" and that meets certain NCAA requirements. See
2014-15 NCAA Manual at 57 (Bylaw 12.01.4); 189 (Bylaw 15.02.5).

24 ³ Jenkins Plaintiffs name as conference Defendants the
25 Atlantic Coast Conference; the Big 12 Conference; the Big Ten
26 Conference; the Pac-12 Conference; and the Southeastern
27 Conference. Consolidated Plaintiffs name all of those as well as
28 the American Athletic Conference; Conference USA; the Mid-American
Conference; the Mountain West Conference; the Sun Belt Conference;
and the Western Athletic Conference.

1 of attendance. They have not yet moved to certify a Rule 23(b) (3)
2 class.⁴

3 This Court previously certified a class in In re NCAA
4 Student-Athlete Name & Likeness Licensing Litigation (later
5 titled, O'Bannon v. National Collegiate Athletic Association),
6 2013 WL 5979327 (N.D. Cal.). That certification decision was not
7 appealed. After a bench trial, the Court ruled that the NCAA's
8 restrictions on student-athletes receiving compensation for the
9 use of their names, images and likenesses violated the Sherman
10 Antitrust Act, and ordered injunctive relief. O'Bannon, 7 F.
11 Supp. 3d 955, 963 (N.D. Cal. 2014). In O'Bannon v. National
12 Collegiate Athletic Association, 802 F.3d 1049 (9th Cir. 2015),
13 the Ninth Circuit affirmed this Court's ruling on the NCAA's
14 violation of antitrust law and vacated part of this Court's
15 injunctive remedy. See id. at 1053. On October 26, 2015, the
16 Ninth Circuit directed the NCAA to file a response to the
17 plaintiffs' petition for rehearing en banc. See No. 14-16601,
18 Docket No. 114. The NCAA filed its response on November 16, 2015.
19 See id., Docket No. 115.

20 LEGAL STANDARD

21 Plaintiffs seeking to represent a class first must satisfy
22 the threshold requirements of Rule 23(a). Rule 23(a) provides
23 that a case is appropriate for certification as a class action if:

24 (1) the class is so numerous that joinder of all members
25 is impracticable;

26 ⁴ Consolidated Plaintiffs indicated at the hearing that they
27 no longer pursue a claim under California's Unfair Competition
28 Act. That claim is dismissed.

(2) there are questions of law or fact common to the class;
 (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Also, Plaintiffs must meet the requirements of one of the subsections of Rule 23(b). In this motion, Plaintiffs seek certification under Rule 23(b)(2). Rule 23(b)(2) applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Plaintiffs seeking class certification bear the burden of demonstrating that they satisfy each Rule 23 requirement at issue. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). The court must conduct a "'rigorous analysis,'" which may require it "'to probe behind the pleadings before coming to rest on the certification question.'" Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting Falcon, 457 U.S. at 160-61).

DISCUSSION

Plaintiffs move to certify classes to seek injunctive relief against Defendants. Consolidated Plaintiffs propose three classes:⁵

⁵ As suggested by the Court at the hearing, Plaintiffs proposed revised class definitions for consistency between the two actions. See Docket No. 291-1, Ex. 1.

1 Division I FBS Football Class: Any and all NCAA Division
2 I Football Bowl Subdivision ("FBS") football players
3 who, at any time from the date of the Complaint through
4 the date of the final judgment, or the date of the
5 resolution of any appeals therefrom, whichever is later,
6 received or will receive a written offer for a full
7 grant-in-aid as defined in NCAA Bylaw 15.02.5, or who
8 received or will receive such a full grant-in-aid.

9 Division I Men's Basketball Class: Any and all NCAA
10 Division I men's basketball players who, at any time
11 from the date of the Complaint through the date
12 of the final judgment, or the date of the resolution of
13 any appeals therefrom, whichever is later, received or
14 will receive a written offer for a full grant-in-aid as
15 defined in NCAA Bylaw 15.02.5, or who received or will
16 receive such a full grant-in-aid.

17 Division I Women's Basketball Class: Any and all NCAA
18 Division I women's basketball players who, at any time
19 from the date of the Complaint through the date of the
20 final judgment, or the date of the resolution of any
21 appeals therefrom, whichever is later, received or will
22 receive a written offer for a full grant-in-aid as
23 defined in NCAA Bylaw 02.5, or who received or will
24 receive such a full grant-in-aid.

25 Docket No. 291-1, Ex. 1. Jenkins Plaintiffs seek to represent two
26 classes, identical to the first two of Consolidated Plaintiffs'
27 proposed classes. Id.

28 I. Consolidated Plaintiffs' Class Representatives and Mootness

A student-athlete is eligible to participate in NCAA
athletics and receive a GIA for a limited period of time.
Defendants argue that the claims of Consolidated Plaintiffs'
proposed class representatives are moot because they are no
longer eligible to participate in NCAA athletics, precluding
this Court from granting their motion for class
certification. Although their opposition brief alludes to
"standing," Defendants clarified at the hearing and in their
supplemental brief that they argue mootness at the time of
class certification, not lack of standing at the time of

1 filing the complaints.⁶ The Jenkins Plaintiffs' complaint
 2 names representatives with claims that are not moot.
 3 Although Consolidated Plaintiffs do not dispute that their
 4 class representatives' claims are moot, the Court applies the
 5 exception to mootness for inherently transitory claims.

6 Defendants are correct that, if "the plaintiff's claim
 7 becomes moot before the district court certifies the class,
 8 the class action normally also becomes moot." Slayman v.
 9 FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1048 (9th
 10 Cir. 2014).

11 However, Plaintiffs argue that the "inherently
 12 transitory" exception to mootness permits this Court to
 13 certify the class even though Consolidated Plaintiffs'
 14 representatives' claims are moot. When this exception
 15 applies, a court may "avoid[] the spectre of plaintiffs
 16 filing lawsuit after lawsuit, only to see their claims mooted
 17 before they can be resolved." Pitts v. Terrible Herbst,
 18 Inc., 653 F.3d 1081, 1090 (9th Cir. 2011). "'Some claims are
 19 so inherently transitory that the trial court will not have
 20 even enough time to rule on a motion for class certification
 21 before the proposed representative's individual interest
 22 expires.'" Id. (quoting Cnty. of Riverside v. McLaughlin,
 23 500 U.S. 44, 52 (1991)) (brackets omitted); Haro v. Sebelius,

24
 25 ⁶ Defendants suggest in a footnote that this Court cannot
 26 certify a class if any members of the proposed classes are
 27 ineligible to play NCAA athletics and, thus, lack standing. But
 28 because Defendants clarified at the hearing that they raise
 mootness rather than standing issues, this argument is not
 applicable.

1 747 F.3d 1099, 1110 (9th Cir. 2014). Such a claim will
2 repeat as to the class because other persons similarly
3 situated will have the same complaint. Pitts, 653 F.3d at
4 1090.

5 Defendants respond that Consolidated Plaintiffs'
6 interests are insufficiently "short-lived" to warrant
7 applying the exception because student-athletes have up to
8 four seasons of eligibility over the course of five years.
9 See 2014-15 NCAA Manual at 75. Defendants continue that the
10 named Consolidated Plaintiffs knew of their eligibility
11 period and could have filed their complaints sooner than in
12 their final seasons of eligibility. Consolidated Plaintiffs
13 counter that few student-athletes would be expected to bring
14 litigation against their school shortly after beginning their
15 first year on campus. Further, some student-athletes receive
16 one-year GIAs. Consolidated Plaintiffs have been diligent in
17 seeking class certification since they filed their
18 complaints.

19 The Court finds that, in the particular circumstances of
20 this case, Consolidated Plaintiffs' claims are transitory
21 enough that there was insufficient time to obtain a ruling on
22 the motion for class certification before the proposed
23 representatives' interests in injunctive relief expired. See
24 Pitts, 653 F.3d at 1090; Haro, 747 F.3d at 1110. The first
25 cases that eventually became part of this multidistrict
26 litigation were filed in California (Alston v. Nat'l
27 Collegiate Athletic Ass'n) and New Jersey (Jenkins) in March
28 2014. A motion to transfer the then-pending actions was

1 filed with the Judicial Panel on Multidistrict Litigation
2 (JPMDL) later that month. In April, John Bohannon, one of
3 Consolidated Plaintiffs' proposed representatives, filed his
4 complaint in Minnesota (Floyd et al. v. Nat'l Collegiate
5 Athletic Ass'n); he was in his final year of NCAA
6 eligibility. Another case was filed in Louisiana in May.
7 The JPMDL issued orders transferring the cases to this
8 district in June. In July, all Plaintiffs except those in
9 Jenkins filed a Consolidated Amended Complaint. That month,
10 another case was filed in this district and related to this
11 case. In August, another case was filed in Minnesota and
12 transferred to this district by the JPMDL. And another case
13 was filed in this district and related to this case in
14 November 2014. In January 2015, Justine Hartman,
15 Consolidated Plaintiffs' proposed women's basketball
16 representative, filed her complaint in this district (Hartman
17 et al. v. Nat'l Collegiate Athletic Ass'n); she also was in
18 her final year of eligibility. Her case was related to this
19 case and her claims were incorporated into the Consolidated
20 Amended Complaint in February. Although this coordination
21 and consolidation took time, it will, as the JPMDL found in
22 its June 2014 transfer order, "eliminate duplicative
23 discovery; prevent inconsistent pretrial rulings, including
24 with respect to class certification; and conserve the
25 resources of the parties, their counsel, and the judiciary."
26 No. 14-md-02541-CW, Docket No. 1.

27 Meanwhile, in November 2014, Plaintiffs had filed a
28 Joint Motion for Class Certification, which the Court

1 indicated would be heard in February 2015. In February 2015,
2 the Court adopted a stipulation allowing Plaintiffs to file
3 the Amended Joint Motion for Class Certification to account
4 for new and substituted class representatives; the motion was
5 noticed to be heard on May 14, 2015. The class certification
6 hearing was later delayed due to requests from both sides
7 because of various issues, including weather, athletic
8 schedules, attorneys' schedules and discovery.

9 Also contributing to this delay were recent changes in
10 the law, which require consideration of the merits of a case
11 on a class certification motion. See Ellis v. Costco
12 Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011); Dukes,
13 131 S. Ct. at 2551-52. These changes are resulting in a
14 perceived need for more discovery and expert testimony before
15 class certification than was the case in years past. Here,
16 Defendants submitted expert reports with their opposition to
17 class certification. The parties agreed that, if Plaintiffs
18 filed expert reports with their reply, which they did,
19 Defendants would be given additional time to depose
20 Plaintiffs' experts and file a sur-reply. Thus, the hearing
21 was reset for October 1, 2015.

22 The complexity, pace and cutting edge nature of this
23 multidistrict litigation affected the timing of this Court's
24 class certification hearing and decision. There is nothing
25 to be gained by denying class certification only for class
26 members to file a new lawsuit to be included in this
27 litigation. Accordingly, the Court finds that the inherently
28 transitory exception to mootness applies to Consolidated

1 Plaintiffs' claims. Consolidated Plaintiffs represent that
 2 they could add named Plaintiffs who are still eligible to
 3 receive GIAs. In an abundance of caution, it might behoove
 4 them to move to do so.

5 II. Class Certification and Rule 23(a) Requirements

6 Defendants do not dispute that Plaintiffs satisfy the
 7 requirements of Rule 23(a)(1), (2) and (3). The Court
 8 addresses each requirement in turn.

9 A. Rule 23 (a)(1): Numerosity

10 Plaintiffs assert, and Defendants do not dispute, that
 11 the proposed classes comprise thousands of potential members
 12 because of the numerous FBS football and Division I men's and
 13 women's basketball programs implicated and the numerous GIAs
 14 the NCAA permits each school to award. Thus, Plaintiffs meet
 15 this requirement. See In re Citric Acid Antitrust Litig.,
 16 1996 WL 655791, at *3 (N.D. Cal.).

17 B. Rule 23(a)(2): Commonality

18 Plaintiffs identify several common questions regarding
 19 Defendants' alleged violations of federal antitrust law and
 20 the injunctive relief sought. See In re NCAA Student-Athlete
 21 Name & Likeness Licensing Litig., 2013 WL 5979327, at *4
 22 (N.D. Cal.) (class certification decision in case later
 23 titled, O'Bannon v. National Collegiate Athletic
 24 Association). Such questions include the characteristics of
 25 the markets Plaintiffs identify in their complaints, "whether
 26 NCAA rules have harmed competition in those markets," and
 27 "whether the NCAA's procompetitive justifications for its
 28

conduct are legitimate." See id. Thus, Plaintiffs sufficiently show commonality.

C. Rule 23(a)(3): Typicality

"[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" Falcon, 457 U.S. at 156 (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)) (some quotation marks omitted). The purpose of the requirement is "to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). In the antitrust context, generally, "typicality will be established by plaintiffs and all class members alleging the same antitrust violation by defendants.'" White v. Nat'l Collegiate Athletic Ass'n, 2006 WL 8066803, at *2 (C.D. Cal.) (quoting In re Rubber Chemicals Antitrust Litig., 232 F.R.D. 346, 351 (N.D. Cal. 2005)).

Here, named Consolidated Plaintiffs participated in NCAA Division I men's and women's basketball,⁷ and named Jenkins Plaintiffs participate in FBS football and Division I men's basketball. All received or will receive full GIAs subject to NCAA Bylaws restricting the amount of such GIAs. Named

⁷ Defendants do not dispute that a Division I men's basketball player may represent an FBS football player. Because the players challenge the same type of restriction in Division I men's basketball and FBS football, the Court finds that Consolidated Plaintiffs' representative—a Division I men's basketball player—may represent Consolidated Plaintiffs' proposed men's basketball and football classes.

1 Plaintiffs assert that such NCAA restrictions constitute
 2 antitrust violations that lead to cognizable antitrust
 3 injuries. Because all proposed class members share these
 4 asserted characteristics, claims and injuries, Plaintiffs
 5 satisfy Rule 23(a)(3). See NCAA Student-Athlete Name &
 6 Likeness Licensing, 2013 WL 5979327, at *5; In re NCAA I-A
 7 Walk-On Football Players Litig., 2006 WL 1207915, at *6 (W.D.
 8 Wash.); White, 2006 WL 8066803, at *2.

9 D. Rule 23(a)(4): Adequacy

10 Defendants claim that conflicts of interest among
 11 proposed class members preclude all named Plaintiffs from
 12 meeting Rule 23(a)(4)'s adequacy requirement. Defendants
 13 present two theories that some proposed class members have
 14 interests in maintaining the challenged restrictions in
 15 conflict with those of named Plaintiffs: the "substitution
 16 effect" and the "economics of superstars." To the extent
 17 either of Defendants' theories could be read to rely on
 18 potential harm to high school students, players who will not
 19 receive full GIAs or walk-on players who receive no
 20 compensation, the Court notes that the proposed class
 21 definitions do not include these individuals. For the
 22 reasons discussed below, the Court finds that named
 23 Plaintiffs meet Rule 23(a)(4)'s adequacy requirement and that
 24 Defendants' theories for intra-class conflicts are without
 25 support.

26 "Resolution of two questions determines legal adequacy:
 27 (1) do the named plaintiffs and their counsel have any
 28 conflicts of interest with other class members and (2) will

1 the named plaintiffs and their counsel prosecute the action
 2 vigorously on behalf of the class?" Hanlon v. Chrysler
 3 Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). "'Only conflicts
 4 that are fundamental to the suit and that go to the heart of
 5 the litigation prevent a plaintiff from meeting the Rule
 6 23(a)(4) adequacy requirement.'" In re Online DVD-Rental
 7 Antitrust Litig., 779 F.3d 934, 942 (9th Cir. 2015) (quoting
 8 1 William B. Rubenstein et al., Newberg on Class Actions
 9 § 3.58 (5th ed. 2011)); see Amchem Products, Inc. v. Windsor,
 10 521 U.S. 591, 625-27 (1997).

11 Defendants' "substitution effects" theory predicts the
 12 following chain of events: removing the GIA cap would lead to
 13 some student-athletes receiving greater compensation; greater
 14 compensation is an incentive for players to opt in to, or
 15 remain in, NCAA athletics who otherwise would have pursued
 16 more lucrative opportunities; that incentive would lead to
 17 more players competing for finite school resources; and that
 18 competition would result in less valued student-athlete class
 19 members losing their full GIAs.

20 Defendants also argue that an "economics of superstars"
 21 effect would occur absent the GIA cap. The relief Plaintiffs
 22 seek, goes Defendants' theory, would lead to a scenario in
 23 which "some players would receive a high level of
 24 compensation due to their high level of talent, but many more
 25 players would receive a much lower level of compensation, or
 26 none at all, and the overall income distribution would be
 27 highly skewed." Report of Defendants' Expert, Dr. James
 28 Ordoover (Ordoover Report) ¶ 48. According to Defendants,

1 giving schools the freedom to compensate “superstar” or
2 highly valued athletes above the GIA cap while continuing to
3 accept—and possibly accepting more—walk-on players would lead
4 to a wage distribution among student-athletes similar to that
5 seen in professional leagues and would cause some members of
6 the proposed classes to earn less than they earn with the
7 current restrictions. See id. ¶¶ 45-68. Dr. Ordoover opines
8 that schools pay many players who currently receive full GIAs
9 more than the incremental amount of revenue they produce for
10 the school. He refers to this as paying these athletes more
11 than their “marginal revenue product.” He opines that if
12 schools could compensate without a GIA cap, they would
13 compensate these players at their lower marginal revenue
14 product level. Id. ¶¶ 71-73.

15 1. Speculation as to the Relief Plaintiffs Seek
16 Defendants’ theories for intra-class conflict assume
17 that Plaintiffs seek an injunction that would create a
18 completely unrestricted open market in which schools would
19 compete to pay higher and higher amounts to a select few
20 student-athletes without any requirements to provide a
21 minimum number of full GIAs. In fact, although Plaintiffs
22 challenge NCAA rules capping the GIA amount, they do not
23 challenge existing rules—or Defendants’ ability to enact new
24 rules—setting minimum numbers of full GIAs.

25 It is speculative, not inevitable, that Defendants would
26 change other NCAA rules or that the Court would order such an
27 unrestrained market. Defendants could carry out
28 alternatives, such as requiring a minimum number of full GIAs

1 or requiring that schools not reduce or eliminate existing
 2 GIAs.⁸ If Defendants wanted to spread financial aid broadly
 3 and ensure the existing numbers of full GIAs, they could do
 4 so. For instance, the NCAA currently, with limited
 5 exemptions, requires that FBS schools “[p]rovide an average
 6 of at least 90 percent of the permissible maximum number of
 7 overall football grants-in-aid per year during a rolling two-
 8 year period” and, each year, “offer a minimum of 200
 9 athletics grants-in-aids or expend at least \$4 million on
 10 grants-in-aid to student-athletes in athletics programs.”
 11 2014-15 NCAA Manual at 354. Plaintiffs do not challenge this
 12 requirement. Also, Plaintiffs’ experts, Dr. Roger Noll and
 13 Dr. Edward Lazear, explain that any substitution effect is
 14 unlikely in the event that both the cap on GIA and the limit
 15 on the number of GIAs a school may award were removed. See,
 16 e.g., Lazear Report ¶¶ 56, 61, 74; Noll Report at 5.

17 In speculating about intra-class conflicts, Defendants
 18 fail to recognize their own role in determining how
 19 compensation amounts would be set even if this Court were to
 20 enjoin the current GIA cap. “[T]he mere potential for a
 21 conflict of interest is not sufficient to defeat class
 22 certification; the conflict must be actual, not
 23

24 ⁸ Plaintiffs posit more possible alternatives: conferences,
 25 not schools, could pay athletes; schools could be required to
 26 provide all GIA recipients in one sport full cost of attendance
 27 before they could provide any other player in that sport more
 28 compensation; and schools could be required to pay each player on
 their teams the same amount. See Report of Plaintiffs’ Expert,
 Dr. Daniel Rascher (Rascher Report) ¶ 32.

hypothetical.” Berrien v. New Raintree Resorts Int'l, LLC,
276 F.R.D. 355, 359 (N.D. Cal. 2011); see Cummings v.
Connell, 316 F.3d 886, 896 (9th Cir. 2003) (“[T]his circuit
does not favor denial of class certification on the basis of
speculative conflicts.”).⁹

Defendants also argue that due process concerns are
raised by certifying a class to pursue an injunction that
would disadvantage some unnamed members of the proposed
classes. Plaintiffs respond that, in an injunctive relief
case such as this one, “divergent interests within the class
militate in favor of certification—because certification
gives affected parties a greater voice in the litigation.”
Laumann v. National Hockey League, 2015 WL 2330107, *10
(S.D.N.Y.). Here, although the proposed class members may be
competitors rather than consumers as in Laumann, they are
thousands of student-athletes who, because they receive GIAs,
are subject to the same challenged restraint. A single
student-athlete could sue to obtain an injunction against the
GIA cap which would implicate all proposed class members’

⁹ Nor is Defendants’ reliance on Walk-On Football
Players persuasive. In that case, a putative class sought to
eliminate a cap on the number of scholarships a school could
award. The class included a group of “Division I-A walk-ons
. . . .” Walk-On Football Players, 2006 WL 1207915, at *2.
The plaintiffs sought injunctive relief and money damages
under Rule 23(b)(3). See id. The court concluded that the
plaintiffs did not meet Rule 23(a)(4), reasoning that “to
prove that he is entitled to a particular piece of the
damages pie, each class member will have to offer proof that
necessarily will involve arguing that a threshold number of
other players (class members and non-class members) would not
have gotten that same scholarship money.” Id. at *8. Here,
however, Plaintiffs seek only injunctive relief aimed at the
GIA cap on behalf of players who have received or will
receive a full GIA.

1 interests. In deciding whether to certify a (b)(2) class,
2 the court considers that, in an individual case, "there is a
3 real risk that the individual case will impact the absent
4 parties' interests, with those parties being neither
5 represented nor heard." Rubenstein et al., Newberg on Class
6 Actions § 4:34. When the Rule 23 requirements are met,
7 "Class certification helps the absent parties—it guarantees
8 that their interests will be adequately represented, and it
9 provides them notice and an opportunity to be heard about any
10 settlement and/or attorney's fees request." Id. (footnotes
11 omitted).

12 Further, Plaintiffs contend that Defendants should not be
13 heard to argue that class certification should be denied because
14 some members of the proposed classes might be benefitted by, and
15 thus prefer, continuation of antitrust violations. See Probe v.
16 State Teachers' Retirement System, 780 F.2d 776, 781 (9th Cir.
17 1986). Defendants' response that there may be no antitrust
18 violation begs the question. Plaintiffs also argue that if
19 competition among class members precluded certification of a
20 class, then classes of employees could not be certified in
21 employment cases and classes of sellers could not be certified in
22 monopsony antitrust cases such as this one. Such is not the case.
23 See Meiresonne v. Marriott Corp., 124 F.R.D. 619, 625 (N.D. Ill.
24 1989). In Laumann, the court recognized, "If the fact that
25 illegal restraints operate to the economic advantage of certain
26 class members were enough to defeat certification, the efficacy of
27 classwide antitrust suits—and the deterrence function they serve—
28 would wither." 2015 WL 2330107 at *10. Here, although Defendants

1 suggest that class members might prefer to leave an unlawful
2 restraint in place because they otherwise would have to compete
3 against one another, such preference for non-competition does not
4 justify denying injunctive relief class certification.

5 2. Expert Evidence and Intra-Class Conflicts

6 Defendants argue that Plaintiffs fail to provide expert
7 testimony of an economic model to analyze a scenario with a
8 hypothetical injunction and that this failure should preclude
9 certification. Plaintiffs respond that their pleadings
10 sufficiently support class certification and that no expert
11 testimony is needed. Because Defendants base their argument
12 regarding conflicts of interest on a form of relief that
13 Plaintiffs do not seek, the Court agrees with Plaintiffs that
14 economic modeling of a scenario with an injunction is
15 unnecessary to determine Rule 23(a)(4) adequacy in this case.

16 Nonetheless, Plaintiffs counter Defendants' economic
17 analyses from Dr. Ordoover with their own expert reports from
18 Dr. Noll, Dr. Rascher and Dr. Lazear.

19 The Court finds that Dr. Ordoover's reports fail to show
20 intra-class conflicts of interest because, even if Plaintiffs
21 sought the relief he assumes, his reports fail to demonstrate
22 that enjoining the GIA cap would induce additional players to
23 participate in NCAA athletics, and would induce schools, to
24 attract those additional players, to reduce or deny GIAs to
25 members of the proposed classes who receive full GIAs. Nor
26 do they demonstrate that schools would change how they have
27 valued members of the proposed classes because of an
28 injunction against a GIA cap or that schools, despite their

1 past actions and sources of revenue, would be forced by
2 economic circumstances to harm certain members of the
3 proposed classes.

4 a. Substitution Effect

5 Dr. Ordoover predicts that some members of the proposed
6 classes will be harmed by any player compensation system that
7 does not include the GIA cap. So long as schools compensate
8 some student-athletes at a higher level after an injunction
9 than they did before, Dr. Ordoover posits that "increases in
10 the amount of athletics-based aid would naturally induce some
11 people to accept or continue to receive such scholarships
12 that otherwise would choose not to participate as FBS/D-I
13 scholarship student-athletes." Ordoover Report ¶ 21. He
14 refers to these athletes as "additional players." Id.
15 Plaintiffs' expert, Dr. Noll, provides multiple persuasive
16 reasons why current recipients of full GIAs would not be
17 harmed if the GIA cap were lifted. See Noll Report at 4-6.

18 With the cap, few athletes offered GIAs for FBS football
19 or Division I basketball turn them down; ten percent of them
20 did not join an FBS football program and five percent of them
21 did not join a Division I men's basketball program between
22 2007 and 2011, according to Dr. Noll's report. Id. at 15-16.
23 And some who decline GIAs or who leave a school do so for
24 non-financial reasons, such as health or academics. Id. at
25 14-15. In addition, among the athletes who turn down or give
26 up GIAs, many have skill levels so low that they are unlikely
27 to receive compensation offers large enough to prompt them to
28 accept a scholarship absent the GIA cap. See id. at 17. As

1 Dr. Noll explains, "[N]early all athletes who plausibly
2 decline or terminate scholarships for financial reasons are
3 in the two lowest quality groups of high school players."
4 Id. at 13, 16-17 (noting that "73 percent of those declining
5 a DI men's basketball scholarship were rated as zero-star
6 recruits" and that "80 percent of students who decline FBS
7 offers are in the two lowest quality groups"). The Court
8 finds that such additional individuals will not be induced to
9 accept GIA offers and displace class members absent the cap,
10 and, thus, will not create intra-class conflicts.

11 Dr. Ordoover opines that players who declared themselves
12 eligible to play in professional leagues, either in the
13 United States or abroad, would potentially displace class
14 members. Plaintiffs' expert, Dr. Lazear, explains that Dr.
15 Ordoover provides no evidence that college pay would rival
16 that of the professional leagues, nor evidence regarding the
17 role that "non-monetary considerations" play in deciding
18 whether to attend college. Lazear Report ¶¶ 66, 69-70.
19 Also, Dr. Lazear identifies "college basketball players in
20 2013 who entered the draft and did not make an NBA roster,"
21 and "football players in 2014 who entered the draft and did
22 not get drafted," but finds only nineteen and forty-five such
23 examples, respectively. Id. ¶ 66; see also Rascher Report
24 ¶ 110.

25 Finally, Dr. Lazear challenges Dr. Ordoover's prediction
26 that the displaced players would be current full-GIA
27 recipients rather than other student-athletes, such as
28 "current partial GIA recipients, marginal high school

1 athletes who would be the last to be given scholarships, and
2 walk-ons who might have gotten a scholarship had additional
3 players not chosen to stay." See Lazear Report ¶ 72. Dr.
4 Ordover does not cite examples of schools rescinding
5 scholarships to full GIA recipients. Although Dr. Ordover
6 indicates that there are no national rules that protect a GIA
7 recipient from losing a scholarship because of athletic
8 performance, the NCAA could adopt such rules. The Court
9 finds insufficient support to conclude that schools would
10 rescind scholarships to class members absent the GIA cap,
11 rather than displace non-class members.

12 In sum, Dr. Ordover identifies a potential group of
13 athletes who might seek to displace members of the proposed
14 classes absent the GIA cap, but fails to provide sufficient
15 basis from which this Court can conclude that lifting the GIA
16 cap for all student-athletes would induce this group to
17 participate in NCAA athletics and schools to respond by
18 withdrawing full GIAs from some class members so as to create
19 intra-class conflicts.

20 b. Economics of Superstars

21 Because schools provide full GIAs to members of the
22 proposed classes although they are not required to do so and
23 because Plaintiffs do not oppose alternative NCAA rules
24 regarding the distribution of GIAs, the Court finds
25 insufficient basis in Dr. Ordover's reports for intra-class
26 conflicts of interest arising from a hypothetical "economics
27 of superstars." The Court does not find sufficient basis for
28 his prediction that, absent the GIA cap, schools would pay

1 some student-athletes on the basis of their lower marginal
2 revenue product.

3 Based on his "economics of superstars" theory, Dr.
4 Ordover predicts that roughly forty percent of FBS players
5 and sixty percent of men's basketball players would receive a
6 GIA valued at less than what they currently receive. See
7 Ordover Report ¶¶ 57-61. Those percentages may be even
8 higher, he adds, due to walk-on players who receive no
9 compensation, the lack of collective bargaining in student
10 athletics and the possibility that schools may offer fewer
11 roster spots absent the GIA cap. See id. ¶¶ 62-68. To
12 arrive at his percentages, he assumes that student-athletes
13 would be compensated at an amount equal to fifty percent of
14 their team's gross revenues, basing that assumption on an
15 amicus brief filed by economists and professors of sports
16 management in support of the plaintiffs in O'Bannon. Id.
17 ¶¶ 57-61. Dr. Ordover states that he is unaware of any
18 support for the claim by these economists, but he uses that
19 assumption and divides the teams' gross revenues by the limit
20 on the number of full GIAs a school may award—eighty-five in
21 FBS football and thirteen in men's basketball—to estimate an
22 amount that would be paid to players. Id. Then, he assumes
23 that salaries would be distributed among student-athletes in
24 a way similar to that among professional athletes. Id.
25 ¶¶ 60-61. Also, Dr. Ordover hypothesizes that without the
26 GIA cap schools would pay student-athletes only their
27 marginal revenue product and that this amount in some cases
28 would be less than a full GIA.

1 Dr. Lazear raises a serious concern with Dr. Ordoover's
2 predictions, however, by explaining that they cannot account
3 for schools' "revealed preference"—making a choice repeatedly
4 over time reveals that the benefits of the choice exceed the
5 costs. Lazear Report ¶ 79. Members of the proposed classes
6 have received or will receive full GIAs. "[T]hat a college
7 has already chosen to award a student athlete a GIA means
8 that the benefit, broadly defined, from doing that must
9 exceed the cost to the college, at least in expectation."

10 Id. Dr. Ordoover responds that "revealed preference" under
11 the GIA cap does not necessarily predict schools' preference
12 absent the GIA cap. See Ordoover Reply ¶¶ 19-20. Dr. Ordoover
13 predicts "a regime change in the way student-athletes are
14 evaluated and awarded financial aid" absent the GIA cap
15 because schools would base player compensation on the
16 player's "expected value" and "have stronger incentives to
17 more closely align compensation to the player's 'value.'"

18 Id. ¶ 22. Still, Dr. Ordoover does not explain why schools
19 today provide full GIAs to purportedly overvalued class
20 members without being required to do so and would stop doing
21 so absent the GIA cap.

22 Even assuming that Dr. Ordoover's marginal revenue
23 product estimates are accurate and that some are below the
24 current GIA cap, Dr. Noll points out, "The fact that nearly
25 all scholarship athletes have been paid the GIA cap for
26 decades, notwithstanding that colleges do not need to use all
27 of their scholarships or to pay athletes as much as the NCAA
28 rules allow, supports the conclusion that the [marginal

1 revenue products] of these players are not less than the GIA
2 cap." Noll Report at 27; 29-30. And Dr. Noll explains that
3 marginal revenue product values reflect a student-athlete's
4 performance after a season concludes, but relevant here is
5 how a school values a student-athlete before the student-
6 athlete performs. See id. at 27-28. "Expected marginal
7 revenue product" is "almost certain to diverge from the
8 actual [marginal revenue product] of an athlete in any
9 specific year because initial expectations about an athlete's
10 contribution to the team are unlikely to be perfect"

11 Id.

12 In sum, Dr. Ordoover's "economics of superstars"
13 prediction lacks sufficient support to demonstrate intra-
14 class conflicts of interest.

15 Both the "substitution effect" and "economics of
16 superstars" theories also depend on the assumption that
17 schools could not afford to spend more money compensating all
18 student-athletes rather than cutting payments to some. That
19 assumption is also not supported, as discussed in the next
20 section.

21 c. NCAA Financial Data on Athletic Departments

22 Defendants predict that an injunction would increase the
23 costs to schools of participating in FBS and Division I
24 athletics and, in turn, schools would stop participating in
25 FBS and Division I athletics or take steps to lower their
26 costs, such as offering fewer GIAs. Yet again, Plaintiffs do
27 not seek an unrestricted market for player compensation.
28

1 Defendants would maintain a role in determining how
2 compensation would be set without the current GIA cap.

3 Further, Defendants assume that any increase in student-
4 athlete compensation resulting from an injunction would force
5 schools to offset such cost by disadvantaging some members of
6 the proposed classes. The Court finds insufficient basis for
7 such an assumption, because of schools' past behavior and
8 alternative available sources of funds. Dr. Ordoover posits
9 that, according to NCAA data, "most athletic departments,
10 many FBS football and Division I men's basketball programs,
11 and all Division I women's basketball programs have
12 consistently higher expenses than revenues." Ordoover Report
13 ¶ 75. He predicts harm to some class members to the extent
14 that an injunction leads to any increase in costs. Id.

15 Plaintiffs' experts challenge Dr. Ordoover's conclusions.
16 For instance, Dr. Noll notes that, recently, "revenues from
17 college sports at FBS institutions have grown far more
18 rapidly than the rate of increase in the value of an athletic
19 scholarship." Noll Report at 24. "The growth in revenues
20 from college sports has been used to increase expenditures in
21 football and men's basketball, especially on the salaries of
22 coaches and administrators, recruiting activities, and
23 facilities for those sports." Id. Similarly, Dr. Lazear
24 asserts that Dr. Ordoover's revenue analysis fails to account
25 for alternative sources of funds to compensate student-
26 athletes and does not consider that colleges allocate funds
27 to departments on the basis of more criteria than simply
28

1 revenue generation. See Lazear Report ¶¶ 122-38. Other
2 sources of funds include:

3 (1) redirections from other school expenditures (not
4 necessarily sports), (2) changes in additions to or
5 subtractions from the endowment, (3) increased alumni
6 donations specifically made to cover athlete salaries
7 . . . , (4) reductions in spending on other factors that
8 are complements with players, such as spending on
9 coach's salaries or on facilities (athletic or other).

10 Id. ¶ 129; see Noll Report at 23-25; Rascher Report ¶¶ 82-
11 97. Also, according to Dr. Lazear, "with the exception of
12 the PAC-12, revenues grew 4 percent to 7 percent for public
13 schools in the power conferences between 2013 and 2014."

14 Lazear Report ¶ 124. That other schools "continue to invest
15 in their sports programs even when net revenues are negative
16 means that schools value the programs at least as much as
17 the amount they spend on them." Id. ¶ 133.

18 Dr. Ordoover responds that not all schools are
19 benefitting from revenue increases and that "some incremental
20 deterioration in the financial position of athletics
21 departments will cause some schools to reevaluate their
22 participation in FBS/D-I athletics." Ordoover Reply Report
23 ¶¶ 52-54. Dr. Rascher notes that, after schools recently
24 were allowed to pay up to cost of attendance, "no Division I
25 school announced a unilateral reduction in GIA offers, and
26 . . . no school reduced its offers to some
27 football/basketball athletes in order to fund the increase to
28 other athletes." Rascher Report ¶¶ 77-78; see also O'Bannon,
7 F. Supp. 3d at 982 (finding, on the basis of evidence
relating to NCAA revenues, that "schools would not exit FBS
football and Division I basketball if they were permitted to

1 pay their student-athletes a limited amount of compensation
2 beyond the value of their scholarships").

3 Accordingly, Plaintiffs persuasively demonstrate that
4 Dr. Ordoover's bases for predicting that schools would be
5 forced by budgetary constraints to make decisions leading to
6 intra-class conflicts are flawed.

7 Defendants lack sufficient support to show intra-class
8 conflicts arising from their "substitution effects" and
9 "economics of superstars" theories. Plaintiffs meet Rule
10 23(a)(4)'s requirements. In addition, the Court finds that
11 counsel is experienced in class action litigation and
12 litigation on behalf of athletes, a point that Defendants do
13 not dispute.

14 In sum, Plaintiffs satisfy Rule 23(a).

15 III. Rule 23(b)(2) Requirements

16 The Ninth Circuit has explained that the Rule 23(b)(2)
17 requirements as stated in Wal-Mart Stores, Inc. v. Dukes, 131
18 S. Ct. 2541, 2557 (2011), "are unquestionably satisfied when
19 members of a putative class seek uniform injunctive or
20 declaratory relief from policies or practices that are
21 generally applicable to the class as a whole." Parsons v.
22 Ryan, 754 F.3d 657, 688 (9th Cir. 2014) (citing Rodriguez v.
23 Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010)). "That inquiry
24 does not require an examination of the viability or bases of
25 the class members' claims for relief, does not require that
26 the issues common to the class satisfy a Rule 23(b)(3)-like
27 predominance test, and does not require a finding that all
28 members of the class have suffered identical injuries." Id.

(footnote omitted). "Rather, as the text of the rule makes clear, this inquiry asks only whether 'the party opposing the class has acted or refused to act on grounds that apply generally to the class.'" Id. (quoting Fed. R. Civ. P. 23(b)(2)).

Here, Defendants argue that the purported intra-class conflicts discussed above also make injunctive relief inappropriate. As discussed above, the Court finds no such conflicts. Plaintiffs allege that all members of the proposed classes suffer antitrust harms by being undercompensated for the services they offer as student-athletes. The NCAA's GIA cap applies generally to the class by precluding schools from paying any class member more than the cap. Plaintiffs seek to enjoin the cap on GIAs—an injunction that would apply to all class members by permitting schools to compensate them independent of the GIA cap. See id. at 689 (noting that "every [plaintiff] in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in . . . policy and practice"). Thus, Plaintiffs satisfy Rule 23(b)(2).

IV. Request to Dismiss Jenkins as Duplicative

Defendants argue that, rather than certify the Jenkins classes, the Court should simply dismiss the Jenkins case because it was later-filed, names fewer Defendants, and proposes classes encompassed by, but more limited than, Consolidated Plaintiffs' proposed classes. Plaintiffs characterize this suggestion as untimely, given that this

1 Court previously denied a motion to dismiss the complaints.
2 See Docket No. 131. Although Defendants argue that the
3 request for certification of identical classes in two cases
4 creates new grounds for dismissal, they cite no authority
5 requiring dismissal.

6 Defendants cite cases involving the "first-to-file"
7 rule, but these cases fail to provide grounds for dismissing
8 Jenkins Plaintiffs' action. "There is a generally recognized
9 doctrine of federal comity which permits a district court to
10 decline jurisdiction over an action when a complaint
11 involving the same parties and issues has already been filed
12 in another district." Pacesetter Sys., Inc. v. Medtronic,
13 Inc., 678 F.2d 93, 94-95 (9th Cir. 1982). The court in which
14 the second action was filed may "transfer, stay, or dismiss"
15 that action. Alltrade, Inc. v. Uniweld Products, Inc., 946
16 F.2d 622, 623 (9th Cir. 1991).

17 Congress created a procedural tool for use when similar
18 cases are filed in multiple districts—a transfer by the
19 JPMDL. See 28 U.S.C. § 1407. That panel has already
20 addressed these cases and decided to transfer them to this
21 Court for pretrial proceedings, which include class
22 certification motions. This Court may not transfer a
23 multidistrict litigation case to itself for trial. See
24 Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523
25 U.S. 26, 28, 40 (1998). Jenkins Plaintiffs repeatedly have
26 asserted their right to a remand to the District of New
27 Jersey for trial. Under these circumstances, to dismiss a
28

1 transferred case rather than remanding it would subvert the
2 multidistrict litigation process.

3 In support of their opposition to certification of the
4 Jenkins classes, Defendants also cite the potential for
5 duplicative discovery and duplicative work by counsel that
6 could affect a later motion for attorneys' fees.
7 Consolidated Plaintiffs and Jenkins Plaintiffs alleviate
8 concerns regarding duplication by requesting that lead
9 counsel for each serve as co-lead counsel for all injunctive
10 relief classes, agreeing to serve joint discovery requests
11 and expert reports. Concerns about duplicative work by
12 counsel may be raised in opposition to any attorneys' fees
13 motions. Duplication at trial can be mitigated by staying
14 one action while the other proceeds to trial. The first
15 ruling may create a collateral estoppel or res judicata
16 effect. If Consolidated Plaintiffs successfully move for
17 certification of a Rule 23(b)(3) damages class, Plaintiffs
18 propose to seek to stay the Jenkins action pending completion
19 of a trial by jury in this district by co-lead counsel. If
20 Consolidated Plaintiffs do not succeed in such a motion,
21 Plaintiffs have committed to seek to stay either the
22 consolidated case or the Jenkins case prior to trial of the
23 other.

24 Defendants also claim that certification of Consolidated
25 Plaintiffs' and Jenkins Plaintiffs' proposed classes would
26 deprive them of their Seventh Amendment rights if injunctive
27 relief claims were resolved before damages claims. Seventh
28 Amendment rights can be protected by trying the complaint

1 seeking damages first or by declining to apply non-mutual
2 offensive collateral estoppel.

3 The Court finds no reason to deny certification of all
4 classes, or to dismiss Jenkins Plaintiffs' action.

5 CONCLUSION

6 For the reasons above, this Court GRANTS Plaintiffs'
7 amended joint motion for class certification (Docket No.
8 200). The Court certifies each class defined above.

9 The Court appoints lead counsel for Consolidated
10 Plaintiffs (Habens Berman Sobol Shapiro LLP and Pearson,
11 Simon, & Warshaw LLP) and lead counsel for Jenkins Plaintiffs
12 (Winston & Strawn LLP) as co-lead counsel for the Rule
13 23(b) (2) injunctive relief classes in both cases.

14 The Court DISMISSES Consolidated Plaintiffs' claim under
15 California's Unfair Competition Act.

16 IT IS SO ORDERED.

17
18 Dated: December 4, 2015

19 
20 CLAUDIA WILKEN
21 United States District Judge
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