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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	Case No. 4:14-md-2541-CW CONSOLIDATED PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CERTIFICATION OF DAMAGES CLASSES Date: TBD Time: TBD Dept: Courtroom 2, 4th Floor Judge: Hon. Claudia Wilken Complaint Filed: March 5, 2014

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on a date and time to be determined by the Court, before the Honorable Claudia Wilken, District Court Judge, at the Oakland Courthouse, Courtroom 2, 1301 Clay Street, Oakland, CA 94612, the Consolidated Plaintiffs will and hereby do move for certification pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure of the following damages classes:

> **Division I FBS Football Class**: All current and former National Collegiate Athletic Association ("NCAA") Division I Football Bowl Subdivision ("FBS") football players who, at any time from March 5, 2010 through the final disposition of this case, received from an NCAA member institution for at least one academic term (such as a semester or quarter) (1) a full athletics grant-in-aid required by NCAA rules to be set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid that did not include a full cost of attendance payment.
>
> **Division I Men's Basketball Class**: All current and former NCAA Division I men's basketball players who, at any time from March 5, 2010 through the final disposition of this case, received from an NCAA member institution for at least one academic term (such as a semester or quarter) (1) a full athletics grant-in-aid required by NCAA rules to be set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid that did not include a full cost of attendance payment.
>
> **Division I Women's Basketball Class:** All current and former NCAA Division I women's basketball players who, at any time from March 5, 2010 through the final disposition of this case, received from an NCAA member institution for at least one academic term (such as a semester or quarter) (1) a full athletics grant-in-aid required by NCAA rules to be set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid that did not include a full cost of attendance payment.

This motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the accompanying Expert Report of Professor Daniel A. Rascher, the accompanying Declarations of Steve W. Berman and Bruce L. Simon, all exhibits and appendices to such documents, any papers filed in reply, any argument as may be presented at the hearing, and all other papers and records on file in this matter.

Plaintiffs also move for appointment of Hagens Berman Sobol Shapiro LLP and Pearson, Simon & Warshaw LLP as Co-Lead Class Counsel for the Classes pursuant to Federal Rule of Civil Procedure 23(g).

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should certify the proposed classes of current and former NCAA football and men's and women's basketball players seeking damages stemming from Defendants' collusive agreement barring these athletes from receiving athletics-related financial aid covering the full cost of attending their respective institutions.

2. Whether the Court should appoint Shawne Alston, Nick Kindler, D.J. Stephens, and Afure Jemerigbe as class representatives.

3. Whether the Court should appoint Interim Co-Lead Counsel, Hagens Berman Sobol & Shapiro LLP ("Hagens Berman") and Pearson, Simon & Warshaw LLP ("Pearson Simon"), as Co-Lead Class Counsel for the damages classes.

II. INTRODUCTION

> "I believe that schools should be allowed the opportunity to provide student-athletes with resources to cover the full cost of attendance – and ***I have advocated for such additional aid***."
>
> - NCAA President Mark Emmert, July 2014
>
> "***In fact, I think Judge Wilken may have done us a favor.*** She may have put in place a ruling that will enable full cost of attendance, and we've struggled for years to get to that point on an NCAA basis."
>
> - Defendant Big 12 Conference Commissioner Bob Bowlsby, April, 2015.
>
> "[T]his is something we've always wanted, going way back***, we've always wanted full cost of attendance***"
>
> - Defendant Southeastern Conference Commissioner Mike Slive, June 2015[1]

The Consolidated Plaintiffs ("Plaintiffs") seek to certify three damages classes in this antitrust action against the NCAA and eleven of its most powerful athletic conference members ("the Conference Defendants").[2] Prior to 1976, Defendants allowed member institutions to

[1] *See* the Declaration of Steve W. Berman in Support of Consolidated Plaintiffs' Motion for Class Certification of Damages Classes ("Berman Decl."), ¶¶ 49, 58, 59, concurrently filed herewith.

[2] The Pac-12 Conference, The Big Ten Conference, The Big 12 Conference, the Southeastern

provide scholarship athletes with certain payments exceeding tuition and fees, room and board, and required books. In 1976, Defendants imposed the unlawful restraint at issue in this case: a prohibition against college athletes receiving any athletics-related compensation beyond tuition and fees, room and board, and required books (an athletics-related "grant-in-aid" or "GIA"). Unfortunately for the football and men's and women's basketball players who leave their blood, sweat, and tears on the gridiron and hardwood, every year this GIA amount is typically ***several thousands of dollars*** below the cost it takes to attend one of these institutions and live like a normal student ("the Cost of Attendance").

Plaintiffs represent three putative classes consisting of Division I FBS players, Division I men's basketball players, and Division I women's basketball players who, due to Defendants' collusive restraint, did not receive the Cost of Attendance during the time period of March 5, 2010, through the final disposition of this case ("the "Class Period"). Absent this restraint, Class Members would have received athletic scholarships covering, at a minimum, the Cost of Attendance. Each member of the class was directly impacted by Defendants' collusion. Prior to the relaxation of Defendants' restraint in 2015, no athlete could receive, as a condition of accepting a merit-based GIA offer, an amount that covered the true cost of attendance. This was a market-wide restraint that had direct, market-wide impact on the specific transactions at issue in this case: the offering and agreeing to accept a GIA to play football or basketball.

All members of the proposed classes therefore suffered antitrust injury in the form of reduced competition for their services, reduced choice, and reduced market variety (in the sense that their GIA offers were less diverse than otherwise might have been the case). Further, Class Members also suffered direct pecuniary harm because they experienced a collusive shortfall they otherwise would not have, but for the alleged restraints.

Each of the proposed classes satisfies all certification requirements under Rules 23(a). Regarding numerosity and Rule 23(a)(1), there are thousands of football and basketball players

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Conference, the Atlantic Coast Conference, the American Athletic Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference and the Western Athletic Conference.

who have been impacted by Defendants' collusion during the class period. Rule 23(a)(2) is satisfied, as, like other antitrust cases against the NCAA, this case involves a host of common questions of law and fact, including whether Defendants' purportedly pro-competitive justifications for their conduct are legitimate.

Rule 23(a)(3) is satisfied, as the proposed Class Representatives' claims are also typical of Class Members' claims. Every Class Member – no matter whether female, male, football player, or basketball player – suffered from the same collusive restraint. Rule 23(a)(4) is satisfied, as the proposed Class Representatives are more than adequate to represent the Classes. Their interests are squarely aligned with all Class Members, as they challenge Defendants' uniformly-applicable rules that prohibited athletics scholarships from covering the Cost of Attendance. The proposed class representatives are fully committed to this case, and they have chosen counsel well-versed in complex antitrust class actions and in litigation against the NCAA.

Plaintiffs also satisfy Fed. R. Civ. P. 23(b)(3), as common questions of law and fact predominate over questions that would affect only individual Class Members. As conveyed more fully in the Berman Declaration and Rascher Report, this case involves a staggering amount of common evidence that Plaintiffs contend demonstrates Defendants' violation of the federal antitrust laws. Plaintiffs will use evidence common to the Classes to prove that it was cost-cutting, pure and simple, that inspired Defendants to institute the unlawful restraint, and not any aspirations of better achieving "amateurism," "competitive balance," or "academics and athletics integration."[3]

Plaintiffs will also use common evidence to prove there was no pro-competitive virtue behind Defendants instituting and maintaining their restraint, given that Defendants and their member schools themselves have repeatedly admitted that they believe college athletes should have received the Cost of Attendance a long time ago.[4]

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[3] *See, e.g.*, Berman Decl., ¶¶ 11 (NCAA-Secretary Treasurer, speaking just a few years before the challenged restraint was put in place, proclaiming: "***[T]he financial situation*** forces us to sit down and review the growth. . . . ***Gentlemen, we must hang together or we will hang separately***.") (Emphasis added.)

[4] *See, e.g.*, Expert Report of Daniel A. Rascher on Damages Class Certification ("Rascher Report"), ¶ 131 (NCAA President Myles Brand in 2003: "Ideally, the value of an athletically

Plaintiffs also offer reliable and class-wide methods for proving at trial (1) that Defendants' anticompetitive conduct had class-wide impact, and (2) class members' aggregate and individual damages. Professor Daniel Rascher – whose testimony the Court cited in its *O'Bannon* decision[5] as well as previously in the present case[6] – has created a model showing how he can demonstrate that Defendants' unlawful cap impacted every class member. Similarly, Professor Rascher provides a reliable methodology for damages. For example, he explains how the available data demonstrating the amounts that schools are ***currently*** providing their student-athletes are reliable data points to assist in demonstrating the amounts that the schools ***would have*** provided these athletes but for the restraint.

This Court and others have certified numerous classes of current and former college athletes in antitrust actions against the NCAA.[7] This case should be no different.

III. FACTUAL HISTORY COMMON TO THE PROPOSED CLASSES

A. The Imposition and Reinforcement of the Unlawful Restraint

As thoroughly detailed in the Berman Declaration and Rascher Report, class-wide evidence demonstrates the origins of and motivations for the restraint at issue. Beginning at least as early as the 1960s, Defendants and their members repeatedly sought ways to collectively

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related scholarship would be increased to cover the full-cost of attendance, calculated at between $2000 and $3000 more per year than is currently provided. ***I favor this approach of providing the full cost of attendance***.") (Emphasis added.); Berman Decl., ¶ 50 (Stanford University President, Bernard Muir, speaking in 2014: "Cost of Attendance: This is really important for us at Stanford, and we are talking about roughly a $3,500 increase to the scholarship for our student athletes – ***something that we should have been doing for a while*** so we could pay for a student-athlete to go home throughout the course of the year and pay for ancillary expenses.") (Emphasis added.)

[5] *See, e.g.*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 982 (N.D. Cal. 2014) *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015) ("Dr. Rascher offered similar testimony and documented that participation in FBS football and Division I basketball generates significant revenue and is highly profitable for most schools. . . . These revenues are what enable them to spend so much on coaches and training facilities.").

[6] *See, e.g.*, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.* ("*NCAA GIA Cap*"), No. 14-md-02541, 2015 WL 7960673, at *4 n.8, 7-8, 10 (N.D. Cal. Dec. 4, 2015).

[7] *See id.*, at *2, 11 (certifying three injunctive relief classes); *White v. Nat'l Collegiate Athletic Ass'n*, No. CV 06-0999-RGK, 2006 WL 8066803, at *6-7 (C.D. Cal. Oct. 19, 2006) (certifying damages class); *In re NCAA Student-Athlete Name & Likeness*, No. C 09-1967 CW, 2013 WL 5979327, at *7 (N.D. Cal. Nov. 8, 2013) (certifying injunctive relief class).

contain costs.[8] As part of this mission, Defendants and their member schools agreed in 1976 to prohibit member schools from providing Class Members with athletics-related compensation above the specifically-defined GIA – defined as permissibly including only "tuition and fees, room and board, and required course-related books."[9] In so doing, they eliminated the $15 per month in so-called "laundry money" that schools were previously allowed to provide as a standard part of athletics scholarships.[10]

The GIA permitted under the restraint was expressly restricted to cover an amount less than the full Cost of Attendance.[11] The Cost of Attendance at a member institution is separately and more broadly defined by a different NCAA bylaw to be "an amount . . . that includes the total cost of tuition and fees, room and board, books and supplies, transportation, ***and other expenses related to attendance at the institution***."[12] Therefore, under the NCAA rules, the maximum amount that a college athlete could receive in an athletic scholarship would fall short of covering those day-to-day expenses – gas, travel, laundry, etc. . . . – that are necessary just to get by.[13]

The restraint at issue was binding on all Class Members. The Conference Defendants, along with their member institutions, agreed to the NCAA rules and enacted their own rules prohibiting compensation above GIA to Class Members.[14] Defendants policed these restraints of trade so rigidly that member institutions had no choice but to comply with them or face significant penalties, including a boycott by the other member institutions of any noncompliant schools or players, and possible expulsion from the NCAA.[15]

For the nearly four decades (1976-2015) during which the restraint was in place, Defendants repeatedly considered and reinforced the collusive agreement. Class-wide evidence

[8] Berman Decl., ¶¶ 10-13; Rascher Report, ¶¶ 105-133.

[9] Consolidated Amended Complaint ("CAC"), ¶ 297, July 11, 2014, ECF No. 60.

[10] In fact, Defendants narrowly avoided achieving an additional cost savings goal, eliminating altogether the concept of an athletics scholarship untethered to financial need. Berman Decl., ¶ 10.

[11] *Id*., ¶¶ 14-20.

[12] *See* CAC, ¶ 299 (emphasis added).

[13] CAC, ¶ 4.

[14] CAC, ¶¶ 146-181.

[15] CAC, ¶¶ 286-94.

shows that Defendants and their members were well aware that the restraint was having a broad and negative impact on college athletes, but yet continued to reinforce it.[16] Lehigh University's President, Peter Links, perhaps put it best in his 1988 memorandum to the NCAA President and other high-ranking NCAA executives:

> What's wrong with the present system? ***Current limitations on grants-in-aid are too low to meet the full costs of a college education, so genuinely poor student-athletes must find other sources of money. . . .***
>
> [A]ppeals on behalf of impoverished college athletes ***have been voiced at every NCAA convention for years***…. Every year we are asked to 'have a heart,' and ***every year compassion is tempered by pragmatism***; no one wants to add costs to a program that's losing money, as most of them are.[17]

B. But for Defendants' Unlawful Restraint, Football and Men's and Women's Basketball Players Would Have Received Cost of Attendance

Extensive class-wide evidence shows that, but for the artificially-depressed GIA cap, Defendants' member schools would have competed with one another to provide athletes with athletic scholarships covering Cost of Attendance.[18] This is evident from Defendants' conduct (1) before the imposition of the restraint, (2) during the period of the restraint, and (3) after the lifting of the restraint.

Before the collusive agreement was reached in 1976, Defendants' member institutions had no qualms with providing amounts above GIA, and the so-called "laundry money" payments amounted to over $1,300 dollars per year in today's dollars.[19] ***During*** the period of the restraint, including in the Class Period, member institutions demonstrated that they clearly had the financial wherewithal to provide full Cost of Attendance.[20] Unable to compete for college athletes with the terms of their scholarship plans, member schools engaged in an ultra-competitive "arms race" to hire the best (and most expensive) head coaches and legions of assistant coaches, and to build the

[16] *See* Berman Decl., ¶¶ 17, 18, 30, 31, 39 and 45; Rascher Report, ¶¶ 121, 123, 128 and 129.

[17] Berman Decl., ¶ 39 (emphasis added); Rascher Report, ¶ 128.

[18] *See* Rascher Report, ¶¶150, 169-173.

[19] *Id.*, ¶¶ 95-104; CAC, ¶ 306.

[20] *Id.*, ¶ 267.

best (and most expensive) athletic-related facilities, including game facilities, training facilities, and athletes-only academic facilities.[21] ***After*** Plaintiffs filed this case and after Defendants amended Bylaw 15:02.5 to allow for payments up to COA, droves of schools immediately began offering Cost of Attendance to their football and basketball players, thereby indicating that – but for the restraint – these schools would have done so long ago.[22]

C. Plaintiffs Will Use Common Evidence to Establish that Defendants' Expected Purported Pro-Competitive Justifications Are Not Valid

In defense of their collusive agreement, Defendants are expected to offer the same allegedly pro-competitive justifications that they have asserted in several previous antitrust cases brought by current and former college athletes. For example, Defendants will likely claim that the cap on athletic scholarships' financial aid terms was (1) necessary to preserve "amateurism," (2) critical to ensure that athletes were "integrated" into academics, and (3) imperative to maintain "competitive balance" amongst the teams.

These defenses all have class-wide applicability. *See, e.g., In re NCAA Student-Athlete Name & Likeness Licensing Litig.* (noting "whether the NCAA's procompetitive justifications for its conduct are legitimate" as an example of a "common question[] of law and fact that must be resolved to determine whether the NCAA violated federal antitrust law").[23] Moreover, Plaintiffs will present common evidence to debunk these defenses, establishing that there simply is not a single lawful, pro-competitive justification for capping college-athletic scholarships at an amount below the amount that it costs for a student to attend a university.

Plaintiffs will present common evidence that any "amateurism"-related defense does not excuse Defendants' conduct. For example, the President of the NCAA, Dr. Mark Emmert, testified during the *O'Bannon* trial that "giving student-athletes scholarships up to their full cost of attendance ***would not violate the NCAA's principles of amateurism*** because all the money given

[21] As University of Florida President Bernie Machen summarized, when speaking about the exponential revenue growth in college athletics: "It has been spent entirely on facilities and coaches' salaries. The amount spent on students has not increased at all after this additional money has gone to college sports. That's just embarrassing." *See*, ECF No. 165-5 at 1.

[22] Rascher Report, ¶¶ 149-150, 150-178.

[23] *NCAA Student-Athlete Name & Likeness*, 2013 WL 5979327, at *4.

to students would be going to cover their 'legitimate costs' to attend school."[24] The CAC and Berman Declaration are rife with additional examples of similar statements from Defendants and personnel from their member schools.[25]

Moreover, the Berman Declaration provides extensive documentary evidence from the NCAA's files, produced in this case, showing members' widespread belief that the NCAA's brand of "amateurism" is indefensible. In particular, many of the members have spoken with remarkable candor in surveys commissioned by the NCAA:

- From a 1985 NCAA-sanctioned survey: a suggestion to "[c]ut out ***current hypocrisy regarding 'amateur sports'*** in Div I. . . ."
- From an NCAA survey on "core values" from the mid-2000s: "I see so many ***contradictions*** as to what is envisioned and what is actually happening. I don't know that a new coat of paint (ie. mission statements and philosophical beliefs) is going to fix structural damage."
- From a 2010 NCAA-sanctioned survey: "I don't believe there's much the NCAA can do about the big money that swirls around men's basketball and football. They've become professional enterprises, ***no matter how the NCAA likes to define 'amateur.'***"[26]

Similarly, Plaintiffs have marshalled many examples of class-wide evidence that rebuts the contention that providing COA athletics scholarships would have hindered the "integration" of college athletes into academic life. Not only was this argument rejected in *O'Bannon* (*see* 802 F.3d at 1075), but, again, survey evidence produced to date in this case provides further examples of common proof rebutting this proposition:

- From a NCAA survey on "core values" from the mid-2000s: "I do not believe that student-athletes at elite Div. I programs are integrated properly into the undergraduate population."
- From a 2010 NCAA-sanctioned survey: "Men's basketball does not represent the membership well in regarding to integrating intercollegiate athletics into higher

[24] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1075 (9th Cir. 2015) (emphasis added).

[25] *See, e.g.*, Berman Decl., ¶ 67 (August 8, 2015 article reporting that Ohio University's Athletic Director Jim Schaus stated that, with respect to moving to provide Cost of Attendance: "[Ohio University] support[s] it, it's the right thing to do." The same article reported that "[Schaus] doesn't see cost-of-attendance as a stipend, or additional payment of student-athletes. He said the new allowance represents a new definition of the traditional scholarship.").

[26] Berman Decl. at 36, 41, 67 (emphasis added).

education – college basketball appears to be only an NBA training camp and does not encourage earning a degree."

- From the same 2010 NCAA-sanctioned survey: "I also believe we need to keep pushing to integrate the athletic culture more tightly to the academic culture. It is not that they have grown apart… I do not believe they were ever linked.").[27]

Defendants' likely argument regarding "competitive balance" is equally misguided, having already been rejected in *O'Bannon* (802 F.3d at 1072) ("We therefore accept the district court's factual findings that the compensation rules do not promote competitive balance. . . ."). Nonetheless, to the extent Defendants revisit those arguments, documentary evidence they have produced in this case further demonstrates – on a class-wide basis – that the artificial restraint on athletics-related financial aid did nothing to foster competitive balance.[28]

Defendants will rely on common evidence in an effort to bolster their defenses. Plaintiffs will rely on common evidence to show that Defendants do not have a legitimate procompetitive justification for enacting and maintaining the scholarship cap. To the contrary, the common proof will show the real (unlawful) reason behind the scholarship cap – Defendants' collective desire to cut costs and increase profit share.[29]

IV. PLAINTIFFS' PROPOSED CLASSES AND REPRESENTATIVE PLAINTIFFS

Plaintiffs seek certification of three classes of college football, men's basketball, and women's basketball athletes, under Fed. R. Civ. P. 23(a) and 23(b)(3), to pursue damages resulting from Defendants' unlawful restraint. The proposed classes are:

- **Division I FBS Football Class**: All current and former National Collegiate Athletic Association ("NCAA") Division I Football Bowl Subdivision ("FBS") football players who, at any time from March 5, 2010 through the final disposition of this case,

[27] Berman Decl., at 50, 54, 57.

[28] *See, e.g.*, Berman Decl., ¶ 89 (document memorializing meeting between consultant Jean Frankel and NCAA in 2013, and stating: "We're not going to create competitive equity, because we can't. ***That's always been a reality***. . . .") (Emphasis added.)

[29] As many courts have held, including in a case involving the NCAA, an institution's interest in saving money does not qualify as a pro-competitive justification under the antitrust laws. *See, e.g.*, *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1022 (10th Cir. 1998) ("[C]ost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises.").

received from an NCAA member institution for at least one academic term (such as a semester or quarter) (1) a full athletics grant-in-aid required by NCAA rules to be set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid that did not include a full cost of attendance payment.

- **Division I Men's Basketball Class**: All current and former NCAA Division I men's basketball players who, at any time from March 5, 2010 through the final disposition of this case, received from an NCAA member institution for at least one academic term (such as a semester or quarter) (1) a full athletics grant-in-aid required by NCAA rules to be set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid that did not include a full cost of attendance payment.

- **Division I Women's Basketball Class**: All current and former NCAA Division I women's basketball players who, at any time from March 5, 2010 through the final disposition of this case, received from an NCAA member institution for at least one academic term (such as a semester or quarter) (1) a full athletics grant-in-aid required by NCAA rules to be set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid that did not include a full cost of attendance payment. [30]

The proposed class representatives are (1) Shawne Alston, (2) Nick Kindler, (3) D.J. Stephens, and (4) Afure Jemerigbe.

Shawne Alston was a Division I FBS men's football player at West Virginia University, a current member of the Defendant Big 12 Conference and a previous member of the Big East Conference.[31] Alston received a full athletics-based GIA which was less than the full cost of attendance.[32]

Nick Kindler also was a Division I FBS men's football player at West Virginia University.[33] Kindler received a full athletics-based GIA which was less than the full cost of attendance.[34]

D.J. Stephens was a Division I men's basketball player at the University of Memphis, a current member of the Defendant American Athletic Conference and a previous member of

[30] The proposed Consolidated Classes do not include any football or basketball players that played for any college or university in the Ivy League or any of the Service Academies, neither of which offers athletics-based grants-in-aid to athletes. CAC, ¶ 498.

[31] CAC, ¶ 24.

[32] CAC, ¶¶ 32, 36, 41, and 47.

[33] CAC, ¶ 51.

[34] CAC, ¶ 54, 60, 64, 68 and 77.

Defendant Conference USA.[35] Stephens received a full athletics-based GIA which was less than the full cost of attendance.[36]

Afure Jemerigbe was a Division I women's basketball player at the University of California, Berkeley, a member of the Defendant Pac 12 Conference.[37] Jemerigbe received a full athletics-based GIA which was less than the full cost of attendance.[38]

These class representatives and the members of the proposed classes were subject to identical unlawful practices, regardless of which school they attended and which sport they played.

V. ARGUMENT

A. Standard for Class Certification

"Class actions play an important role in the private enforcement of antitrust actions."[39] As such, courts '"resolve doubts in these actions in favor of certifying the class.'"[40] Plaintiffs seeking to represent a class must satisfy each of the requirements of Fed. R. Civ. P. 23(a), as well as one of the requirements of Fed. R. Civ. P. 23(b). Plaintiffs meet this standard. As explained below, Plaintiffs satisfy each of the Fed. R. Civ. P. 23(a) requirements and the requirements of Fed. R. Civ. P. 23(b)(3).

B. Plaintiffs Meet the Elements of Rule 23(a)

1. The Class Members are "numerous."

Fed. R. Civ. P. 23(a)(1) requires that any proposed class be so numerous "that joinder of all members is impracticable." The numerosity requirement is satisfied when the proposed class members number in the thousands.[41] Here, the NCAA produced "squad lists" that demonstrate

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[35] *Johnson, et al. v. Nat'l Collegiate Athletic Ass'n. et al*, No. 14-cv-05126-CW (N.D. Cal. Nov. 19, 2014), ECF No. 1, ¶ 35.

[36] *Id.*, ¶ 37.

[37] *Hartman, et al v. Nat'l Collegiate Athletic Ass'n., et al*, No. 15-cv-00178-CW (N.D. Cal. Jan. 13, 2015), ECF No. 1,¶ 29.

[38] *Id.*, ¶ 35.

[39] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 612 (N.D. Cal. 2015).

[40] *Id.* (quoting *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005)).

[41] *See, e.g., NCAA Student-Athlete Name & Likeness*, 2013 WL 5979327, at *3.

that the proposed classes each contain thousands of class members.[42] Plaintiffs satisfy the numerosity requirement.

2. This case involves common question of law and fact.

Fed. R. Civ. P. 23(a)(2) requires that "there are questions of law or fact common to the class." "The commonality requirement is generally construed liberally[.] "[43] Specifically, "all that Rule 23(a)(2) requires is 'a single ***significant*** question of law or fact.'"[44]

Plaintiffs have identified a host of common questions of law and fact which will determine whether Defendants violated federal antitrust law.[45] As this Court already observed in its ruling on the injunctive relief class certification motion, "[s]uch questions include the characteristics of the markets Plaintiffs identify in their complaints, 'whether NCAA rules have harmed competition in those markets,' and 'whether the NCAA's procompetitive justifications for its conduct are legitimate.'"[46]

These common questions revolve around the central issues of the existence and effect of the alleged conspiracy in restraint of trade. As such, the commonality requirement is satisfied.[47]

3. The Class Representatives' claims are typical.

Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "The test of typicality is 'whether other

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[42] Rascher Report, ¶ 318.

[43] *White*, 2006 WL 8066803, at *2.

[44] *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original; citation omitted).

[45] *See* section V(c)(1), *infra*, regarding predominance of common questions of fact and law; CAC, ¶ 502.

[46] *NCAA GIA Cap*, 2015 WL 7960673, at *4 n.7 (quoting *NCAA Student-Athlete Name & Likeness*, 2013 WL 5979327, at *4); *see also* CAC, ¶ 502 (providing examples of "the questions of law and fact common to the Classes").

[47] *See In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1180 (N.D. Cal. 2013) ("'[C]ourts have consistently held that the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'") (citation omitted); *Kamakahi v. Am. Soc'y for Reprod. Med.*, 305 F.R.D. 164, 183 (N.D. Cal. 2015) ("Plaintiffs[']claim rests on the question of whether the Guidelines constitute an unlawful price fixing agreement. . . . The Court is therefore satisfied that whether the Guidelines violate the antitrust laws is a question common to all class members and susceptible to resolution by common proof, and thus meets Rule 23(a)(2)'s commonality requirement.").

members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'"[48] "In the antitrust context, generally, 'typicality will be established by plaintiffs and all class members alleging the same antitrust violation by defendants.'"[49]

This test is plainly met here. As in the *White* case, "Plaintiffs allege a horizontal agreement by the NCAA in violation of the Sherman Act" and "Plaintiffs and all members of the proposed class[es] allege they were affected by the GIA cap in the same way."[50] The Class Representatives received athletically-based GIAs that were artificially depressed due to Defendants' collusion.[51] Every Class Member – no matter whether male, female, football player, or basketball player – suffered this same harm stemming from the same antitrust violation.[52]

The Class Representatives' claims rely on facts and legal theories identical to those of the Class Members. The typicality requirement is satisfied.

4. The class representatives are adequate.

Fed. R. Civ. P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Meeting the adequacy requirement hinges upon resolving two questions: "'(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'"[53]

The Class Representatives do not have any conflict of interest with the Class Members. To the contrary, the Class Representatives' interests are squarely aligned with all Class Members, as they challenge Defendants' rules that prohibited paying Cost of Attendance athletic scholarships to

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[48] *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation omitted).

[49] *NCAA GIA Cap*, 2015 WL 7960673, at *4 n.10 (quoting *White*, 2006 WL 8066803, at *2).

[50] *White*, 2006 WL 8066803, at *2 (finding that Plaintiffs satisfied the typicality requirement and certifying a class for damages under Rule 23(b)(3)).

[51] *See* section IV, *supra*.

[52] *Id*.

[53] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (internal citation omitted).

all football and basketball players.[54] The proposed Class Representatives are fully committed to this case. They have devoted substantial time to conferring with counsel and responding to discovery requests, and they will fully comply with all discovery and trial obligations going forward.

Furthermore, Plaintiffs' proposed Class Counsel satisfy the adequacy requirement. In retaining Hagens Berman and Pearson Simon, Plaintiffs have employed firms with long track records of vigorously prosecuting complex antitrust actions like this one and who are well-versed in litigation against the NCAA.[55]

The Class Representatives and Class Counsel satisfy the adequacy requirement.

5. The proposed Classes are ascertainable.

'"As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists.'"[56] This is easily done here. The Classes are comprised of FBS football and Division I men's and women's basketball players who at any time between March 5, 2010 and the final disposition of

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[54] Defendants may take the position that class certification should be denied because full cost of attendance payments would have resulted in certain Class Members receiving lesser athletic scholarships than they otherwise received. There are at least two fundamental flaws with this argument. For one, the NCAA members schools' ***current practices*** demonstrate that, even if they were permitted to provide full COA scholarships, they still would have had sufficient funds to provide – at a minimum – full GIA athletic scholarships to all Class Members. *See* Rascher Report, ¶¶159-178.

More importantly, though, even if Defendants' speculation was correct as to how the schools would have behaved, this Court has already found that class certification should not be denied simply because certain Class Members theoretically "benefit" from the unlawful restraint. *See NCAA GIA Cap*, 2015 WL 7960673, at *7 ("'If the fact that illegal restraints operate to the economic advantage of certain class members were enough to defeat certification, the efficacy of classwide antitrust suits – and the deterrence function they serve – would wither.' . . . Here, although Defendants suggest that class members might prefer to leave an unlawful restraint in place because they otherwise would have to compete against one another, such preference for non-competition does not justify denying injunctive relief class certification.") (quoting *Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 400 (S.D.N.Y. 2015)).

[55] *See* Declaration of Bruce L. Simon In Support of Consolidated Plaintiffs' Motion for Certification on Damages Classes ("Simon Decl."), Ex. 1, concurrently filed herewith, and Berman Decl., Ex.78 and; *see also NCAA GIA Cap*, 2015 WL 7960673, at *10 ("[T]he Court finds that counsel is experienced in class action litigation and litigation on behalf of athletes, a point that Defendants do not dispute.").

[56] *CRT Antitrust Litig.*, 308 F.R.D. at 613 (quoting *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009)).

the case received an athletic scholarship covering less than Cost of Attendance.[57] These athletes can be identified by reviewing the "squad lists" that have been produced or will be produced in this litigation.[58] The Classes are therefore ascertainable.

C. Plaintiffs Satisfy Rule 23(b)(3)

A class is certifiable under Fed. R. Civ. P. 23(b)(3) where (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fair and efficient adjudication of the controversy." Each of these tests is met here.

1. Common questions of law and fact "predominate".

"[T]he predominance analysis under Rule 23(b)(3) focuses on the relationship between the common and individual issues in the case, and tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation."[59] It "does ***not*** require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof."[60] Rather, it requires only "that common questions '***predominate*** over any questions affecting only individual [class] members.'"[61]

In an antitrust case, the "predominance" inquiry is satisfied where Plaintiffs establish "the predominance of common issues related to three key elements: "(1) whether there was a conspiracy to fix prices in violation of the antitrust laws; (2) whether Plaintiff sustained an antitrust injury, or the 'impact' of Defendants' unlawful activity; and (3) the amount of damages sustained as a result of the antitrust violations."[62]

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[57] *See* section IV, *supra.*

[58] *See* Rascher Report, ¶¶ 40, 176, 179, 318.

[59] *Abdullah v. U.S. Sec. Assoc., Inc.*, 731 F.3d 952, 964 (9th Cir. 2013), *cert. denied*, _U.S._, 135 S. Ct. 53 (2014) (internal quotation marks and citation omitted).

[60] *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, _U.S._, 133 S. Ct. 1184, 1196 (2013) (emphasis and alteration in original; citation omitted).

[61] *Id.* (emphasis and alteration in original; quoting Fed. R. Civ. P. 23(b)(3)). Rule 23(b)(3) does not require a showing that "'th[e] questions will be answered, on the merits, in favor of the class.'" *Abdullah*, 731 F.3d at 964 (quoting *Amgen*, 133 S. Ct. at 1191).

[62] *In re Static Random Access (SRAM) Antitrust Litig.*, No. C0701819CW, 2008 WL 4447592, at *5 (N.D. Cal. Sept. 29, 2008).

Common questions predominate here. Plaintiffs will establish each of the above elements through generalized proof applicable to the Class as a whole.

(a) Defendants' antitrust liability for price-fixing is a common issue

Defendants' price-fixing scheme has been in place for four decades, since 1976.[63] There is a very substantial amount of documentary evidence and other proof illustrating the existence of the conspiracy.[64] Similarly, numerous documents provide examples of the common proof that Plaintiffs will use at trial to rebut the procompetitive defenses that Defendants can be expected to deploy in this case – *e.g.*, "amateurism," "competitive balance," etc. . . . Examples of such common proof, which show that cost-cutting was Defendants' motivation for the restraint, include the following:

- Document titled "Proceedings of the 2nd Special Convention" (described as occurring on August 14-15, 1975), reflecting the following "opening remarks" of NCAA President John A. Fuzak: "Due to the intense competitive nature of the intercollegiate athletics [sic], ***it seems the only way to successfully curtail costs is at the national level***…. [t]he NCAA, to be an effective instrument, must adopt measures to curtail costs which may well guarantee the continuation of intercollegiate athletics…. [w]e urge you to put aside, or at least put in second place, your special interests and ***put as primary the goal of curtailing costs so intercollegiate athletics may survive. It is probably better to cut off the hand than to die.***" Berman Decl., ¶ 14 (emphasis added).

- Document dated June 21, 1993 and titled "Special NCAA Committee to Review Financial Conditions in Intercollegiate Athletics," which stated, in part, "[t]he committee took note of the fact that ***cost reduction had been a primary focus of the NCAA membership at least from the time of special Conventions in the mid-1970s that began the establishment of limitations of the numbers of grants-in-aid. . . .***" Berman Decl., ¶ 42 (emphasis added).

- November 18, 2003 e-mail from the NCAA's Steve Mallonee to the NCAA's Director of Membership Services Lynn Holzman, stating that "[t]he financial aid regulations used to permit an institution to provide a student-athlete with commonly accepted educational expenses, which was tuition and fees, room and board and required books and laundry money of $15 a month…. ***I think it was actually rescinded due to costs reasons*** and the fact that other students did not have the same benefit as part of their scholarships." Berman Decl., ¶ 44 (emphasis added).

Furthermore, Plaintiffs will utilize class-wide economic evidence to demonstrate that Defendants violated the antitrust laws. Professor Rascher's report details numerous common issues, including (1) the process for identifying relevant markets and demonstrating market

[63] Berman Decl., ¶¶21-28.

[64] *See generally* CAC, ¶¶ 297-311 and Berman Decl., ¶¶ 14-69.

power[65], (2) the anti-competitive harm that all Class Members have suffered, and the common proof by which this anti-competitive harm can be proven,[66] (3) the analysis of Defendants' purported pro-competitive justifications,[67] (4) the analysis of Plaintiffs' proffered less restrictive alternatives,[68] and (5) the fact that, but for the restraint, NCAA member schools would have competed more vigorously to acquire the services of Division I athletes, thereby increasing the value of Class Members' scholarships.[69]

"In price-fixing conspiracies, 'courts have frequently found [the antitrust violation conspiracy] standard satisfied' because 'proof of an alleged conspiracy and defendants' acts in furtherance of such conspiracy require common proof of defendants' conduct.'"[70] This case should be no different. Common issues pertaining to Defendants' price-fixing conspiracy predominate.

(b) The artificially-depressed cap on athletic scholarships caused common impact.

"For impact in an antitrust case, the Court must determine whether [Plaintiffs] have shown a reasonable method for determining, on a classwide basis, the alleged antitrust activity's impact on class members."[71] The Court should not, however, engage in a complete merits analysis at this point.[72] Nor should it "engag[e] in a battle of the experts."[73] All the Court must do is find that Plaintiffs have '"come forward with seemingly realistic methodologies.'"[74]

Plaintiffs – through the work of their expert, Professor Daniel Rascher – have cleared this hurdle. Utilizing a form of the well-established "before and after" model, Professor Rascher

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[65] Rascher Report, ¶¶ 65-74.

[66] *Id.*, ¶¶ 75-83, 88-105, 149-181.

[67] *Id.*, ¶¶ 84-87.

[68] *Id.*

[69] *See id.*, ¶¶ 150, 169-173.

[70] *SRAM Antitrust Litig.*, 2008 WL 4447592, at *5 (citations omitted).

[71] *CRT Antitrust Litig.*, 308 F.R.D. at 625.

[72] *Amgen*, 133 S. Ct. at 1194-95.

[73] *CRT Antitrust Litig.*, 308 F.R.D. at 625.

[74] *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *8 (N.D. Cal. June 5, 2006) (quoting *Rubber Chemicals*, 232 F.R.D. at 353).

closely examines the periods of time ***before*** and ***after*** the restraint in order to demonstrate what happened ***during*** the period of time the restraint was in place – *i.e.*, in order to show the common impact that resulted from the unlawful restraint.[75]

Prior to 1976, Defendants' members' actions made clear that they believed the unconstrained optimal price for athletic scholarship recipients was higher than the amount permitted under the restraint.[76] During this time, Defendants' member schools pervasively provided remuneration above the GIA cap by providing so-called "laundry money" to cover incidental expenses.[77] This provides an indicator of market impact in the but-for world.[78]

In 2015, the NCAA abandoned the restraint at issue in this case.[79] The period of time from 2015 onwards therefore provides an excellent natural experiment to test the common impact of the restraint.[80] Defendants' new rules that now permit (and, in some cases, require) that athletic scholarships provide more than the old GIA amount has led to increased competition among member schools, as well as an increase in the maximum athletic scholarship offer to a new collectively-agreed-upon maximum of Cost of Attendance.[81] This development is significant because how the member institutions are now behaving (once the collusive cap has been lifted) is an excellent guide to determining a lower bound on how these schools would have behaved during the Class Period were this cap never instituted in the first place.[82]

By constructing this "before and after" model, Professor Rascher demonstrates two types of common impact that occurred during the period in which the restraint was in place: (1) market-wide economic harm; and (2) pecuniary harm. Regarding the former, the extent to which schools

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[75] Rascher Report, ¶¶ 91-210.

[76] *Id*., ¶¶ 95-117.

[77] *Id*.

[78] *Id*.

[79] *Id*., ¶ 146.

[80] *Id*., ¶¶ 149-150, 159-181.

[81] *Id*.

[82] This post-2014 conduct is still not a perfect benchmark because the process of "unwinding" an approximately 40-year-old conspiracy is not instantaneous for some schools. *Id*., ¶¶ 182-195. Nonetheless, schools' conduct from 2015 onwards is still an excellent model for the harm incurred by student-athletes in the but-for world. *Id*., ¶¶ 149-150, 159-181.

changed their conduct after the restraint was lifted "is sufficient to show that the market-wide equilibrium was severely perverted by the Defendants' anticompetitive agreement."[83] As soon as they were freed from the restraint, the vast majority of schools playing sports in Conference Defendant conferences immediately began offering their players Cost of Attendance.[84] This has resulted in upward pressure on payments in conferences outside of the FBS.[85] For example, even the Metro Atlantic Athletic Conference – not generally considered to be a basketball powerhouse – has decided, in the wake of the Power 5 conferences adopting Cost of Attendance, to follow suit.[86] In short, each of the three markets at issue in this case was substantially altered by the relaxation of the restraint, and each athlete in those markets was harmed because his/her payments were specifically capped below Cost of Attendance.[87] This sort of "market-wide" harm constitutes class-wide impact in an antitrust case.[88]

Addressing "pecuniary harm," Professor Rascher demonstrates that Class Members suffered financial harm by establishing that these athletes – but for the restraint – would have earned an athletics scholarship during the class period that can be reasonably estimated to exceed the GIA that they did receive.[89] In order to identify these Class Members, Professor Rascher evaluates the 2015-2016 conduct of Defendants and their member institutions, and separates the athletes into two camps.[90]

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[83] *Id.*, ¶ 169.

[84] *Id.*

[85] *Id.*

[86] *Id.*, ¶ 170.

[87] *Id.*, ¶ 172.

[88] *See Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 223 (2d Cir. 2008) ("[O]ne form of antitrust injury is '[c]oercive activity that prevents its victims from making free choices between market alternatives'") (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983)); *Laumann*, 105 F.Supp.3d at 400 ("It is [whether a common injury unites the class] . . . that drives the Rule 23 analysis – and there is no question that here, a common injury exists in the form of diminished consumer choice."); *see also id.* at 401 ("Here, every class member has suffered an injury, because every class member, as a consumer in the market for baseball or hockey broadcasting, has been deprived of an option – a la carte channels – that would have been available absent the territorial restraints. . . .") and 402 ("The restriction of consumer options is an *ipso facto* antitrust harm.").

[89] Rascher Report, ¶¶ 174-181.

[90] *Id.*, ¶ 218.

First, any Class Member that attended a school that instantly, as soon as the restraint was lifted, offered team-wide Cost of Attendance payments clearly was impacted.[91] Professor Rascher identifies schools that qualify.[92] Class Members attending these schools, but for the restraint, would have received higher athletic scholarships during the Class Period.[93] *Second*, there has also been pecuniary impact to Class Members that attended a "competitive fringe" of schools who, after the lifting of the restraint, (1) provided some level above GIA (but not covering 100% of the Cost of Attendance) or (2) who have said that their Cost of Attendance adoption will happen, but just be delayed.[94] Again, Class Members attending these schools, but for the restraint, would have received higher athletic scholarships during the Class Period.

The process for identifying the amounts that various schools are offering their athletes in scholarships in the post-restraint world is entirely feasible. The facts needed are objective, measurable data that every school (and possibly the NCAA[95]) keeps in the natural course of business.[96] As such, at the conclusion of discovery, the question of common pecuniary impact can be assessed and answered for each of the 352 Division I schools attended by Class Members.

Using the well-established "before and after" model, Professor Rascher has met his burden of offering a "reasonable method for determining, on a classwide basis, the [restraint's] impact on class members."[97]

(c) Damages can be proven on classwide basis.

In price-fixing cases such as this one, '"[p]laintiffs are not required to supply a precise damage formula at the certification stage.'"[98] Rather, they must "simply offer a proposed method

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[91] *Id*., ¶ 220.

[92] *Id*., ¶¶ 201-205.

[93] *Id*., ¶¶ 219-220.

[94] *Id*.

[95] As outlined in more detail in the Rascher Report, Plaintiffs believe that the NCAA hosts data required to carry out this methodology on their "Compliance Assistance" software that they provide to member schools. *Id*., ¶¶ 42, 152, 225-226.

[96] *Id*., ¶ 27.

[97] *See CRT Antitrust Litig.*, 308 F.R.D. at 625.

[98] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 606 (N.D. Cal. 2010) *amended in part*, No. M 07-1827 SI, 2011 WL 3268649 (N.D. Cal. July 28, 2011) (internal citation

for determining damages that is not 'so insubstantial as to amount to no method at all.'"[99]

Plaintiffs here have met this "low burden."[100] Professor Rascher has crafted a damages model[101] of a world absent from the restraint – *i.e.*, a world in which from 1976 forward, the maximum allowed athletic scholarship included Cost of Attendance (as opposed to simply the old GIA).[102] Using this model, Professor Rascher's damages methodology is a simple, two-step process: (1) identify – without resorting to individualized inquiries – the set of athletes who the market would have deemed worthy of a scholarship including Cost of Attendance; and (2) once this group of affected Class Members is identified, calculate the damages they suffered as a result of the collusive restraint.[103]

For the first step, Professor Rascher explains that he includes on this list all athletes who attend or attended a school that (1) is currently giving Cost of Attendance ***or*** (2) has shown a commitment to give Cost of Attendance at some point (by either presently giving some amount above GIA or by publicly stating that it will ultimately adopt Cost of Attendance).[104] This second group of athletes is included on the list because, as Professor Rascher explains, the only reason their respective schools are not presently paying Cost of Attendance is due to the lingering effects of the conspiratorial restraint, such as timing and budget issues that never would have arisen if the restraint was not imposed in the first place.[105]

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omitted).

[99] *In re Apple iPod iTunes Antitrust Litig.*, No. C 05-00037 JW, 2011 WL 5864036, at *3 (N.D. Cal. Nov. 22, 2011) (quoting *In re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064, at *11 (N.D. Cal. Dec.23, 2010)).

[100] *Rubber Chemicals*, 232 F.R.D. at 354.

[101] Given that the fact discovery cutoff is still five months away and relevant data will still be produced by Defendants and third-parties, this model, although complete, is still preliminary in nature. Rascher Report, ¶¶ 158, 178.

[102] *Id.*, ¶ 11.

[103] *Id.*, ¶¶ 212-220.

[104] *Id.*, ¶¶ 201-209.

[105] *Id.*, ¶¶ 185, 195.

The second step – calculating the damages – is simple arithmetic.[106] Each Class Member on the above-described list suffered damages equal to the difference between his/her Cost of Attendance and the amount of the GIA that he/she received.[107] This is a simply a data entry exercise that can been done once each school's data is provided. It is difficult to imagine a less complicated methodology for calculating damages in an antitrust case.

Defendants may claim that "offsets" – *e.g.*, money that student-athletes received from Pell Grants or Student Assistance Funds[108] – would render the damages calculation too complicated and the case unsuitable for class treatment. However, numerous courts have rejected this very argument on class certification.[109]

Moreover, even if the final sum of damages must take offsets into consideration,[110] Dr. Rascher has demonstrated a methodology by which the court can "accurately calculate damages. . . ." even if Plaintiffs must net out offsets.[111] Specifically, Professor Rascher has explained that accessible documents will make any necessary offset calculations at the end of the case little more than arithmetic.[112]

Professor Rascher has gone well beyond Rule 23's requirement that Plaintiffs merely identify a damages methodology that is not "so insubstantial as to amount to no method at all."[113]

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[106] *Id*., ¶¶ 16, 158, 218, 224.

[107] *Id*., ¶¶ 213-214.

[108] Further information about Pell Grants, Student Assistance Funds, and other sources of money for college athletes can be found in the Rascher Report in ¶¶ 279-315.

[109] *See, e.g., Berrien v. New Raintree Resorts Int'l, LLC*, 276 F.R.D. 355, 364 (N.D. Cal. 2011) ("Assuming that such a [equitable offset] defense applies here, it pertains to the amount each class member may receive as damages. 'The potential existence of individualized damage assessments, however, does not detract from the action's suitability for class certification.'") (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010)).

[110] A point with which Plaintiffs disagree. *See, e.g.*, Rascher Report, ¶¶ 279-315.

[111] *See Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514, 5151 (9th Cir. 2013) (reversing a denial of class certification in a wage and hour case because "[the defendant's] own documents demonstrate the feasibility of calculating damages in this case. [The defendant's] electronic payroll records contain much of the data needed to calculate damages.").

[112] *See* Rascher Report, ¶¶ 300-317 (noting that, by the end of the case, Plaintiffs will have data demonstrating any potential offset amount – *e.g.*, Miscellaneous Expense Allowance, Hope Grant, etc… – for ***every single Class Member***).

[113] *See Perez v. State Farm Mut. Auto. Ins. Co.*, No. C 06-01962 JW, 2011 WL 8601203, at *5 (N.D. Cal. Dec. 7, 2011) (internal quotation and citation omitted).

To the contrary, Professor Rascher has built a complete working model that can be applied to determine damages on a class-wide basis.

2. A class action is superior to other available methods.

Certification is appropriate under Fed. R. Civ. P. 23(b)(3) if class treatment "is superior to other available methods for fairly and efficiently adjudicating the controversy." Several factors play a role in this calculus: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions;" (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members;" (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum;" and (4) "the likely difficulties of managing a class action."[114]

These factors signify that this case is best-suited for class treatment. Factors (1) and (3) favor concentrating the claims in a single forum, as the damages sustained by each individual Class Member are likely too low to incentivize Class Members to litigate their claims individually.[115] This is especially true, given how expensive it would be for Plaintiffs to marshal the evidence they need to prevail in complex antitrust litigation against well-funded, litigation-savvy defendants like the NCAA and Conference Defendants.[116]

Moreover, factor (2) – the extent and nature of similar litigation – favors class certification. Plaintiffs are not aware of any other litigation in the country involving similar antitrust damages claims against the NCAA or Conference Defendants. Rather, all such litigation has been consolidated into this MDL, with the undersigned counsel given a leadership role.[117] Finally, with respect to factor (4), as this Court knows from its experience with the *O'Bannon* trial, this type of

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[114] Fed. R. Civ. P. 23(b)(3).

[115] *See Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 549 (C.D. Cal. 2012) ("The cost of repairing the suspension defect is estimated to be $500; this is undoubtedly too small an amount to incentivize class members to litigate their claims individually.").

[116] *See In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919, 1033 (C.D. Cal. 2015) ("The funds required to marshal the type of evidence, including expert testimony, that is necessary to pursue such a claim against a well-represented corporate defendant would discourage individual class members from filing suit when the expected return is so small.").

[117] *See* Order, Aug. 22, 2014, ECF No. 82; Order Granting Motion for Rule 23(b)(2) Class Certification, Dec. 4, 2015, ECF No. 305.

class action – although complex – would not be unduly difficult to manage through trial.

Accordingly, each of the factors under Fed. R. Civ. P. 23(b)(3) favors this case proceeding as a class action.

D. The Court Should Appoint Hagen Berman Sobol Shapiro LLP and Pearson, Simon & Warshaw, LLP as Class Counsel

"An order that certifies a class action . . . must appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). Rule 23(g) provides that, "[i]n appointing class counsel, the court [] must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Hagens Berman and Pearson Simon seek to be appointed as Co-Lead Class Counsel. Both proposed firms have extensive experience in handling complex class actions, including antitrust class actions.[118] Moreover, both firms have proven their worth in vigorously prosecuting this case from its inception, including (1) successfully arguing that the matter should be transferred to the Northern District of California, (2) successfully opposing Defendants' motion to dismiss, (3) diligently propounding and responding to extensive discovery, and (4) successfully moving for class certification under Rule 23(b)(2).[119]

The two firms should be appointed as Co-Lead Class Counsel.

VI. CONCLUSION

Defendants violated the federal antitrust laws for more than four decades, and the effects of their collusion continue. Defendants capped the amount of athletic scholarship that college athletes could receive to an amount well below the Cost of Attendance. No matter whether they went to a big college or a small school, were a star of the team or a bench player, the thousands of football and men's and women's basketball players in the proposed classes suffered the same harm. Those players were barred from receiving athletic scholarships covering the costs that it

[118] *See* Berman Decl., Ex. 78 and Simon Decl., Ex. 1.

[119] *See, e.g.*, Simon Decl., ¶¶ 4-12.

actually takes to attend college. Only one case is needed to hold Defendants accountable for this harm. Plaintiffs' motion for damages class certification should be granted.

DATED: February 16, 2016

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Additional Class Counsel

E-FILING ATTESTATION

I, Steve W. Berman, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

s/ Steve W. Berman
STEVE W. BERMAN

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

s/ Steve W. Berman
STEVE W. BERMAN