Raoul D. Kennedy (SBN 40892)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue, Suite 1100
Palo Alto, CA 94301
Telephone: (650) 470-4500
Facsimile: (650) 470-4570
raoul.kennedy@skadden.com

Jeffrey A. Mishkin (*pro hac vice*)
Karen Hoffman Lent (*pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
jeffrey.mishkin@skadden.com
karen.lent@skadden.com

Attorneys for Defendant
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
[Additional Counsel Listed on Signature Page]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	MDL Docket No. 14-md-02541-CW
This Document Relates to: ALL ACTIONS EXCEPT *Jenkins, et al. v. NCAA, et al.*, Case No. 14-cv-02758-CW	**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CONSOLIDATED PLAINTIFFS' MOTION FOR CERTIFICATION OF DAMAGES CLASSES** Date: October 25, 2016 Time: 2:30 p.m. Courtroom: Courtroom 2, 4th Floor Before: Hon. Claudia Wilken

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

Table of Contents

Table of Authorities

Cases

Statutes

Table of Abbreviations

Ariz. St.	Declaration of Justin W. Pollnow, Director of Athletics Compliance, Arizona State University, sworn to on August 25, 2016 (attached as Exhibit 6 to the accompanying Declaration of Karen Hoffman Lent)
Ark. St. Aid Rep.	Financial aid report of Arkansas State University (attached as Exhibit 7 to the accompanying Declaration of Karen Hoffman Lent)
Ball St. Aid Rep.	Financial aid report of Ball State University (attached as Exhibit 8 to the accompanying Declaration of Karen Hoffman Lent)
Belmont	Declaration of Heather Copeland, Assistant Athletic Director for Compliance, Belmont University, sworn to on August 4, 2016 (attached as Exhibit 9 to the accompanying Declaration of Karen Hoffman Lent)
Berkeley Squad MBB 2011-12	2011-12 men's basketball squad list of University of California at Berkeley (attached as Exhibit 10 to the accompanying Declaration of Karen Hoffman Lent)
BU	Declaration of Bethany Ellis, Senior Associate Athletic Director and Senior Woman Administrator, Boston University, sworn to on August 16, 2016 (attached as Exhibit 11 to the accompanying Declaration of Karen Hoffman Lent)
Buffalo Aid Rep.	Financial aid report of the University at Buffalo (attached as Exhibit 12 to the accompanying Declaration of Karen Hoffman Lent)
CCSU	Declaration of Paul Schlickmann, Director of Athletics, Central Connecticut State University, sworn to on August 25, 2016 (attached as Exhibit 13 to the accompanying Declaration of Karen Hoffman Lent)
Clemson Aid Rep.	Financial aid report of Clemson University (attached as Exhibit 14 to the accompanying Declaration of Karen Hoffman Lent)
Coastal Carolina	Declaration of AraLeigh Beam, Associate Athletic Director for Compliance, Coastal Carolina University, sworn to on August 4, 2016 (attached as Exhibit 15 to the accompanying Declaration of Karen Hoffman Lent)
Div. I Bylaw (2014)	NCAA Division I Bylaw (NCAA Division I Manual 2014-2015) (excepts attached as Exhibit 1 to the accompanying Declaration of Karen Hoffman Lent)

Div. I Bylaw (2015)	NCAA Division I Bylaw (NCAA Division I Manual 2015-2016) (excepts attached as Exhibit 2 to the accompanying Declaration of Karen Hoffman Lent)
Duke Squad MBB 2011-12	2011-12 men's basketball squad list of Duke University (attached as Exhibit 16 to the accompanying Declaration of Karen Hoffman Lent)
East. Wash.	Declaration of Kandi Teeters, Associate Director of Financial Aid, Eastern Washington University, sworn to on August 18, 2016 (attached as Exhibit 17 to the accompanying Declaration of Karen Hoffman Lent)
Elon	Declaration of Dave Blank, Director of Athletics, Elon University, sworn to on August 24, 2016 (attached as Exhibit 18 to the accompanying Declaration of Karen Hoffman Lent)
Fla. Atl.	Declaration of Brian Battle, Associate Athletic Director for Internal Operations, Florida Atlantic University, sworn to on August 24, 2016 (attached as Exhibit 19 to the accompanying Declaration of Karen Hoffman Lent)
Ga. Tech.	Declaration of Shoshanna Engel, Associate Director of Athletics for Compliance, Georgia Institute of Technology, sworn to on August 26, 2016 (attached as Exhibit 20 to the accompanying Declaration of Karen Hoffman Lent)
Ga. Aid Rep.	Financial aid report of University of Georgia (attached as Exhibit 21 to the accompanying Declaration of Karen Hoffman Lent)
Idaho	Declaration of Daniel Davenport, Director of Student Financial Aid Services, University of Idaho, sworn to on August 19, 2016 (attached as Exhibit 22 to the accompanying Declaration of Karen Hoffman Lent)
Iowa	Declaration of Mark S. Warner, Director of Student Financial Aid, University of Iowa, sworn to on August 16, 2016 (attached as Exhibit 23 to the accompanying Declaration of Karen Hoffman Lent)
Iowa St. Aid Rep.	Financial aid report of Iowa State University (attached as Exhibit 24 to the accompanying Declaration of Karen Hoffman Lent)
Kentucky	Declaration of David Prater, Associate Director of Financial Aid, University of Kentucky, sworn to on July 15, 2016 (attached as Exhibit 25 to the accompanying Declaration of Karen Hoffman Lent)

Ky. Squad MBB 2011-12	2011-12 men's basketball squad list of University of Kentucky (attached as Exhibit 26 to the accompanying Declaration of Karen Hoffman Lent)
LaSalle Squad MBB 2011-12	2011-12 men's basketball squad list of LaSalle University (attached as Exhibit 27 to the accompanying Declaration of Karen Hoffman Lent)
Louisville	Declaration of John C. Carns, Senior Associate Athletic Director of Compliance, University of Louisville, sworn to on August 24, 2016 (attached as Exhibit 28 to the accompanying Declaration of Karen Hoffman Lent)
McNeese	Declaration of Ralynn Castete, Director of Scholarships, McNeese State University, sworn to on August 25, 2016 (attached as Exhibit 51 to the accompanying Declaration of Karen Hoffman Lent)
Mercer	Declaration of Sybil Blalock, Deputy Director of Athletics for Academic Affairs and Senior Woman Administrator, Mercer University, sworn to on August 24, 2016 (attached as Exhibit 29 to the accompanying Declaration of Karen Hoffman Lent)
Montana	Declaration of Jean Gee, Senior Associate Athletic Director and Senior Woman Administrator, University of Montana, sworn to on August 25, 2016 (attached as Exhibit 30 to the accompanying Declaration of Karen Hoffman Lent)
MVSU	Declaration of Lloyd E Dixon, Director of Financial Aid, Mississippi Valley State University, sworn to on August 25, 2016 (attached as Exhibit 31 to the accompanying Declaration of Karen Hoffman Lent)
NCA&T	Declaration of Earl M. Hilton, III, Director of Intercollegiate Athletics, North Carolina Agricultural and Technical State University, sworn to on August 25, 2016 (attached as Exhibit 32 to the accompanying Declaration of Karen Hoffman Lent)
NJIT	Declaration of Leonard I. Kaplan, Assistant Vice President & Director of Athletics, New Jersey Institute of Technology, sworn to on August 23, 2016 (attached as Exhibit 33 to the accompanying Declaration of Karen Hoffman Lent)
Northwestern St.	Declaration of Dustin Eubanks, Assistant Athletic Director and NCAA Compliance Director, Northwestern State University, sworn to on August 23, 2016 (attached as Exhibit 34 to the accompanying Declaration of Karen Hoffman Lent)

Okla. St.	Declaration of Cheryl Flatt, Coordinator of Athletic Scholarships, Oklahoma State University, sworn to on August 19, 2016 (attached as Exhibit 35 to the accompanying Declaration of Karen Hoffman Lent)
Orszag Rep.	Expert Report of Jonathan Orszag, dated August 26, 2016 (attached as Exhibit 3 to the accompanying Declaration of Karen Hoffman Lent)
Pl. Br.	Consolidated Plaintiffs' Notice of Motion and Motion for Certification of Damages Classes, dated February 16, 2016
Rascher Dep.	Transcript of the Deposition of Daniel A. Rascher, Ph.D., taken on August 3, 2016 (excerpts attached as Exhibit 5 to the accompanying Declaration of Karen Hoffman Lent)
Rascher Rep.	Expert Report of Daniel A. Rascher on Damages Class Certification, dated February 16, 2016 (attached as Exhibit 4 to the accompanying Declaration of Karen Hoffman Lent)
SC St.	Declaration of Eric Seifarth, Assistant Athletic Director for Compliance, South Carolina State University, sworn to on August 10, 2016 (attached as Exhibit 36 to the accompanying Declaration of Karen Hoffman Lent)
SUU	Declaration of Todd P. Brown, Associate Athletic Director/ Compliance, Southern Utah University, sworn to on August 23, 2016 (attached as Exhibit 37 to the accompanying Declaration of Karen Hoffman Lent)
UL Lafayette	Declaration of Jessica Leger, Deputy Director of Athletics, University of Louisiana at Lafayette, sworn to on August 16, 2016 (attached as Exhibit 38 to the accompanying Declaration of Karen Hoffman Lent)
UNF	Declaration of Anissa Agne, Director of Financial Aid, University of North Florida, sworn to on August 23, 2016 (attached as Exhibit 39 to the accompanying Declaration of Karen Hoffman Lent)
UNH	Declaration of Michelle Bonner, Senior Associate Athletic Director for Compliance and Senior Woman Administrator, University of New Hampshire, sworn to on August 15, 2016 (attached as Exhibit 40 to the accompanying Declaration of Karen Hoffman Lent)
UNO	Declaration of Jacob Ludwikowski, Associate Athletic Director for External Relations, University of New Orleans, sworn to on August 22, 2016 (attached as Exhibit 41 to the accompanying Declaration of Karen Hoffman Lent)

UTC	Declaration of Robert David Robinson, Associate Athletics Director—Business Affairs, University of Tennessee at Chattanooga, sworn to on August 24, 2016 (attached as Exhibit 42 to the accompanying Declaration of Karen Hoffman Lent)
UVM	Declaration of Jeff Schulman, Director of Athletics, University of Vermont, sworn to on August 18, 2016 (attached as Exhibit 43 to the accompanying Declaration of Karen Hoffman Lent)
UW-Madison	Declaration of Derek Kindle, Director of the Office of Student Financial Aid, University of Wisconsin-Madison, sworn to on August 15, 2016 (attached as Exhibit 44 to the accompanying Declaration of Karen Hoffman Lent)
Valparaiso	Declaration of Kimberly Smith, Associate Director of Athletics for Compliance, Valparaiso University, sworn to on August 23, 2016 (attached as Exhibit 45 to the accompanying Declaration of Karen Hoffman Lent)
Vanderbilt	Declaration of Brent B. Tenner, Director of the Office of Student Financial Aid and Scholarships, Vanderbilt University, sworn to on July 22, 2016 (attached as Exhibit 46 to the accompanying Declaration of Karen Hoffman Lent)
Va. Tech. Aid Rep.	Financial aid report of Virginia Polytechnic Institute and State University (attached as Exhibit 47 to the accompanying Declaration of Karen Hoffman Lent)
W. Ky.	Declaration of Cynthia G. Burnette, Director of Student Financial Assistance, Western Kentucky University, sworn to on August 24, 2016 (attached as Exhibit 48 to the accompanying Declaration of Karen Hoffman Lent)
Wofford	Declaration of Elizabeth Rabb, Associate Athletics Director, Wofford College, sworn to on August 4, 2016 (attached as Exhibit 49 to the accompanying Declaration of Karen Hoffman Lent)
Youngstown	Declaration of Emily Wollet, Assistant Athletic Director, Youngstown State University, sworn to on August 25, 2016 (attached as Exhibit 50 to the accompanying Declaration of Karen Hoffman Lent)

Preliminary Statement

Defendants respectfully submit this memorandum of points and authorities in opposition to the consolidated plaintiffs' class certification motion. Pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, plaintiffs have asked this Court to certify three putative damages classes comprised of (i) all Division I FBS football players, (ii) all Division I men's basketball players, and (iii) all Division I women's basketball players who, during at least one academic term starting as of March 5, 2010, received a full athletics grant-in-aid ("GIA") limited to tuition, room, board, books and fees. Effective August 1, 2015, NCAA rules were amended to permit a full athletics-based GIA to include reimbursement for other expenses up to each student-athlete's full cost of attendance ("COA"), and plaintiffs seek damages equal to the difference between each putative class member's GIA and his or her full COA.

Plaintiffs' classes may not be certified unless plaintiffs are able to show that common questions of law or fact would predominate over questions affecting only individual members of the putative classes if the case went forward as a class action. Plaintiffs cannot make that showing.[1] Their motion for certification rests on the assumption that scholarship awards to all putative class members were governed by a simple set of uniform, mechanically applied practices. But that assumption is demonstrably untrue. Institutions varied widely in the amounts, types, and combinations of scholarships they awarded to different student-athletes—variations that extended (and still extend) even to students on the *same* team at the *same* institution. The individualized nature of these aid awards means that plaintiffs' one-size-fits-all approach to determining which student-athletes were injured in fact by the challenged GIA rule, and in what amounts, is simply untenable. Instead, complex individualized determinations will have to be made as to ***each*** student-athlete to determine whether that student-athlete actually is a member of the class, was in fact injured by the challenged practices, and (if so) in what amount. Those individual determinations would both predominate over any questions common to the class and make class litigation unmanageable.

---

[1] Each of the three proposed classes suffers from the same deficiencies, so they are addressed together in this brief.

This point is not fairly debatable. Under the NCAA rules in force prior to August 1, 2015, student-athletes were permitted to receive total financial aid up to their full COA, provided that their athletics-based GIA was limited to tuition, room, board, books and fees.[2] The fact that many student-athletes received financial aid equal to their full COA under the challenged GIA rule raises individualized questions as to whether any individual student-athlete was injured in fact by the challenged rule. Moreover, the facts that, following the NCAA rule change in August 2015, many schools chose not to provide increased aid, provided aid that filled only part of the "gap" between the former GIA limit and COA, or chose to provide additional aid to only a limited number of student-athletes, raise additional individualized questions as to whether each putative class member was injured by the former GIA rule and whether that rule (rather than some other cause) had precluded him or her from receiving a higher scholarship award prior to the rule change. And the fact that many student-athletes received only partial GIA awards that, when combined with their non-athletics-based aid, equaled or exceeded the cost of their tuition, room, board, books, and fees, raises individualized issues as to whether such individuals should be considered members of the putative classes.

There are no class-wide answers to these questions. The financial aid records produced by Division I institutions (under subpoenas issued by plaintiffs) show that, both before and after August 1, 2015, there is no pattern to the scholarships awarded to student-athletes, with various components of aid being included in different individuals' financial aid packages.

Plaintiffs' own expert, Dr. Daniel A. Rascher, has acknowledged these individualized questions. He has admitted that, prior to the rule change, many student-athletes were already receiving a full COA scholarship comprising both athletics aid and non-athletics aid—and could not have

---

[2] For certain limited types of need-based aid (most commonly a Pell Grant), total financial aid could then (and can now) exceed COA. (Div. I Bylaw 15.1.1 (2014).) Almost all other sources of non-athletics aid are capped at COA by the independent policies of individual colleges and universities, the terms of the grant award, and by NCAA rules. (Div. I Bylaw 15.1 (2014).) In addition, awards of student-athlete assistance funds (distributed by the NCAA to its member schools through their respective conferences to provide additional funding for student-athletes' educational expenses) may be combined with other aid to exceed the student-athletes' COA. (Div. I Bylaw 15.01.6.1 (2014).)

received more aid because their non-athletics awards were capped at COA. He has also conceded that many student-athletes who received a full GIA scholarship under the challenged rule were not economically harmed by the rule because they would not have received a COA scholarship in the absence of the rule. He further concedes that he cannot discern without further individualized inquiry whether a partial GIA recipient should be included in the putative classes.

Dr. Rascher's concessions reveal the need for a burdensome, detailed, and individualized evaluation of thousands of financial aid records before any fact-finder could accurately and reliably determine which student-athletes have been injured in fact by the challenged rule, and indeed which student-athletes should be included in the putative classes. As explained below, plaintiffs' proposed formulaic approach is no formula at all, but a set of *ipse dixit* pronouncements based on unsupported assumptions and speculations that are contrary to the factual record.[3]

While the inability to show, through common, class-wide evidence, that every putative class member was economically injured, or even which student-athletes are members of the putative classes, is enough to require that plaintiffs' motion be denied, there is yet a third fatal flaw in plaintiffs' argument. The need for a burdensome, detailed, and individualized evaluation of thousands of financial aid records is even more acute with respect to the calculation of damages. Plaintiffs cannot avoid this problem by assuming that every student-athlete in each class should receive damages equal to the full difference between his or her GIA and his or her COA. Dr. Rascher admits that, under the challenged rule, many student-athletes received scholarships totaling more than their tuition, room, board, books and fees, but less than their full COA, and that, under the current rule, many student-athletes are still receiving scholarships totaling more than their tuition, room, board, books and fees, but less than their full COA. Student-athletes in these circumstances would clearly not be entitled to the difference between the cost of their tuition, room, board, books and fees, and their full COA. Identifying these student-athletes and determining the amount of any

---

[3] Dr. Rascher's entire approach on this motion is fraught with fatal flaws, many of which are described in detail in the report of defendants' expert economist, Professor Jonathan Orszag. In light of those flaws, defendants are simultaneously moving to exclude Dr. Rascher's report and testimony as unreliable under Rule 702 of the Federal Rules of Evidence and the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

damages award would require a series of time-consuming, individualized determinations.

For all of these reasons, plaintiffs' motion for class certification should be denied.

Statement of Facts

Before the 2015-16 academic year, Division I Bylaw 15.1 provided:

> A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds *the value of the cost of attendance as defined by Bylaw 15.02.2*. A student-athlete may receive institutional financial aid based on athletics ability (per Bylaw 15.02.4.1) . . . up to the value of a full grant-in-aid, plus any other financial aid *up to the cost of attendance*.

(Div. I Bylaw[4] 15.1 (2014).) Prior to 2015-16, the Division I bylaws defined a full GIA as "financial aid that consists of tuition and fees, room and board, and required course-related books." (Div. I Bylaw 15.02.5 (2014).) At the same time, and continuing until today, the bylaws have defined COA as "an amount calculated by an institutional financial aid office, using federal regulations, 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." (Div. I Bylaw 15.02.2 (2014).) Thus, prior to the 2015-16 academic year, NCAA rules permitted member institutions to award, and student-athletes to receive, *athletically-related financial aid* up to a full GIA, and *total financial aid* up to the student-athletes' full COA.

And prior to 2015-16, many student-athletes within the putative classes *actually did receive* financial aid to cover their full COA. [redacted]

[redacted]

[4] The full description of all abbreviated references may be found in the Table of Abbreviations at the beginning of this memorandum.

[redacted]

[redacted] Student-athletes at numerous other Division I schools likewise received total financial aid equal to their COA. [redacted]

[redacted]

In addition, other student-athletes during the putative class period received financial aid that exceeded a full GIA to cover some, but not all, of the difference between their full GIA and their full COA. [redacted]

[redacted]

Many student-athletes at other schools were in the same position. (*E.g.*, [redacted]; McNeese ¶¶ 6, 7; [redacted]

[redacted]

Many Division I schools cap total financial aid for all students, including student-athletes, at full COA. (*E.g.*, [redacted]; Belmont ¶¶ 4, 9; BU ¶ 4; CCSU ¶ 4; [redacted]; East. Wash. ¶¶ 4, 8; Elon ¶ 4; [redacted]; Idaho ¶ 5; [redacted]; McNeese ¶ 4; [redacted]; SC St. ¶¶ 4, 6; SUU ¶ 4; [redacted]; UNH ¶¶ 4, 6; UNO ¶¶ 4, 7; [redacted]; Wofford ¶ 4; [redacted].) In addition, some schools cap total aid for all students at less than full COA. (*E.g.*, MVSU ¶ 4 ("tuition, room and board"); [redacted].) Importantly, schools do not account for their student-athletes' financial aid in a consistent manner, either as among the 350 indi-

vidual schools or within a given school from year to year and from student to student.

As a result of the varying policies adopted by different Division I colleges and universities, the same type of aid can be, and often is, treated differently by different schools. For example, during the relevant time period, while some schools allowed student-athletes to receive a [redacted] so that total aid exceeded a full GIA, other schools reduced the student-athletes' GIA awards by the amount of any [redacted] received. [redacted] In addition, while some schools allowed student-athletes to receive the Federal Supplemental Educational Opportunity Grant ("FSEOG") in addition to a full GIA, other schools reduced their student-athletes' GIA awards by the amount of any FSEOG received. [redacted]

Furthermore, the same type of aid may be treated differently by the same school, with variation from student-athlete to student-athlete. [redacted]

Such differential treatment of financial aid is evident not only from student-athlete to student-athlete for an individual year, but also from year to year for an individual student-athlete. [redacted]

[redacted]

As noted above, NCAA rules permit certain federally funded need-based grants, including Pell grants, when coupled with athletics-based aid, to exceed a student-athlete's COA. But, as with many other types of scholarships and grants, schools have accounted for these grants differently. For example, some Division I institutions permit Pell grant recipients to retain their full athletics-based scholarships, even if the student-athlete's total aid exceeds his or her COA. Other schools reduce a Pell grant recipient's athletics-based aid so that the student-athlete's total financial aid will not exceed his or her COA. (*E.g.*, Belmont ¶ 5; [redacted]; NCA&T ¶¶ 4, 5; UNO ¶ 5; [redacted] *see also* MVSU ¶ 4 (capping all aid, including Pell, at tuition, room and board).)

Effective August 1, 2015, Division I Bylaw 15.1 was amended to provide:

> A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined by Bylaw 15.02.2. A student-athlete may receive institutional financial aid based on athletics ability (per Bylaw 15.02.4.1) and any other financial aid up to the value of his or her cost of attendance.

(Div. I Bylaw 15.1 (2015).) The amendment to Bylaw 15.1 did not change the basic rule that student-athletes could permissibly receive total aid up to their full COA; the amendment simply permitted that aid to consist entirely of athletics-based aid, rather than a combination of athletics-based scholarships and other financial aid.

Division I institutions reacted to the adoption of the amended bylaw in a variety of ways. Many Division I schools have not changed their scholarship policies and practices and have no plans to provide their student-athletes with athletic scholarships above the former GIA limit. (*E.g.*, Belmont ¶ 10; BU ¶ 7; CCSU ¶ 7; East. Wash. ¶ 9; Elon ¶ 7; [redacted]; MVSU ¶ 7; [redacted]; SC St. ¶ 7; SUU ¶ 7; [redacted]; UNO ¶ 8; [redacted]; Wofford ¶ 7.) Other schools have decided

to award additional athletics-based financial aid on a case-by-case basis. The University of New Hampshire, for instance, may provide additional athletics-based aid to certain students based on demonstrated financial need. (UNH ¶ 8.) The University of Idaho, which will leave FBS football in 2018 after considering the additional cost of full COA athletics-based scholarships (Idaho ¶ 5), did not provide any full COA athletics-based scholarships in 2015-16, and plans to award only one such grant to a men's basketball player "based on his individual circumstances." (*Id.* ¶ 9; *see also* McNeese ¶¶ 8-13; Mercer ¶¶ 9-12; NCA&T ¶¶ 6-10; [redacted])

Many schools that have increased the levels of their athletics-based financial aid have adjusted that aid or reduced or eliminated other financial aid (including grants, scholarships and SAF distributions) so that, as in the past, a student-athlete's total financial aid does not exceed his or her COA (or financial need). [redacted] And, as in the past, some schools continue to permit Pell grant recipients to combine the grant with athletics-based scholarships to exceed their COA, while other schools insist that a student-athlete's total financial aid be limited to his or her COA.

Argument

The standards that govern this motion are settled and familiar. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). To justify departing from that rule, plaintiffs bear the burden of demonstrating that class certification is appropriate. *Id.* at 349. "Rule 23 does not set forth a mere pleading standard"; instead, "[a] party seeking class certification must affirmatively demonstrate his compliance" with the rule. *Id.* at 350. A district court must conduct a "rigorous analysis" to determine if plaintiffs have satisfied the requirements of Rule 23. *Id.* at 351. Such a "rigorous analysis" requires the court "to probe behind the pleadings" and "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted).

Moreover, plaintiffs must meet that burden *now*, at the class certification stage; they may not simply assert that they will do so at the merits stage of the case. "A party's assurance to the

court that it intends or plans to meet the requirements is insufficient." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2009). Nor may plaintiffs assert that any deficiencies in their model can be corrected with a better model later. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 497 (N.D. Cal. 2008) (expert assertions that a more acceptable model will be developed as the case further progresses are not sufficient).

The particular inquiry here concerns the requirements of Rule 23(b)(3), which provides that a plaintiff seeking certification of a damages class must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Id.*

While the existence of a single question of fact or law common to all members of the class is sufficient to satisfy Rule 23(a)(2), the predominance inquiry of Rule 23(b)(3) is "far more demanding." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Under Rule 23(b)(3), "it is not enough to establish that common questions of law or fact exist, as it is under Rule 23(a)(2)'s commonality requirement." *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115, 128 (N.D. Cal. 2014). The Rule 23(b)(3) analysis "'presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2),' and instead 'focuses on the relationship between the common and individual issues.'" *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 WL 1207915, at *9 (W.D. Wash. May 3, 2006) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)).

The certification standard must be applied in the context of the showing that plaintiffs must make to establish their substantive case. Here, to establish liability in a federal antitrust action, a plaintiff must prove both (i) a violation of the federal antitrust laws *and* (ii) antitrust impact, or fact

of injury or damage. "Antitrust 'impact is a distinct element of liability, independent of proof of a violation and independent of the matter of individual damages.' Thus, liability cannot be established until this second element is proven." *NCAA Walk-On*, 2006 WL 1207915, at *10 (citation omitted). "The 'mere existence of a violation is not sufficient *ipso facto* to support the action' and a 'private person has no right to complain of a violation of § 1 or § 2 [of the Sherman Act] as such, nor does such a violation *per se* give a private cause of action.'" *Gray v. Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972) (citation omitted).

Antitrust impact requires injury to business or property under Section 4 of the Clayton Act, which provides a private right of action only to those persons "injured in [their] business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). A plaintiff seeking class certification in an alleged price fixing case must prove "common impact in the form of an economic injury"; "in order to satisfy Section 4 of the Clayton Act, plaintiffs must demonstrate that they paid a higher price . . . than they otherwise would have paid in the absence of a conspiracy." *Graphics Processing*, 253 F.R.D. at 507; *see also Simon v. American Tel. & Tel. Corp.*, No. CV 99-11641 RSLW, 2001 WL 34135273, at *8 (C.D. Cal. Jan. 26, 2001) ("In addition to proving an antitrust violation, Plaintiffs must offer proof that they were 'injured in their business or property by reason of' Defendants' alleged violation" for purposes of antitrust impact (citation omitted)). "A 'mere allegation of price-fixing will not satisfy' Rule 23(b)(3)." *NCAA Walk-On*, 2006 WL 1207915, at *9 (citation omitted).

Moreover, because antitrust impact is an element of defendants' liability (not an element of plaintiffs' damages), a court may not certify a putative class and reserve the question of how to determine which putative class members suffered impact or fact of damage for a later trial on the merits. *Gonzales v. Comcast Corp.*, No. 10-cv-01010-LJO-BAM, 2012 WL 10621, at *19 (E.D. Cal. Jan. 3, 2012). When "[t]he evidence indicates a myriad of individual inquiries are required to ascertain the fact of damages for each Class member," the "damages determination at issue . . . is not one that merely seeks to identify the amount of damages to each putative class member." *Id.* "Th[e] determination, rather, is one which requires the Court to analyze whether [defendant] is liable to each and every putative class member at all. Such an individualized liability determination

predominates over any common issues" and cannot be "reserved for the post-certification merits inquiry." *Id.*; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013) ("If the damages model cannot withstand [defendants' critique that it is prone to false positives regarding injury in fact], that is not just a merits issue. [The] models are essential to the plaintiffs' claim they can offer common evidence of classwide injury. No damages model, no predominance, no class certification." (citation omitted)).

Accordingly, common issues of fact and law do not predominate with respect to liability, and a putative damages class may not be certified, where antitrust impact for all putative class members cannot be established by common proof. "[I]t is generally accepted that classes should not be certified where 'not every member of the proposed classes can prove with common evidence that they suffered impact.'" *Gonzales*, 2012 WL 10621, at *18 (citation omitted); *see also Blades*, 400 F.3d at 566 ("For a class to be certified, plaintiffs need to demonstrate that common issues prevail as to the existence of a conspiracy and the fact of injury.").

Plaintiffs here have not shown—and cannot show—that common questions predominate as to liability, class membership, or damages. First, they have not shown—and cannot show—that questions of fact common to all putative class members predominate with respect to liability because they cannot show that common evidence will be used to establish *antitrust impact*, or *fact of injury*, as to all class members. Second, plaintiffs have not demonstrated—and cannot demonstrate—that common questions predominate over individualized questions with respect to which partial GIA recipients *are members of the putative classes*. Finally, plaintiffs have not demonstrated—and cannot demonstrate—that common questions predominate over individualized questions with respect to the *amount of damages* allegedly suffered by those putative class members whom a jury might eventually find to have been adversely impacted by the challenged rule.

I. PLAINTIFFS CANNOT DEMONSTRATE THAT QUESTIONS OF FACT AND LAW COMMON TO ALL PUTATIVE CLASSES MEMBERS PREDOMINATE OVER QUESTIONS AFFECTING ONLY INDIVIDUAL CLASS MEMBERS WITH RESPECT TO PROOF OF ANTITRUST IMPACT

In arguing that they can establish with common evidence that each member of the putative classes was injured in fact, plaintiffs assert that their economics expert, Dr. Rascher, has articulated

two forms of impact allegedly resulting from the pre-2015 rule: "market-wide economic harm" and "pecuniary harm" to individual class members. (Pl. Br. at 18.) Neither is sufficient to support plaintiffs' motion. Proof of market-wide impact is insufficient as a matter of law to meet plaintiffs' burden of showing actual injury to every member of the putative classes. Moreover, plaintiffs have conceded that some putative class members have not suffered pecuniary harm, and they have failed to offer any common, class-wide methodology to determine which putative class members were injured and which were not.

A. Allegations of Market-Wide Impact Are Insufficient to Establish Antitrust Impact, or Fact of Injury, on a Common, Class-Wide Basis

In describing their market-wide harm theory, plaintiffs assert that the former GIA rule "severely perverted" the "market-wide equilibrium" (*id.* at 19), resulting in "reduced competition . . ., reduced choice and reduced market variety" (Rascher Rep. ¶ 90). According to Dr. Rascher, "[e]very participant in these markets was directly impacted by the restraint on the maximum GIA. This is because violations of the antitrust laws, including price fixing as alleged here, harm the entire market, not just those who pay higher prices or receive lower compensation." (*Id.* ¶ 89.)

Plaintiffs' assertion of market-wide impact from "reduced competition . . ., reduced choice, and reduced market variety" fails to establish common impact flowing from an alleged antitrust violation in a private antirust case. As previously explained, proof of antitrust impact in a private antitrust action requires evidence that each plaintiff was injured in his or her business or property, which is to say that each plaintiff, *in fact*, suffered some financial or pecuniary harm. As a matter of substantive antitrust law, an allegation that class members "have suffered cognizable antitrust injury in the form of lower quality, less choice, and reduced innovation," in the absence of pecuniary harm, is insufficient to prove impact under Section 4 of the Clayton Act on a class-wide basis. *Graphics Processing*, 253 F.R.D. at 507. Plaintiffs "must prove more than just the fact that collusive behavior occurred. 'The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust violations, under both the *per se* rule and rule-of-reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury.'" *Rail Freight Fuel Surcharge*, 725 F.3d at 249 n.5 (quoting *Atlantic*

Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339 n.8 (1990)).

Unsurprisingly, the court in *Rock v. NCAA*, No. 1:12-cv-01019-TWP-DKL, 2016 WL 1270087 (S.D. Ind. Mar. 31, 2016), recently rejected this very same market-wide impact theory propounded by the very same expert witness, and denied class certification. In *Rock*, a class of Division I football and basketball players challenged the Division I limits on the award of multi-year athletics-based scholarships. Dr. Rascher there claimed that the plaintiffs could prove with common proof that all putative class members had suffered injury because, absent the challenged rule, they would have had "stronger bargaining positions, better options, and many of them would actually take better offers." *Id.* at *13. The court rejected plaintiffs' market impact theory because "anti-trust injury as to each member of the class cannot be proven without considering the facts surrounding each class member, including whether each member would have actually received a multi-year GIA or would not have otherwise had their GIA reduced or canceled." *Id.* at *14. Accordingly, "even if there could be some level of relevant common proof of generalized antitrust injury, the individual issues regarding the critical element of anti-trust liability [actual impact to individual class members] clearly predominate." *Id.*

The legal insufficiency of plaintiffs' "market-wide economic impact" theory is plain: were it accepted, it would permit plaintiffs to prove common impact in every antitrust case merely by alleging anticompetitive conduct. Antitrust impact, as a separate requirement of liability in private antitrust cases, would effectively be eliminated. Courts have rejected such a result. "Applying a presumption of impact based solely on an unadorned allegation of price-fixing would appear to conflict with the 2003 amendments to Rule 23, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery." *Hydrogen Peroxide*, 552 F.3d at 326. Simply put, common "proof of conspiracy is not proof of common injury." *Blades*, 400 F.3d at 572.[5]

---

[5] Plaintiffs' reliance on the decisions in *Ross v. Bank of America, N.A. (USA)*, 524 F.3d 217 (2d Cir. 2008), and *Laumann v. National Hockey League*, 105 F. Supp. 3d 384 (S.D.N.Y. 2015), is misplaced. In those cases, the purported loss of market choice was enough to allege threatened harm for purposes of injunctive relief only, where the requirements of Rule 23(b)(3) were inapplicable. In *Laumann*, for instance, the plaintiffs' allegation of reduced market choice was sufficient to satisfy their burden under Rule 23(b)(2) for certification of an injunctive relief class, but was not enough to meet the predominance requirement with respect to impact under Rule 23(b)(3). After *(cont'd)*

In fact, Dr. Rascher conceded the insufficiency of this theory in his report and in his deposition. In his report, he recognized that any effect of the challenged rule was neither market-wide nor class-wide when he asserted that some student-athletes were not in sufficient demand to bargain for a full COA scholarship, and thus could not have suffered injury from reduced competition, reduced choice, or reduced market variety. (Rascher Rep. ¶¶ 274, 276; *see also* Orszag Rep. ¶¶ 24-38.) And in his deposition, Dr. Rascher conceded that such impact is so "much more speculative to try to figure out how you would measure [it]," that "you don't ever see that . . . in, say, a damages case. You stick to the more measurable direct pecuniary harm." (Rascher Dep. at 139-40.) Accordingly, such speculative impact is not class-wide and Dr. Rascher has made no effort to model or measure such impact in this case. (*Id.* at 158.)

Plaintiffs thus cannot show that common questions will predominate over individualized questions with respect to antitrust injury merely by relying on Dr. Rascher's market-wide impact theory. Rather, they have the burden of demonstrating that they can prove—using common, class-wide evidence—that each putative class member suffered pecuniary, financial harm as a result of the challenged GIA rule. The factual record that plaintiffs have collected reveals that plaintiffs cannot meet this burden, and their motion for class certification should therefore be denied.

B. Plaintiffs Cannot Demonstrate That They Can Establish Antitrust Impact, or Fact of Injury, for Each Putative Class Member on a Common, Class-Wide Basis

Plaintiffs describe the "pecuniary harm" that allegedly flowed from the challenged rule as the difference between the amount of financial aid that student-athletes in the putative classes actually received and the amount of financial aid that they would have received in the absence of the challenged rule. (Pl. Br. at 19.) But plaintiffs and their expert concede, as they must, that *not every putative class member suffered pecuniary injury as a result of the challenged rule*, because not every putative class member would have received more financial aid than he or she actually re-

---

(cont'd from previous page)
excluding the damages model of the plaintiffs' expert, Dr. Roger Noll, the court held that the plaintiffs had *no* evidence of common impact and could not show, through common, class-wide proof, that all putative class members were injured by the alleged conspiracy. On that ground, the court denied certification of the putative damages class under Rule 23(b)(3). 105 F. Supp. at 398-99.

ceived during the class period in the absence of the challenged rule. (Rascher Dep. at 152-58.)

While acknowledging that many individual class members were not injured by the challenged rule, plaintiffs and their expert have not offered a common, class-wide method of establishing which putative class members were injured by the rule and which were not. Proof of that question will require, even under Dr. Rascher's proposed approach, an individualized inquiry into the specific components of each putative class member's particular financial aid package both during the putative class period and since the 2015 amendment to Bylaw 15.1 to determine the amount of financial aid that each student-athlete actually received and to predict the amount of financial aid that that student-athlete likely would have received in the absence of the pre-2015 GIA rule.

In *O'Bannon*, this Court denied certification under Rule 23(b)(3) of a putative class of Division I football and basketball players seeking damages flowing from the pre-2015 rules preventing student-athletes from receiving payments related to their athletic ability in excess of their tuition, room, board, books and fees. In so doing, this Court explained that, "where the 'fact of injury' cannot be determined by a 'virtually mechanical task,' class manageability problems frequently arise." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at *8 (N.D. Cal. Nov. 8, 2013). Similarly, in *NCAA Walk-On*, the district court denied class certification under Rule 23(b)(3) for a putative class of Division I football and basketball players challenging the NCAA's limits on the annual number of athletics-based scholarships on the grounds that proof of antitrust injury required individualized questions that predominated over any questions of law and fact common to all class members. As the court explained:

> [E]ven if "antitrust injury" can be proven to some degree as a general matter (*i.e.*, some players were hurt by Bylaw 15.5.5), antitrust injury *as to each member of the class* (proof of which is required) cannot be proven without considering the facts surrounding each class member, including whether each one of them would have actually been awarded one of the additional scholarships and which school he would have attended. Fully proving antitrust injury requires providing answers to highly individualized questions such as these.

2006 WL 1207915, at *12.

Other courts have reached the same conclusion in analogous circumstances. *See, e.g.*, *Graphics Processing*, 253 F.R.D at 505 ("The record shows that the only way to fully assess [antitrust impact] in this action would be to conduct a wholesaler-by-wholesaler and re-seller-by-re-

seller investigation, which would essentially result in 'thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment.'" (citation omitted)); *Rail Freight Fuel Surcharge*, 725 F.3d at 252 ("Meeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy. Otherwise, individual trials are necessary to establish whether a particular shipper suffered harm from the price-fixing scheme." (citation omitted)); *In re Photochromic Lens Antitrust Litig.*, MDL No. 2173, 2014 WL 1338605, at *19 (M.D. Fla. Apr. 3, 2014) (denying certification because plaintiffs could not "utilize the identical evidence on behalf of every member of the class to prove the element of antitrust impact" when plaintiffs' expert demonstrated impact only as to 88% of Group A purchasers and 90% of Group B purchasers, and presented no methodology to demonstrate impact on Group C purchasers (citation omitted)).[6]

Through the testimony of Dr. Rascher, plaintiffs here propose to prove pecuniary impact at trial by subtracting the amount of financial aid that each of the thousands of putative class members received during the damages period from the amount that each such putative class member likely would have received during that period in the absence of the former GIA rule. The factual record adduced by plaintiffs, however, demonstrates that this approach will not involve common, class-wide evidence. There are hundreds of different federal, state, local and institutional academics-based and need-based scholarships and grants, in addition to athletics-based grants, that were awarded to student-athletes during the damages period, and each student-athlete has a unique financial aid package composed of athletics-based and other forms of scholarships and grants. Determining whether each student-athlete was adversely affected by the challenged GIA rule neces-

---

[6] Plaintiffs' reliance on *White v. NCAA*, No. CV 06-0999-RGK (MANx), 2006 WL 8066803 (C.D. Cal. Oct. 19, 2006), is misplaced. The class in *White* was certified early in the case and before the Supreme Court decided *Wal-Mart* and *Comcast*, requiring a "rigorous analysis" on class certification motions. Moreover, although the *White* court granted the certification motion, it expressed doubt regarding the ultimate suitability of that case for class treatment, and in the same order granted the NCAA leave to move to decertify the class if discovery failed to produce the class-wide evidence that the *White* plaintiffs had promised, but not provided. The case settled before that decertification motion was decided. By contrast, discovery in this case has already demonstrated that this case is not suited for class determination.

sarily requires hundreds of individualized inquiries.

Dr. Rascher seems to believe that the mass of squad lists and individual financial aid records collected by plaintiffs somehow constitute "common" evidence of all these disparate and individualized aid awards because those records (he thinks) are similar—but not identical—among the 350 Division I schools. (Rascher Dep. at 125-26.) But this belief wholly ignores the thousands of variations among student-athletes' financial aid packages and the ambiguities in the records that would require additional explanation from the school or the student-athlete. And it grossly misconstrues the requirement that "common" questions be provable by common evidence applicable to all class members. "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Blades*, 400 F.3d at 566.

The enormous body of evidence adduced by plaintiffs from the individual schools shows that the way that they award financial aid to student-athletes and account for that aid varies from school to school, and may vary from student-athlete to student-athlete within the same school, and from year to year for the same student-athlete. Thus, for example, proof of the component parts of the financial aid package of a Georgetown basketball player during the 2011-12 academic year will not suffice to prove the component parts of the financial aid package of a different Georgetown basketball player in that same year, let alone the components of the financial aid packages of the thousands of other putative class members at hundreds of other schools in each year of the damages period. Each putative class member will need to present evidence of his or her own individual financial aid package for each year—evidence that will do nothing to establish the claims of other putative class members. These individual questions predominate for purposes of Rule 23(b)(3).

Evidently recognizing this problem, Dr. Rascher has attempted to forecast what each student-athlete would have received in the absence of the challenged GIA rule by dividing the 350 Division I institutions into four categories, depending on his perception of their response to the 2015 amendment of Bylaw 15.1. To determine each school's response, Dr. Rascher relies on (a) 2015-16 squad lists and other financial aid documents, (b) public statements by school officials,

press reports and anonymous survey results suggesting each school's future scholarship plans, and (c) student-athletes' individual "star" ratings as published by a third-party recruitment service. (Rascher Rep. ¶¶ 202-04; *see also* Orszag Rep. ¶ 42.) Proceeding on an individual school-by-school basis and using different combinations of these assorted pieces of particularized data, Dr. Rascher classifies each school as being in one of the following four categories:

> (1) "Instant" adopters (those institutions that immediately began to award full COA athletic scholarships to most of their football and basketball players);
>
> (2) "Partial" adopters (those institutions that either (a) immediately began to award some amount of financial aid above tuition, room, board, books and fees (though not a full COA scholarship) to at least ten football players or at least three basketball players, or (b) made a public statement that suggested to Dr. Rascher that the school intended to do so at some future date);
>
> (3) "Wait" (any remaining institution that neither (a) immediately awarded some amount of financial aid above tuition, room, board, books and fees to at least ten football players or at least three basketball players nor (b) publicly suggested an intention to do so in the future); or
>
> (4) "Unknown" (any institution for which Dr. Rascher has insufficient information to otherwise classify it).

(*See* Rascher Rep. App. D; *see also* Orszag Rep. ¶ 41.)

Dr. Rascher's speculative, imprecise approach cannot result in common, class-wide proof that all putative class members were, in fact, injured by the challenged rule. (Orszag Rep. ¶¶ 39-86.) Indeed, Dr. Rascher classifies one-third of the FBS football and men's and women's basketball programs as Wait or Unknown, meaning that he has *no* basis to know whether they intend to offer athletic-based scholarships above the former GIA level. (*Id.* ¶¶ 44, 84-85.) Putative class members whose schools unilaterally decided not to increase athletics-based scholarships above the former GIA level cannot now claim that the former GIA rule caused them to receive less financial aid. As Dr. Rascher admitted, "presumably there would be schools that would be less likely than others to provide the cost of attendance." (Rascher Dep. at 44.) If the evidence shows that a school would not increase their athletics-based scholarships in the absence of the challenged rule,

student-athletes at those schools would not have suffered any harm. (*Id.* at 158.)[7]

Dr. Rascher further speculates, with absolutely no factual or economic support, that *every* FBS football and Division I men's and women's basketball player who attended an Instant or Partial adopter school would have received an athletics-based scholarship equal to his or her full COA in each year of the putative damages period. (*See* Orszag Rep. ¶ 43.) The detailed factual record that Dr. Rascher and plaintiffs have amassed, however, establishes that, in 2015-16, many Instant or Partial adopter schools did *not* provide athletics-based financial aid equal to COA to all of their scholarship football and basketball players.[8] There is no basis whatsoever in that record or in economics for Dr. Rascher's unsupported speculation that if, in 2015-16, a school awarded *some* amount of financial aid above tuition, room, board, books and fees (regardless of how much) to as few as ten football players or three basketball players, or publicly suggested its intention to do so in the future, that school would have awarded full COA scholarships to *all* of its scholarship football and basketball players in each of the academic years since March 5, 2010. (Orszag Rep. ¶¶ 73-84.) Rather, it is far more likely that, during the putative class period, some student-athletes at Instant or Partial adopter schools would have received athletic scholarships amounting to less than their full COA even if the challenged rule had not existed. Proof of the amount of financial aid that each Instant and Partial adopter school would have awarded to each of its student-athletes during the putative class period in the absence of the challenged rule must be made on a school-by-school and student-by-student basis, and cannot be made with evidence common to all putative class members.

Relatedly, the factual record also demonstrates that many student-athletes received financial aid covering their full COA prior to 2015. Thus, even if it were determined that a school would

---

[7] The evidence shows that many schools have not increased their athletics-based aid above the former GIA and have no plans to do so in the future. (*E.g.*, Belmont ¶ 10; BU ¶ 7; CCSU ¶ 7; East. Wash. ¶ 9; Elon ¶ 7; [redacted]; MVSU ¶ 7; [redacted]; SC St. ¶ 7; SUU ¶ 7; [redacted]; UNO ¶ 8; [redacted]; Wofford ¶ 7.)

[8] Indeed, Dr. Rascher contemplates that Instant adopter schools may not have awarded any additional financial aid to as many as 11% of their football players, 20% of their women's basketball players and 23% of their men's basketball players, and that Partial adopter schools may not have awarded any additional financial aid to as many as 88% of their football players, 80% of their women's basketball players and 76% of their men's basketball players. (Rascher Rep. App. D.)

have awarded its student-athletes full athletics-based COA scholarships during the putative class period, those student-athletes were not injured by the challenged rule because, as previously explained, they would not have received any additional financial aid in the absence of the rule. (Orszag Rep. ¶¶ 101-08.) [redacted], for example, awarded full COA scholarships to most of its football and basketball players in 2015-16. But the factual record also shows that, during the putative class period, many student-athletes at [redacted] received financial aid covering their full COA [redacted], and thus suffered no antitrust impact, or injury, as a result of the challenged rule. Determining which student-athletes at each of the 350 Division I schools received financial aid covering their full COA during the putative class period, and thus were not injured by the challenged rule, would require individualized inquiry into the financial aid records of each putative class member. Such proof does not involve questions of fact common to all putative class members, but requires evidence of thousands of questions affecting only individual class members.

[redacted] is not unique. Although defendants have not examined the financial aid records of every student-athlete at every Division I school during each year of the putative class period—as the jury would need to do if this case were certified as a damages class action under Rule 23(b)(3)—it is clear that student-athletes at many Division I institutions have received financial aid packages covering their full COA during the putative class period. [redacted] (*see also* Orszag Rep. App. D.)

Plaintiffs cannot avoid these individualized inquiries by the use of averages where, here, the actual individualized data exists. Dr. Rascher testified that, if he does not receive individualized financial aid data from certain Division I schools, he will use average GIA and COA data to analyze the impact of the challenged rule on student-athletes, as well as the amount, if any, of their damages. (Rascher Dep. at 228.) But Dr. Rascher admits that COA is personalized to each student-athlete and that "it's better to try to use the personalized financial information" for each student-athlete, rather than average COA data. (*Id.* at 229.) And he concedes that all the relevant data exists and is knowable. (*Id.* at 233-34.)

While averages may suffice in some instances to calculate, to a reasonable certainty, the amount of each putative class member's damages, they can have no application in determining whether a particular student-athlete suffered injury in fact; "[a]verages or community-wide estimations would not be probative of any individual's claim." *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011). The substitution of average GIA or COA amounts for the actual, personalized amounts to establish which putative class members suffered antitrust impact should be rejected. *See, e.g., In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2010 WL 2332081, at *10 (N.D. Cal. June 9, 2010) (rejecting plaintiffs' use of averaging to prove class-wide injury because it "obscures individual variations over time among the prices that different customers pay for the same or different products").

In sum, antitrust liability may not be established as to any particular student-athlete unless plaintiffs establish that that student-athlete suffered antitrust impact, *i.e.*, some pecuniary harm. The factual record developed by plaintiffs here shows that many student-athletes did not suffer antitrust impact—either because they actually received financial aid to cover their full COA during the class period, or because the school they attended unilaterally determined not to increase the level of athletics-based financial aid following the rule change in 2015. In either case, such putative class members would not have received any additional financial aid in the absence of the challenged rule. To determine *which* student-athletes suffered antitrust impact, the jury would have to make an individualized inquiry into the specific components of every student-athlete's financial aid package to determine both how much financial aid the student-athlete actually received and how much financial aid the student-athlete likely would have received in the absence of the challenged GIA rule. Such individualized questions with respect to liability clearly predominate over common, class-wide questions, and preclude certification of the proposed classes under Rule 23(b)(3).

II. PLAINTIFFS CANNOT DEMONSTRATE THAT QUESTIONS OF FACT AND LAW COMMON TO ALL PUTATIVE CLASS MEMBERS PREDOMINATE OVER QUESTIONS AFFECTING ONLY INDIVIDUAL CLASS MEMBERS WITH RESPECT TO PROOF OF CLASS MEMBERSHIP

Certification also should be denied because, for many student-athletes, an individualized determination will be necessary to tell whether he or she *is* a member of the class. Plaintiffs have

defined their putative classes to include all FBS football and Division I men's and women's basketball players who, in any academic term since March 5, 2010, received a full GIA athletics-based scholarship comprised of tuition, room and board, and books. Dr. Rascher proposes to identify student-athletes meeting this class definition by identifying those student-athletes who are listed as having received 100% of a full GIA on their school's squad lists. (Rascher Rep. ¶ 318.)[9]

But Dr. Rascher's proposal overlooks a simple, and serious, problem: there are hundreds—perhaps thousands—of student-athletes who, according to the squad lists, did not receive 100% of a full GIA during the putative class period. Indeed, while the pre-2015 squad lists for some schools, like [redacted] and [redacted], show that most student-athletes received a full GIA ([redacted]), the pre-2015 squad lists for other institutions, like [redacted] and [redacted] show that most student-athletes received only partial GIA awards. ([redacted]) Partial GIA recipients should, by definition, be excluded from the classes.

But plaintiffs are unwilling to do so. They argue that some partial GIA recipients belong in the class either because their partial GIA was above some unidentified arbitrary percentage of a full GIA that a fact-finder might later assign (Rascher Dep. at 57-61), or because some partial GIA recipients (plaintiffs do not know which ones, or how many) probably had their athletic aid reported as less than 100% only because their schools (plaintiffs do not know which ones, or how many) took the non-athletics-based aid that that student-athlete received into account when reporting how much athletics-based aid he or she would get. Thus, if a partial GIA recipient received non-athletics-based aid that, when added to athletics-based aid, equaled or exceeded his or her full GIA amount, plaintiffs declare that student-athlete to be an "[e]conomically" full GIA recipient and a class member, despite the record evidence to the contrary (or, as Dr. Rascher tries to minimize it,

---

[9] Dr. Rascher also proposes to include student-athletes who are listed as having received 50% of a full GIA as class members because (he says) they likely received a full GIA for one semester only, although he testified that that assumption is rebuttable if the individual schools have further information about such student-athletes, and he has not developed a formula for discerning the truth about these student-athletes. (Rascher Dep. at 110-20.) And student-athletes with 50% partial GIA's are not universally full GIA recipients. ([redacted])

"despite the accounting"). (Rascher Rep. ¶ 180.)

But neither Dr. Rascher nor the plaintiffs have any idea, with respect to any partial GIA recipient, whether their receipt of a partial GIA was really just an accounting issue, or something more serious. As Professor Orszag explains, the question whether a partial GIA recipient who received additional non-athletics-based aid actually would have received a full GIA if he or she had not received the non-athletics-based aid is an individualized question. Its resolution depends on, among other things, whether the student-athlete was awarded only a partial GIA because, together with the recipient's other aid, his or her total aid equaled a full COA and thus the payment of any greater GIA would have been impermissible under the school's independent policy capping total aid at COA. If the student-athlete's total aid did not equal his or her full COA, and the school could have awarded him or her a larger GIA, but chose not to do so, that student-athlete should not be considered a full GIA recipient for purposes of class membership. (Orszag Rep. ¶¶ 92-100.)

"Certification is not appropriate where ascertaining class membership necessitates an unmanageable individualized inquiry." *Daniel F.*, 305 F.R.D. at 125; *see also Tietsworth v. Sears Roebuck & Co.*, No. 5:09-cv-00288 JF (HRL), 2013 WL 1303100, at *4 (N.D. Cal. Mar. 28, 2013) (denying renewed motion for certification of Rule 23(b)(3) class because "ascertaining class membership would require unmanageable individualized inquiry" (citation omitted)). The individualized inquiries into the details of the financial aid packages of hundreds, or even thousands, of partial GIA recipients since March 5, 2010, likely requiring specific testimony from school adminis-

trators to explain each school's policies, accounting practices, intentions, rationales for particular cases, and a multitude of other individualized facts, to determine whether those partial GIA recipients should be deemed members of the putative classes precludes class certification in this case.

III. PLAINTIFFS CANNOT DEMONSTRATE THAT QUESTIONS OF FACT AND LAW COMMON TO ALL PUTATIVE CLASS MEMBERS PREDOMINATE OVER QUESTIONS AFFECTING ONLY INDIVIDUAL CLASS MEMBERS WITH RESPECT TO PROOF OF DAMAGES

Finally, "[w]hile the necessity for individualized damages calculations *alone* normally will not preclude class certification, the facts of this case demonstrate that the issues of antitrust injury and damages will be intertwined to such a degree that individual issues are not simply about damages." *NCAA Walk-On*, 2006 WL 1207915, at *14. In such circumstances, "[t]he potential for thousands of complicated jury trials on antitrust injury and damages is great" and "a class action would be unmanageable." *Id.* Damages calculation is "far from mechanical" when "calculating damages would require manual review of each claimant's records, as well as discovery on what each claimant paid, what he/she still owes, the nature of the services provided, and the amounts attributable to services covered under the Parity Act—thus necessitating mini-trials on individualized issues." *Daniel F.*, 305 F.R.D. at 131.

Here, since March 5, 2010, thousands of football and basketball players have received unique financial aid packages comprised of athletics-based aid and often one or more of the hundreds of different federal, state, local, institutional or association-sponsored grants. Dr. Rascher concedes that Division I institutions differ in how they have treated the hundreds of scholarship grants (Rascher Rep. ¶¶ 312-13 & n.350); the jury must consider each individual scholarship at each Division I institution when calculating damages. In addition, the evidence conclusively establishes that Division I institutions have often treated a particular scholarship differently from one student to another in a given year, and from one year to another for the same student. Sometimes non-athletics-based grants were awarded in addition to a full GIA; sometimes they supplemented a partial GIA. Federally funded need-based Pell grants, when coupled with a student-athlete's other financial aid, sometimes resulted in the student-athlete having received more than his or her full COA; sometimes, however, aid was capped at COA. As discussed above, many of those student-

athletes were not injured by the challenged GIA rule, and many are not members of the putative classes. But, even for those putative class members who could prove that they were injured in fact by the challenged rule, proof of the amount of their damages will be a complex, particularized undertaking requiring a very substantial amount of jury time to resolve. (Orszag Rep. ¶¶ 109-19.)

Critically, the Seventh Amendment to the United States Constitution ensures that each putative class member is entitled to present his or her damages case to a jury, to set forth the evidence of what he or she received in financial aid during each academic year since March 5, 2010, and to try to persuade the jury that he or she would have received more financial aid than he or she actually received but for the challenged pre-2015 GIA rule. Defendants, too, have a Seventh Amendment right to have a jury decide whether their conduct caused harm to plaintiffs and each member of the putative classes they seek to represent and, if so, the monetary amount of that harm.

The parties' Seventh Amendment right to have damages determined by a jury renders the case unmanageable. Just like the plaintiffs in *Walk-On*, plaintiffs here "suggest no way to deal with each purported class member's Seventh Amendment right to have his damages determined by a jury." 2006 WL 1207915, at *13. Plaintiffs have brought this case on behalf of as many as 20,340 student-athletes per year (as many as eighty-five scholarship FBS football players at each of 124 Division I institutions, thirteen scholarship Division I men's basketball players at 350 Division I schools and fifteen scholarship women's basketball players at 350 Division I schools) for each of the five academic years between March 2010 and August 2015. If, for each academic year, each student-athlete were allotted *ten minutes* to explain his or her financial aid package for that year and to testify as to the amount he or she allegedly should have received in that year but for the challenged rule, the trial of the damages phase of this case would exceed 16,900 hours of jury time. Such an unmanageable procedure cannot satisfy the requirement of Rule 23(b)(3) that a class action be the superior method of adjudicating the action.

Conclusion

For the foregoing reasons, plaintiffs' motion for certification of damages classes should be denied.

DATED: August 26, 2016

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jeffrey A. Mishkin
Jeffrey A. Mishkin (*pro hac vice*)
Karen Hoffman Lent (*pro hac vice*)

Attorneys for Defendant
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

PROSKAUER ROSE LLP

By: /s/ Scott P. Cooper

Scott P. Cooper (SBN 96905)
Jennifer L. Jones (SBN 284624)
Jacquelyn N. Ferry (SBN 287798)
2049 Century Park East, Suite 3200
Los Angeles, CA 90067
Telephone: (310) 557-2900
Facsimile: (310) 557-2193
scooper@proskauer.com
jljones@proskauer.com
jferry@proskauer.com

Attorneys for Defendant
PAC-12 CONFERENCE

MAYER BROWN LLP

By: /s/ Britt M. Miller

Andrew S. Rosenman (SBN 253764)
Britt M. Miller (*pro hace vice*)
71 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
arosenman@mayerbrown.com
bmiller@mayerbrown.com

Richard J. Favretto (*pro hac vice*)
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
rfavretto@mayerbrown.com

Attorneys for Defendant
THE BIG TEN CONFERENCE, INC.

POLSINELLI PC

By: /s/ Leane K. Capps

Leane K. Capps (*pro hac vice*)
Caitlin J. Morgan (*pro hac vice*)
POLSINELLI PC
2950 N. Harwood, Suite 2100
Dallas, TX 75201
Telephone: (214) 397-0030
Facsimile: (214) 397-0033
Email: lcapps@polsinelli.com
Email: cmorgan@polsinelli.com

Mit S. Winter (SBN 238515)
Amy D. Fitts (*pro hac vice*)
POLSINELLI PC
900 W. 48TH Place
Kansas City, MO 64112
Telephone: (816) 753-1000
Facsimile: (816) 753-1536
Email: mwinter@polsinelli.com
Email: afitts@polsinelli.com

Wesley D. Hurst (SBN 127564)
POLSINELLI LLP
2049 Century Park East, Suite 2300
Los Angeles, CA 90067
Telephone: (310) 556-1801
Facsimile: (310) 556-1802
Email: whurst@polsinelli.com

Attorneys for Defendants
THE BIG 12 CONFERENCE, INC. AND CONFERENCE USA

ROBINSON BRADSHAW & HINSON

By: /s/ Robert W. Fuller

Robert W. Fuller, III (*pro hac vice*)
Nathan C. Chase Jr. (SBN 247526)
Mark W. Merritt (*pro hac vice*)
Lawrence C. Moore, III (*pro hac vice*)
Amanda R. Pickens (*pro hac vice*)
101 N. Tryon St., Suite 1900
Charlotte, NC 28246
Telephone: (704) 377-2536
Facsimile: (704) 378-4000
nchase@rbh.com
rfuller@rbh.com
mmerritt@rbh.com
lmoore@rbh.com
apickens@rbh.com

Mark J. Seifert (SBN 217054)
Robert R. Moore (SBN 113818)
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111
Telephone: (415) 837-1515
Facsimile: (415) 837-1516
mseifert@allenmatkins.com
rmoore@allenmatkins.com

Attorneys for Defendant
SOUTHEASTERN CONFERENCE

SMITH MOORE LEATHERWOOD LLP

By: /s/ D. Erik Albright

D. Erik Albright (*pro hac vice*)
300 North Greene Street, Suite 1400
Greensboro, NC 27401
Telephone: (336) 378-5368
Facsimile: (336) 433-7402
erik.albright@smithmoorelaw.com

Jonathan P. Heyl (*pro hac vice*)
101 N. Tryon Street, Suite 1300
Charlotte, NC 28246
Telephone: (704) 384-2625
Facsimile: (704) 384-2909
jon.heyl@smithmoorelaw.com

Charles LaGrange Coleman, III (SBN 65496)
HOLLAND & KNIGHT LLP
50 California Street, Suite 2800
San Francisco, CA 94111-4624
Telephone: (415) 743-6900
Facsimile: (415) 743-6910
ccoleman@hklaw.com

Attorneys for Defendant
THE ATLANTIC COAST CONFERENCE

COVINGTON & BURLING LLP

By: /s/ Benjamin C. Block

Benjamin C. Block (*pro hac vice*)
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
Telephone: (202) 662-5205
Facsimile: (202) 778-5205
bblock@cov.com

Rebecca A. Jacobs (SBN 294430)
One Front Street
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
rjacobs@cov.com

Attorneys for Defendant
AMERICAN ATHLETIC CONFERENCE

WALTER HAVERFIELD LLP

By: /s/ R. Todd Hunt
R. Todd Hunt (*pro hac vice*)
The Tower at Erieview
1301 E. 9th Street, Suite 3500
Cleveland, OH 44114-1821
Telephone: (216) 928-2935
Facsimile: (216) 916-2372
rthunt@walterhav.com

Attorneys for Defendant
MID-AMERICAN CONFERENCE

BRYAN CAVE LLP

By: /s/ Adam Brezine
Adam Brezine (SBN 220852)
560 Mission Street, 25th Floor
San Francisco, CA 94105
Telephone: (415) 674-3400
Facsimile: (415) 675-3434
adam.brezine@bryancave.com

Richard Young (*pro hac vice*)
Brent Rychener (*pro hac vice*)
90 South Cascade Avenue, Suite 1300
Colorado Springs, CO 80903
Telephone: (719) 473-3800
Facsimile: (719) 633-1518
richard.young@bryancave.com
brent.rychener@bryancave.com

Attorneys for Defendant
MOUNTAIN WEST CONFERENCE

JONES WALKER LLP

By: /s/ Mark A. Cunningham
Mark A. Cunningham (*pro hac vice*)
201 St. Charles Avenue
New Orleans, LA 70170-5100
Telephone: (504) 582-8536
Facsimile: (504) 589-8536
mcunningham@joneswalker.com

Attorneys for Defendant
SUN BELT CONFERENCE

BRADLEY DEVITT HAAS & WATKINS, P.C.

By: /s/ Jon T. Bradley
Jon T. Bradley (*pro hac vice*)
2201 Ford Street
Golden, CO 80401
Telephone: (303) 384-9228
Facsimile: (303) 384-9231
jon@goldenlawyers.com

Attorneys for Defendant
WESTERN ATHLETIC CONFERENCE

FILER'S ATTESTATION

I, Jeffrey A. Mishkin, am the ECF user whose identification and password are being used to file DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' AMENDED JOINT MOTION FOR CLASS CERTIFICATION. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Jeffrey A. Mishkin

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 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.

/s/ Jeffrey A. Mishkin