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

EXPERT REPORT OF DANIEL A. RASCHER ON DAMAGES CLASS CERTIFICATION

February 16, 2016

Table of Contents

1. QUALIFICATIONS

1. My name is Daniel A. Rascher. I am Director of Academic Programs for the Sport Management Master's Program and Professor at the University of San Francisco ("USF"). I teach courses in sport economics and finance and research methods to graduate students. I am also a Partner of OSKR, LLC, an economic consulting firm specializing in applying economic analysis to complex legal issues, as well as President of SportsEconomics, LLC, ("SportsEconomics") an economic, finance, and marketing research consulting firm focused on the sports industry. Formerly, I was an Assistant Professor and Associate Professor at USF, an Assistant Professor at the University of Massachusetts, Amherst, Adjunct Professor at Northwestern University, and Visiting Professor at the IE Business School in Madrid, Spain. I was also previously a Principal at LECG, LLC, a provider of expert economic consulting and related services. I received a Ph.D. in Economics from the University of California at Berkeley, having focused on the fields of industrial organization, econometrics, and labor economics. I have published numerous articles, book chapters, and a textbook in the field of sports economics and finance and have worked on over one hundred consulting projects involving the sports, entertainment, and tourism industries.

2. I have previously submitted an expert report in this matter pertaining to injunctive class certification.[1] I have also consulted with counsel for both plaintiffs and defendants on a variety of lawsuits and class certification matters, including in the *O'Bannon* case,[2] in which I testified at trial. I have also filed an expert report on class certification in *Rock v. NCAA*.[3]

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[1] *Expert Report of Daniel A. Rascher on Injunctive Class Certification*, June 25, 2015 (herein "*Rascher Injunctive Report"*). Available as redacted form at docket number 230-8 (06/26/15).

[2] Edward O'Bannon, *et al*. v. NCAA and Collegiate Licensing Company, No. C 09-3329 CW (herein "*O'Bannon*").

[3] John Rock, on behalf of himself and all others similarly situated, Plaintiff, v. National Collegiate Athletic Association, Defendant, No. 1:12-cv-Ol019-TWP-DKL (herein "*Rock*"). Expert Report of Daniel A. Rascher on Class Certification, November 23, 2014.

3. I am also certified as a valuation analyst (Certified Valuation Analyst) by the National Association of Certified Valuators and Analysts. Attached as Appendix A is my curriculum vitae which includes my qualifications as an expert witness and my testimonial experience, including my publications from the last 10 years and all cases in the last 4 years where I testified at trial or was deposed.

4. I am being compensated at my usual and customary hourly rate of $500 per hour, plus reimbursement of expenses. In my work on this matter, I have been assisted by OSKR staff, working under my supervision and control. I have no direct financial interest in the outcome of this matter.

2. SCOPE OF WORK

5. Class Counsel have asked me to determine whether economic evidence and methods that would be used to prove liability, anticompetitive impact, and damages are common to the members of each of the proposed classes (as defined in the accompanying motion for certification of damages classes), including an evaluation of whether class-wide impact and anticompetitive harm can be demonstrated in a relevant antitrust market by means of common economic evidence. I have also been asked to present a common, formulaic method for calculating damages and present an in-depth example of how that model provides a valid, formulaic methodology for calculating all injured class members' damages. While this demonstration results in an estimate of damages, it is important to recognize that I present this, not for the merits of that estimate, but as evidence of the feasibility of such a formulaic approach. My ultimate damages opinion will be rendered after the completion of the discovery process.

6. Throughout this report, my analysis is focused on common issues of fact as they inform my economic analysis and, on occasion, common issues related to the economics relevant to antitrust law, particularly as relates to the rule of reason.

7. In approaching this assignment, I have relied upon a number of documents, including material provided by counsel and third party files, laid out in full in Appendix B. I also rely on my knowledge of the sports economics literature; to the extent I specifically cite to an article or study, I include that title in this report and in my list of materials in Appendix B. In addition, I have relied on my prior report in this matter, as well as my five previous expert reports from *O'Bannon*[4] and *Rock*. Each of these (in unredacted form) has been in the possession of Defendant NCAA since the respective dates of the reports; they provide further support and corroboration for my opinions expressed herein:

- Declaration of Daniel A. Rascher in Support of Motion by Antitrust Plaintiffs for Class Certification, April 24, 2013 from *O'Bannon*.[5]
- Expert Report of Daniel A. Rascher, September 25, 2013 from *O'Bannon*.[6]
- Reply Expert Report of Daniel A. Rascher, November 5, 2013, from *O'Bannon*.[7]
- Expert Report of Daniel A. Rascher on Class Certification, November 23, 2014 from *Rock*.[8]
- Expert Reply Report of Daniel A. Rascher on Class Certification, January 22, 2016 from *Rock*.[9]

I also have relied upon my trial testimony in *O'Bannon* (Trial Transcripts Volumes 3 and 5) that provide further support and corroboration for my opinions express herein.

8. The report I present here draws heavily from these *O'Bannon* and *Rock* reports, as well as my earlier report in the injunctive class certification phase of this case, because much of these same issues have been addressed in these prior reports. To avoid unnecessary repetition, in what I set out below, in some cases I have simply referenced my prior conclusions or those of this Court with respect to what seems to be obvious conclusions of class-wide commonality. Here, I focus my attention on those issues where

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[4] At trial in *O'Bannon*, I was an expert witness qualified to testify on topics of economics, antitrust economics and sports economics. See *O'Bannon* Trial Transcript, Volume 3, pp. 612-3.

[5] Available as redacted in *O'Bannon* Docket Number 748-4 (4/25/13).

[6] Available in redacted excerpts in *O'Bannon* Docket Numbers 909-1 (11/22/13), 905-2 (11/21/13), 1002-3 (2/27/14).

[7] Available in a redacted excerpt in *O'Bannon* Docket Number 957-10 (1/13/14).

[8] Available as redacted in *Rock* Docket Number 148-2 (2/6/15).

[9] Soon available in unredacted form, though temporarily under seal, in *Rock* Docket Number 188 (1/22/16).

I believe new analysis is needed. When a point I would make has already been addressed and settled consistent with my opinion, I note the relevant conclusion of the Court, and move on.

9. If challenged on any of these elements of proof, I can, of course, repeat the evidence provided previously and extend it to any newly available data, and I reserve the right to do so in my reply report, but it is my hope that by avoiding the repetition of the obvious and previously proven elements, I can focus attention either on areas where the analysis differs between the cases, or where the question of damages class certification in this cases raises issues not addressed previously. I reserve the right to change my opinion if new information is presented either through discovery or elsewhere.

3. SUMMARY OF OPINIONS WITH RESPECT TO DAMAGES CLASS CERTIFICATION ISSUES

10. From an economic point of view, this case is extremely simple and entirely worthy of common, class-wide analysis. It rests on a theory of damages that is far more amenable to common analysis and common proof than was the case with *O'Bannon*. From the perspective of damages, it is the economic equivalent of the *White* matter that was certified as a damages class in 2006, but with a fact and data record (especially an actual market test in 2015-16) that allows for stronger proof of Plaintiffs' hypotheses, and which discredits Defendants' previously offered speculative impediments to class-wide evidence of impact and formulaic damages.

11. Specifically with respect to class-wide damages, Plaintiffs' theory is that, had the Defendants refrained from adopting the cap on athletically based aid that was in place from 1976 through January (effective August) 2015. This is the the Pre-2015 Capped Athletic Grant-in-Aid (GIA) Level that the Ninth Circuit called "patently and inexplicably"[10] stricter

[10] "OPINION," United States Court of Appeals for The Ninth Circuit, Case Nos. 14-16601, 14-17068, (herein "*O'Bannon II"*), p. 55.

than necessary to achieve its purported procompetitive goals, Defendants would have adopted a less restrictive alternative restraint. One such less restrictive alternative to the "Full GIA" definition in place at the time this suit was filed is a national agreement to cap athletic aid at a level that was not "patently and inexplicably" stricter than necessary to achieve any provable pro-competitive benefits. Thus, for the purpose of calculating damages, I have modeled a but-for world in which the less restrictive alternative chosen was an agreement to agree to cap athletic compensation at the Full COA instead of the Pre-2015 Capped GIA Level known during the period in suit as the "Full GIA."[11]

12. This is not to say that the Full COA cap, if challenged directly, would necessarily show a level of pro-competitive benefits that outweighs its anticompetitive effects on the market.[12] Rather, it is based on my assumption, grounded in the facts of what has transpired since the *O'Bannon* trial, that the less restrictive alternative Defendants likely would have adopted in the absence of the older "Full GIA" cap would have been the "Full COA" cap. Because all rule of reason cases are specific to the facts of the restraint in suit, economically it will always be a possibility that a viable less restrictive alternative to an overly restrictive restraint is later itself found to be overly restrictive compared to an even less restrictive and/or more pro-competitive restraint. For damages purposes, I assume only the first step in that process has occurred.

13. With that less restrictive cap in place well prior to the start of the damages period, more open competition would have resulted in higher athletic compensation, such that the

[11] Throughout this report, I refer to the old definition of a Full GIA in force during this period as the "Pre-2015 Capped GIA Level" or more simply the "Pre-2015 cap" or "Pre-2015 restraint" and the new limit in force today as a "Full COA GIA."

[12] As I understand it, this is one of the key specific factual and legal questions in the injunctive phase of Plaintiffs' current case. It is not my view that the less restrictive alternative to the pre-2015 cap is itself a net pro-competitive result, but rather is simply a less restrictive alternative than the restraint that was in place during the damages period prior to 2015 and thus is a reasonable, conservative basis for estimating damages in the absence of that pre-2015 cap.

shortfall[13] they experienced would have been reduced, in most cases, to zero. That is, damages for any individual class member can be expressed mathematically as:

$$Damages = (\text{Collusive Shortfall}_{actual} - \text{Shortfall}_{butfor})$$

14. For the set of athletes who would have had their full COA covered in the but-for world, damages simplifies down to:

$$Damages = \text{Collusive Shortfall}_{actual}$$

15. As a result, the need to model in precise detail the level of market compensation in the but-for world is greatly simplified compared to, for example, the harm alleged in *O'Bannon*, where damages were based on estimates of forgone market-level compensation and therefore modeling damages required a hypothetical model of the outcome of open competition for a class of valuable athletes. The best benchmark for *O'Bannon* damages came from outside the college sports industry, and the vacuum left by decades of allegedly (and now-proven) anticompetitive conduct (and thus the absence of real-world data) opened the door to Defendants arguing that the but-for world might be radically different in difficult to predict ways.

16. In contrast, here the best model of this less restrictive alternative is based on current conduct by the Defendants (and their co-conspirators) themselves. Under Plaintiffs' theory of damages in this case, once that shortfall is completely met, an individual plaintiff's damages cannot grow larger, so the focus of harm is not on how much more athletes would have earned in the but-for world, but rather on how much less of a shortfall they would have experienced than in the actual world. This means that once impact is established for the classes of athletes, damages calculations are ministerial subtraction exercises based on

[13] To emphasize that damages in this case are focused on the actual rate of payment falling short of a more competitive rate because of the alleged collusion among Defendants and their co-conspirators, throughout this report I refer to the difference between the Full COA, as is now allowed, and maximum GIA allowed prior to 2015 as the "collusive shortfall" rather than as the "COA Gap." I explain this in more detail in Section 4.3.

objective, real-world data, involving little or no economic modeling. It is a straightforward exercise, perhaps complicated by the need to type the numbers into a spreadsheet first, not complex economic modeling.

17. Based on this, and on the analysis which follows, it is my economic opinion that:

(a) The economic issues related to liability, impact, and damages are properly treated on a class-wide basis, consistent with findings in the injunctive class certification phase of this case, and with the *White* damages class which was also certified.

(b) There is a common, class-wide methodology that results in a reasonable, non-speculative, formulaic estimate of the antitrust damages incurred by the proposed classes.

(c) I have demonstrated the class-wide application of this methodology using the existing discovery available to me. This demonstrates the feasibility of my proposed methodology, and also allows me to extrapolate from the preliminary discovery record to provide an estimate of total damages, subject to the caveat that discovery, especially data discovery, is still ongoing. What matters for the present purposes is not whether the estimate is precise, but whether the methodology it demonstrates is sound, and whether at the merits phase of this case, with fuller discovery, class-wide damages can be calculated by means of common formula. This demonstration shows that yes, it can.

4. ECONOMIC FACTS RELEVANT TO THE RESTRAINTS IN SUIT

18. Economics and college sports share a common feature: the reliance on specialized jargon to capture industry terms. A good deal of this report is about analyzing conduct in the college sports context through an economic lens, for which a short primer on how economic jargon applies to conduct more commonly understood through college sports terms is helpful. As just one simple example, in the antitrust world, typically a compliance officer is someone who works to ensure the firm does not engage in collective pricing with its competitors, but for Division I schools, a compliance officer is someone who ensures the school <u>does</u> follow the Defendants' collective agreements to fix prices. This section provides a few key elements of the economics of antitrust that will be helpful in understanding the nature of the class-wide common economic evidence on which Plaintiffs will likely rely at trial.

4.1 THE ALLEGATIONS THROUGH AN ECONOMIC LENS

19. In the language of economics, this case is about collusion among firms (universities) sponsoring basketball and football teams comprised into separate sports leagues (known as conferences) who buy labor[14] services from college students who also excel in football and basketball. The payment for those services is made in the form of a GIA, which is primarily paid in-kind (through education, or housing, or food) but also usually includes a cash component (such as the monthly check typically given to off-campus students,[15] or any COA stipends provided since August 2015).[16] Regardless of whether athletes have legal status as employees, in economic terms a GIA generically functions as an employment contract.[17]

20. The universities that make up the Defendant Conferences (as well as the other alleged Division I co-conspirators) are buyers of these athletes' services in these markets. The alleged (and acknowledged) agreement among these firms not to compete is codified in the NCAA Bylaws, which are revised and re-promulgated annually, and the specific elements complained about in this litigation consist of some of the restrictions on the maximum-allowed terms of compensation from schools to athletes, captured broadly under

[14] A labor market is commonly defined as an input market in which firms seek workers and workers seek jobs/use of their skills and compensation from those firms. This would apply to relationships beyond just those between an employer and an employee. For example, economically, an input market for independent contractors' services would be a labor market even if those workers lacked employee status, if they were paid only though royalties, or had any other legal non-employee status. Hence, in *Rock*, I explained my own preference for use of the term "recruiting" market to describe this labor market as it moves away from the question of employee status and because it also emphasizes that the market participants include athletes who would have gotten GIAs but for the other restraints the NCAA imposes on the market, such as a cap on output/consumption, but this is a nomenclature issue – the analysis is the same under either phrasing.

[15] [redacted]

[16] Because the in-kind payment involves education, it is important to recognize that, in essence, both parties are exchanging services. This can make a sale look like a purchase, and vice versa.

[17] In a document opposing the adoption of multi-year GIAs, the University of Texas described one-year GIAs as "… a two-party annual contract that provides an out if either party is unhappy with the agreement." (*Override Period (October 2011 meetings): Override Summary for Proposal Nos. 2011-96 and 2011-97* (NCAAGIA01072731 - NCAAGIA01072775, at 768)).

the various dimensions of the NCAA's definition of a maximum GIA. At issue are the joint restrictions limiting schools' or conferences' individual discretion with respect to the price offered in the form of a GIA that were in effect during the damages period until COA payments began in August 2015, though during this period, the NCAA also restricted the number of those offers that could be made (that is, they also restricted quantity) via collective agreement of its members, a restraint that is the subject of separate litigation (*Rock*) in which I have offered the opinion that efforts to cap the number of GIAs is effectively a naked restraint on output.[18]

21. As alleged, the restraints in suit (rules limiting the value of a GIA to the Pre-2015 Capped GIA Level) are the conduct of a classic monopsonist: by artificially reducing the ability of schools to express demand for labor through restrictions on the amount each school can offer its coveted athletes, the NCAA collusively decreased price (and continues to decrease price though to a somewhat lesser degree than before), and forces competition into less efficient channels. But for these rules, the marketplace would have had larger GIAs in the damages period and as a result, the classes of plaintiffs would have received greater compensation for their labor.

4.2 ECONOMICALLY, PLAINTIFFS' CLASS-WIDE ALLEGATIONS ARE A SIMPLE MATTER FOR COMMON ANALYSIS

22. The NCAA has admitted that its member schools agreed to restrict athletic compensation to cover no more than the components of what was called a "Full GIA" – tuition, fees, room, board, and required books from 1976 to 2014. Although the NCAA

[18] The NCAA argued the same in its motion for summary judgment in *O'Bannon*: "The fact is that Division-I and FBS have been extraordinarily successful in increasing output — by every measure — for many decades. The size of the division has increased as schools have joined FBS and/or Division I, resulting in an increased output in the number of games played, **the number of scholarships awarded**, and consumer demand for televised games." (emphasis added) (*In Re NCAA Student-Athlete Name and Likeness Licensing Litigation, NCAA's Memorandum of Points and Authorities in Support of Motion for Summary Judgment; Opposition to Antitrust Plaintiffs' Summary Judgment Motion*, filed December 12, 2013, 4:09-cv-01967-CW Document926, Northern District of California, Oakland Division).

still caps the maximum value of a GIA, since January 2015, the cap was raised (effective August 2015) to the Full Cost of Attendance (COA). Defendants acknowledge that they monitored compliance with the restraint, and took active steps to enforce the restraint and to punish any of Defendants' member school(s) that exceed the restraint. There is bountiful evidence that in the absence of that cap, schools would have paid athletes more to provide their athletic services than they did in the presence of the cap. Not only do Defendants not contest this point, they insist they would have paid athletes more as part of their defense.[19] Conduct both before and after the restraint was imposed shows that restraint had a major impact on industry levels of pay.

23. Most notably, Defendants' conduct since 2015 has shown that many class members' pay has already jumped up by several thousand dollars (usually an amount equal to 5-15% of the total list price of their scholarships) in the immediate wake of the relaxation of the restraint, and Defendants acknowledge that the direct trigger for this increase was the relaxation of the pre-2015 cap. This establishes that the alleged bad act occurred and that it had market-wide impact on pricing. This is a market-wide effect in that the restraint has perverted the market outcome. Every class member has been economically harmed by this market-wide effect.

24. Plaintiffs have proposed three classes of athletes, consisting of all Full GIA recipients[20] in each of the three sports in suit, spanning the years 2009-10[21] through to the final disposition of this case.[22] All of these class members participated in the relevant

[19] Defendants' expert Dr. Janusz Ordover concluded that "…some student-athletes in the proposed classes may receive compensation in addition to – and perhaps significantly in excess of – their current grant-in-aid as a result of the injunctive relief the Plaintiffs seek…" (*Ordover Injunctive Report*, p. 8).

[20] As defined in the accompanying motion for certification of damages classes.

[21] My understanding is that the statute of limitation limits damages to those incurred on or after March 5, 2010. I account for his in my preliminary damages work by dividing full-year damages for 2009-10 by four.

[22] As I show below, for some class members, even under the assumed less restrictive alternative of Full COA GIAs, damages to some class members have continued into 2015-16 due to the ongoing impact of the forty years of prices restrained to the pre-2015 level.

antitrust markets identified in the Consolidated Amended Complaint.[23] As alleged, there are input markets for the labor (athletic services) of three classes of athletes – those playing FBS football, those playing Division I men's basketball, and those playing Division I women's basketball.[24]

25. Thus, this is very simply a case of alleged collusion resulting in harm to competition; that harm to competition causes antitrust injury (a transfer of wealth of this sort is a classic example of the kind of harm the antitrust laws were designed to prevent[25]) to classes of plaintiffs; and that antitrust injury results in classes of damaged plaintiffs.

26. As to what a but-for world could have looked like, the change in the rules as of January 2015 has provided an excellent natural experiment[26] for testing one less restrictive alternative to the Pre-2015 restraint and has revealed that (a) the Plaintiffs' contentions as to how the market would change are well supported by empirical evidence, and (b) past Defendant arguments that predicted chaos or market collapse if the pre-2015 GIA cap were relaxed (even to the Full COA level) are not supported by the evidence. The 2015-16 conduct provides a simple benchmark for establishing common impact and a reasonable and non-speculative estimate of the lower-bound of damages.[27] As a matter of economics,

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[23] *O'Bannon II*, p. 45.

[24] Except where the specifics of those sports or of the legal or NCAA structure (these are distinct – the NCAA does not and cannot make law) affect the economics differently, I will often refer to these three classes collectively. This is because a statement about an anticompetitive harm from a specific restraint in women's basketball will generally be identical in concept to that same harm to men's basketball or football.

[25] *O'Bannon II*, p. 45: "The 'combination[s] condemned by the [Sherman] Act' also include 'price-fixing … by purchasers' even though 'the persons specially injured … are sellers, not customers or consumers.' *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). At trial, the plaintiffs demonstrated that the NCAA's compensation rules have just this kind of anticompetitive effect…"

[26] A natural experiment is an empirical study based on real-world events outside the control of the analyst, but where the real-world conditions closely adhere to the questions being studied. In this case, seeing the world where Full COA GIAs are allowed is a great test of whether such GIA levels could have worked without disastrous consequences in earlier years.

[27] It is important to note that 2015-16 is the first year that Full COA can be paid as part of a scholarship. The immediacy with which schools adopted these new payments has been substantial, yet the complete adoption of this innovation/change will take more than one year to occur fully. For instance, Troy University did not offer COA payments to its athletes in 2015-16, but has just (early February 2016) signed a new incoming class of athletes and offered them $3,000 in COA payments above and beyond

the ease of demonstrating common harm, impact, and quantifying the size of that harm is almost self-evident.

27. The data needed to calculate damages for the impacted athletes exists within (a) an NCAA-housed database designed explicitly to allow comparison of individual athletes' GIA and COA levels and which also tracks those forms of payment Defendants have argued should be considered as potential offsets to damages, and/or (b) in individual school data files that contain the same information as the NCAA's central database. Using the preliminary portion of these data produced to date, I show a simple methodology for establishing common impact and calculating class-wide, formulaic damages.

28. Even the NCAA's claimed defenses, such as a need to cap pay to preserve "amateurism" or to ensure athletes are "integrated" into academics, are class-wide defenses. As Defendants have not yet made the economic arguments in support of these defenses in the context of damages certification, there is nothing yet available to reply to, but I anticipate some of these arguments will follow past claims, which I lay out and address in Appendix C to this report, showing that they are both incorrect, and more importantly, that the proof or disproof of their validity will come through evidence common to the classes.

29. All of the economic elements of the process of testing any one plaintiff's claim: liability issues (such as market definition or the existence of anticompetitive harm), impact, and damages are essentially the same as would be used to make every other plaintiff's claim. These are three classes, each with common evidence of common harm and with easily calculated, formulaic damages.

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the old GIA. See Wise, Jeremy, "Troy athletes to receive cost of attendance stipends," January 21, 2016, Dothan Eagle (dothaneagle.com), (http://bit.ly/1PtvJ2Q).

4.3 THEORY OF PECUNIARY HARM/DAMAGES

30. As with all antitrust cases alleging collusion to fix prices, the economic harm alleged is not whether a specific payment was "enough" or "fair" or "valuable." One can easily see that a GIA, even when limited to the Pre-2015 Capped GIA Level was a valuable form of pay, in that many athletes accepted these offers over other potential uses of their lives, such as taking a job.[28] Showing that the payments provided to class members were valuable is just as irrelevant to establishing pecuniary harm and economic damages in this case as would be showing that a price-fixed flat-screen TV was nevertheless a high-quality product. Instead, the facts make clear that (a) class members all suffered the broad economic impact of a loss of market choice, and (b) that what matters to determine the pecuniary harm related to the alleged antitrust injury is whether the price paid for services was lower than what would have arisen in the market absent such rules.

31. A commonly used phrase to describe the difference between the old and the new maximum GIA is the so-called "COA Gap." This is fine as a description, but it can lead to an inaccurate understanding of the alleged antitrust harms in this matter, because it lends itself to the (economically incorrect) idea that if an athlete was somehow able to cover the additional expenses that comprised his/her COA Gap in some other fashion (such as receipt of a Pell Grant, from family savings, or if a friend provided child care services for free), then he/she was not injured. Economically, it is my view that forms of alternative income available in both the actual and the but-for world do not reduce a given athlete's damages. Receipt of money from the Federal government's Pell program or from a family's college saving fund, or the ability to call on the services of a friend, is economically unaffected by the restraint in suit – in the actual and the but-for world, athletes would remain eligible for this money or help from friends or family members, but would have also received a larger

[28] My understanding is the claim that a given market participant opted to transact in a collusive market over inferior options is not a defense against antitrust liability or the award of damages. What matters is whether the but-for market would have differed from the actual, and clearly here that is the case.

GIA payment. Any time a specific benefit received is unaffected by the restraint in suit, it is irrelevant to calculating economic damages and cannot be an economic offset.

32. To emphasize that damages in this case are focused on the actual rate of payment falling short of a more competitive rate because of the alleged collusion among Defendants and their co-conspirators, throughout this report I refer to the difference between the Full COA, as is now allowed, and the Pre-2015 Capped GIA Level that class members received as the "collusive shortfall" rather than as the "COA Gap." As used in this report, I define the collusive shortfall as the difference between each school's estimate of an athlete's total cost of attendance[29] and the lower amount the NCAA allowed schools to provide in the form of an athletic grant-in-aid. This is not to say that in an unconstrained market athletes may not have received more than the post-2014 cap – almost certainly if such payments were allowed, many athletes would have received thousands of dollars more than the current definition of COA, as Defendants argued in the injunctive certification phase of this case.[30] Rather, damages are so limited by the assumption that in the but-for world, for the purposes of calculating damages, a conservative model of a less restrictive alternative available to Defendants in lieu of the pre-2015 is the current (post-2014) cap.

33. This is essentially what happened as *O'Bannon* was decided; this Court did not set the Full COA (or even Full COA plus $5,000 in deferred payment) as a new cap – it set it as a floor, and the NCAA immediately adopted that new floor as its ceiling. These damages do not hinge on whether this Court will find the COA cap to be, on the one hand, an anticompetitive restraint, or on the other, to be a reasonable and necessary pro-competitive restraint. Rather, my damages calculations assume, at least prior to 2015, that the COA cap would be a viable, less restrictive alternative to the cap that was actually in place prior

[29] I understand this amount is set by each school in accordance with Federal law (*20 U.S.C. § 1087ll*) and is audited to meet the legal requirements set down by the federal government.

[30] *Ordover Injunctive Report*, ¶18. It is important to recognize that this can only be true if at least some schools believe their consumers value team quality sufficiently that any concerns about payments to athletes over COA are more than offset by the consumer benefits of team quality. See *Rascher Injunctive Report*, ¶15.

to 2015, and whether less restrictive that cap itself ultimately proves to be itself anticompetitive is outside the scope of this report.

34. Thus, when I calculate damages, I do so in a but-for economic environment in which I model the impact of rules consistent with the current (post-2014) NCAA rules, which allow schools to zero out any previous collusive shortfall, but to pay no more in athletic aid. Those same rules also lay out treatment of other funds, such as Pell Grants, Hope Grants, or Student Assistant Funds,[31] and for the purposes of calculating damages, I also assume the current rules related to these would have been in place in the but-for world as well, even if this ends up being a conservative estimate of what the true but-for levels of payment may have been.

4.4 IN AN INPUT MARKET, COLLECTIVE EFFORTS TO CONTAIN COSTS ARE THE ESSENCE OF ANTICOMPETITIVE HARM

35. The markets in suit are input markets. Input markets are markets in which a firm that creates a product for sale downstream acquires needed components (i.e., inputs) to create that product.[32] One such example might be a market in which a prepared-food manufacturer acquires its chickens. Another is the market in which NCAA members acquire coaching personnel, as an input to the various sports products those members sell on to their consumers (fans). Most labor markets are input markets – labor is commonly acquired for the purpose of producing a product which is then sold to others. Input markets generally have the feature that they involve sellers in some downstream market acting as buyers in the market in question.

36. Economically, demand for an input market is ultimately derived from a downstream market; if there is no demand for prepared food products made from chicken, prepared

[31] I discuss the Student Assistant Fund, or SAF, in detail in Section 7.5.3.

[32] This was a dispute among the economists in *O'Bannon*. See *Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, pp. 63-64.

food companies will exhibit little or no demand for chicken meat. But the downstream product does not compete in the same market as the input itself – the downstream product drives demand, just as the desire to use a car drives consumer demand for gasoline, but that does not put cars and gasoline into a single market.

37. Analyzing an input market is not fundamentally different than analyzing an output market, but it is important to recognize that a generalized statement that economists or legal scholars make with specific reference to output markets may need to be adjusted with respect to inputs. Economists often use the phrase "mirror image" to capture the fact that a true statement about an output market (such as the general view that lower prices are better) may need to be reversed in an input case. Mechanically applying the logic from output markets to input markets will often get backwards the economics underpinning market definition and analysis of anticompetitive conduct. For example, a collusively depressed input price is not inherently good, despite the broad recognition that in output markets, a lowered price is one of the benefits of competition. To emphasize that low prices, if achieved by collusion, are also price fixing, courts sometimes make this clear by explaining that price fixing includes efforts to "raise, **depress**, fix, peg, or stabilize the price of X."[33]

38. The act of transferring wealth from sellers to buyers by means of collusion is a core form of antitrust injury, no less related to conduct the antitrust laws prohibit than the act of transferring wealth from buyers to sellers by overcharges stemming from price-fixing.[34] Both this court and the Ninth Circuit confirmed this general conclusion, pointing to Supreme Court language that confirms this as well.[35]

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[33] See *Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, p. 60. Emphasis added.

[34] See "Example 24" from the merger guidelines, which illustrates market harm with a transfer of wealth through abuse of market power (Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Issued August 19, 2010 (http://1.usa.gov/1kbwApW)).

[35] See for example, *O'Bannon II*, p. 45.

4.5 ECONOMIC CARTELS REQUIRE MEANS TO MONITOR AND ENFORCE COMPLIANCE WITH ANTICOMPETITIVE AGREEMENTS

39. A hallmark of anticompetitive restraints adopted collectively by competitors is that they require policing and enforcement. Often this is a key means of distinguishing a pro-competitive agreement, such as the adoption of an industry standard, from anticompetitive conduct, such as price fixing, because with a pro-competitive standard, once it is set, it is self-enforcing. It may be necessary to provide a means of certification that the product has been manufactured according to the standard, but there is no need to punish market participants who choose not to use the standard. In contrast, anticompetitive agreements are generally not self-enforcing, and similarly anticompetitive agreements require strong threats of severe punishment to prevent a cartel member from breaking the agreement (i.e., to cheat). Consequently, cartels require some monitoring method to ensure compliance with the cartel and some method to threaten a wayward cartel member with negative consequence in the event of non-compliance.

40. Generally, price fixing cartels require some means of assuring themselves that the other firms are not "cheating" by pricing more competitively than has been agreed to. In the NCAA context, specific bylaws exist, and in some cases, standardized reporting forms are available and/or required, to make this monitoring less difficult and thereby to make cheating on the collective agreement more difficult. For example, all schools are required to maintain, *inter alia*, a Squad List, on which it must indicate (a) all athletic aid provided to each athlete and (b) provide a calculation to show it has not exceeded the collectively agreed-upon maximum grant-in-aid. These Squad Lists must be shown to the NCAA if requested, and must also be shown to any competitor school if the school wishes to challenge whether a team is in compliance with the restraint in suit.

41. In a well-designed system, the potential cost to the school from being punished should exceed the cost of monitoring and compliance with the agreement, or else the punishment is an ineffective deterrent. Thus, within a cartel agreement, efforts to reduce

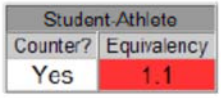
the cost of monitoring/compliance serve to strengthen the effectiveness of the anticompetitive agreement.

42. Among the efforts the central office of the NCAA has undertaken to reduce the cost of monitoring compliance has been the creation of centralized software tools to ensure compliance with the restraint in suit, as well as other allegedly anticompetitive restraints. The software is named Compliance Assistant and it serves that function – it assists schools in complying with the restraints the NCAA imposes on its membership and alerts the school if it is out of compliance. It thus functions, *inter alia*, as a cartel facilitating device.[36] One such example is the feature of this software that alerts the school if it has paid a student more than is allowed under the GIA restraint.[37]

Exhibit 1. Excerpt from NCAA Compliance Assistant Manual flagging payments in excess of the restraint in suit

Over-Award Information

1. If the user awards a student-athlete more aid than he or she is allowed to receive, th appropriate total and counter/equivalency fields will appear highlighted in red t indicate the over-award condition.



Student-Athlete	
Counter?	Equivalency
Yes	1.1

2. If the user saves the student-athlete's information without correcting this over-awar condition and subsequently generates the squad list for the student-athlete's sport, plus symbol ("+") will print to the right of the far right column of the student-athlete' row on the squad list indicating the student-athlete's over award.

Source: NCAA Compliance Assistant manual, p. 6-12.

[36] A cartel-facilitating device is a tool to lower the cost of monitoring or policing a cartel, or to raise the cost of cheating on the cartel. See Salop, S.C. (1986) Chapter Nine. Practices that (credibly) facilitate oligopoly co-ordination. In Stiglitz, J.E. and Mathewson, G.F. (1986) New Developments in the Analysis of Market Structure. *International Economic Association Series, Vol. 77*, p. 265.

[37] Per the software's online manual, the software also flags the athlete with a special symbol that will remain on his/her record until the school reduces his/her aid below the level the NCAA considers "pay" and thus would provide an excellent first approximation as to whether any past money received would be disallowed under the current rules. See "The Compliance Assistant User Guide" Chapter 12 "Standard Reports," NCAA (ncaa.org), (http://on ncaa.com/1WlxDre).

4.6 PROTECTING COMPETITORS AT THE EXPENSE OF COMPETITION IS ANTICOMPETITIVE

43. Economics (as well as antitrust law) recognizes the distinction between protecting competition and protecting competitors.[38] The former is a goal of the antitrust laws; the latter is not and is often anticompetitive. The NCAA's restraints are unabashedly designed to do the latter – to protect competitors at the expense of competition – and thus to harm economic competition. NCAA VP Wally Renfro explained that the NCAA restraints are designed for the very purpose of denying the most competitive firms in the industry the ability to act in their own self-interest by imposing the will of the majority (of lesser economic competitors):

> "If we cannot be satisfied that we will always be among the fittest … an association of diverse members with values that protect the less than fit becomes very attractive. … If the likely extension of unrestrained short-term interest is the loss of opportunity for those who will not be among the blessed few, the only remaining question is when on that inevitable path will the majority impose their core values on the unrestrained self-interest of the few."[39]

44. In the same analysis, Renfro made clear that the NCAA plays the role of what in economics is called a "cartel ring-leader,"[40] providing the means for thwarting individual incentives and replacing them with a collusive outcome:

> "What, in short, is the rationale for a governance structure as established through the National Collegiate Athletic Association? The most reasonable answer, it would seem, is that a national association attempts to overcome or at least mitigate that thing which drives behaviors in a competitive environment - self-interest…"[41]

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[38] "The antitrust laws, however, were enacted for 'the protection of competition, not competitors,'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (http://1.usa.gov/1xlLXpQ).

[39] Renfro, Wallace, "What Will Drive Us: An Examination of Values as a Balance Point Between Self-Interest and Self-Denial in Decision Making," (NCAAGIA01961854 – 878, at 874-5).

[40] See "Cartels and their Ringleaders: New evidence of anti-competitive practices in European industry," November, 2013, Royal Economic Society (res.org.uk), (http://bit.ly/1PVnSzP). See also Davies, S. and De, O. (2013). Ringleaders in Larger Number Asymmetric Cartels. *The Economic Journal, 123*(572), pp. F524-F544.

[41] Renfro, Wallace, "What Will Drive Us: An Examination of Values as a Balance Point Between Self-Interest and Self-Denial in Decision Making," (NCAAGIA01961854 – 878, at 859).

45. A central tenet of modern economics is that in a market of many competitors, each competitor's pursuit of its own self-interested, short-term gain is what drives society as a whole to its optimal economic outcome. But as the NCAA explained in a letter to the DOJ from outside counsel, all of the NCAA's GIA restraints (including those in suit[42]) are designed to prevent those "short-term gains - in terms of athletic success, institutional and individual prestige, and commercial rewards - that schools and individuals can realize by deviating from the long-term norms of amateur intercollegiate athletics."[43] In *Law v. NCAA*, the NCAA explicitly argued to the Tenth Circuit that "a vital part of the NCAA's mission is to limit economic competition between schools…."[44]

46. In my analysis, I point to the copious class-wide common historical evidence that the NCAA has engaged in the alleged misconduct for the stated purpose of regulating individual firm self-interest, primarily through cost-containment efforts. Often the parties express this sentiment as being necessary to protect weak competitors. As should be clear, economically, the protection of weak competitors is not a pro-competitive goal. However, even if Defendants try to argue the contrary view, this dispute will not require a specific analysis of any given plaintiff's individualized circumstance because the focus is on market-wide harms. Consequently, as will be seen in what follows, the analysis is inherently common to all class members (and to society as a whole which has an interest in avoiding anticompetitive harms to our economy).

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[42] Among the "norms" that NCAA Counsel claimed would not survive if schools were not restrained from their own unilateral self-interest was that "athletes must not be paid." (See *Letter from Gregory L. Curtner to United States Department of Justice*, Antitrust Division, Deputy Assistant Attorney Generals Molly Boast, William Cavanaugh Jr., and Carl Shapiro, June 28, 2010 (NCAAGIA01177250– 269, at 261).)

[43] *Letter from Gregory L. Curtner to United States Department of Justice*, Antitrust Division, Deputy Assistant Attorney Generals Molly Boast, William Cavanaugh Jr., and Carl Shapiro, June 28, 2010 (NCAAGIA01177250– 269, at 261).

[44] *Appellant's Petition for Rehearing and Suggestion for Rehearing* En Banc (*Law*), p.6

4.7 A GIVEN JOINT VENTURE IS NOT NECESSARILY 100% PRO- OR ANTI-COMPETITIVE

47. Economically, all cartels of competitors are also joint ventures, and simply changing the label does not turn specific anti-competitive conduct into pro-competitive conduct. As the federal antitrust authorities explain in "Antitrust Guidelines for Collaborations Among Competitors," (also known as the Joint Venture Guidelines):

> Some claims – such as those premised on the notion that competition itself is unreasonable – are insufficient as a matter of law, and others may be implausible on their face. In any case, labeling an arrangement a "joint venture" will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative.[45]

48. Thus, for any given joint venture, the question is whether any specific aspect of the joint venture agreement is, or is not, pro-competitive. Thus, despite the fact that the NCAA may be found to have some pro-competitive advantages as a joint venture sanctioning body, such as setting the rules that define valid on-field conduct, other aspects of the NCAA's conduct have been found to violate the antitrust laws, including joint agreements to limit television output,[46] joint agreements to limit compensation to coaches,[47] and most recently joint agreements to restrict schools from compensating athletes for the use of their names, images and likeness at levels that were "patently and inexplicably"[48] less than a reasonably necessary level.[49]

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[45] *Antitrust Guidelines for Collaborations among Competitors*, April 2000, p. 9 (http://1.usa.gov/SWyWll).

[46] *NCAA v. Board of Regents of Univ. of Okla*., 468 U.S. 85 (1984) (http://bit.ly/1xMBrHb). Emphasis added.

[47] *Norman Law, et al., v. NCAA*, No. 96-3034, U.S. Court of Appeals, Tenth Circuit (http://bit.ly/11eCZhp).

[48] *O'Bannon II*, p. 55.

[49] *Findings of Fact and Conclusions of Law* (*O'Bannon*), August 8, 2014.

4.8 CONFERENCES, NOT THE NCAA, PLAY THE ROLE OF FOOTBALL AND BASKETBALL LEAGUES

49. The NCAA is a sanctioning body and not a sports league, or as Professor Robert Tollison puts it:

> "The NCAA is a group of leagues, each with its own economic policies…The NCAA is a national input cartel with respect to high school players. These points are well recognized in the economic literature on the NCAA.[50]

50. The leagues in college sports are the conferences, such as the Southeastern Conference (SEC), the Big Ten, or the Patriot League. Contrasting what the SEC does for football (similar to what the NFL does) with what the NCAA does, or does not do, for football may help explain this difference.

[50] Tollison, R. (2015). Book review. *Journal of Sports Economics, 16*(8), pp. 871-872. Tollison goes on to say that "…the NCAA is a powerful cartel not a league."

Exhibit 2: Comparison of Role of NFL and NCAA in producing NFL/FBS Football

Activity	NFL	NCAA
Set Schedule	Yes	No: Done by Schools & Conferences
Hire & Train Referees	Yes	No: Done by Conferences
Develop Criteria for Selection to Post-Season	Yes	Only sets minimum standards (5 or 6 wins; APR minima)
Organize Post-Season	Yes	No: Playoffs done by CFP LLC Individual bowls contract w/schools & confs. (NCAA certifies organization as being allowed to sponsor bowl)
Jointly Sell TV Package	Yes	Found illegal in 1984, now done by schools & confs.
Jointly Sell Team Merchandise	Yes	No: stopped last elements in 2014[51]
Jointly Negotiate with Union	Yes	No: NCAA opposes athlete unionization and thus cannot claim protections of a CBA (see below)
Jointly Set Wage Limits	Yes[52]	Yes

51. With men's and women's basketball, the NCAA plays an additional role in organizing a post-season tournament to establish a national championship, comprised of the winners of each of the thirty-plus individual conference/league seasons as well as thirty-plus at-large teams invited primarily from major conferences, plus a secondary tournament, the NIT.

52. This post-season tournament does not make the NCAA a single league for men's or women's basketball any more than the fact that United States Soccer Association annually hosts the Open Cup championship in which teams from across the United States, both from Major League Soccer, from other professional leagues such as the North American Soccer League and the United Soccer League, and even from teams lower down on the pecking order, all compete to be the national champion. While MLS teams usually dominate, as recently as 1999 a non-MLS team (The Rochester Raging Rhinos of US

[51] Nocera, J. and Strauss, B. (2016). *Indentured: The Inside Story of the Rebellion Against the NCAA,* New York: Penguin Random House, pp. 230-232.

[52] My understanding is that the NFL Salary Cap is resistant to antitrust scrutiny because it is part of a collectively bargained union agreement.

Soccer) defeated an MLS Club (The Colorado Rapids) to win the Cup.[53] The existence of a super-tournament that includes multiple leagues in no way converts such a tournament (or its sanctioning body) into a sports league.[54]

53. As an example of a conference, Defendant SEC is a collection of fourteen teams generally situated in the southeastern quarter of the country. Although the conference has other functions, in relation to this litigation, the SEC's football product is a league season of FBS college football culminating in a very successful conference championship game (held annually in Atlanta, Georgia), plus participation in creating a post-season tournament/bowl system of cross-conference play.[55] (The SEC does the same for men's and women's D1 basketball, except here the NCAA has taken on the role of organizing two cross-league, end-of-year tournaments for each gender.) The league negotiates television contracts on behalf of its members and sets the majority of its members' football schedules, leaving each school with four games a season to schedule on their own.

54. The SEC also contracts with other leagues and with entities that operate bowl games to establish a series of post-season games. In many cases, the SEC simply contracts with a bowl game organizer (often a 501(c)(3) non-profit[56] or the for-profit sports network ESPN) to provide a team of a given level of quality, and leaves it up to the bowl organizer to find it an opponent. For the best post-season games, formerly the BCS and now the College Football Playoff (CFP), the SEC has contracted with other FBS conferences to

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[53] The game was played in Crew Stadium in Columbus Ohio and the Rhinos won 2-0. See "U.S. Open Cup Championship Results (1914-present)," U.S. Soccer (ussoccer.com), (http://bit.ly/1QfH9ha).

[54] See also the Deposition of Lynn Holzman, October 30, 2014, (*Rock*) pp. 63-64, where she discusses the "league" role of a conference.

[55] This is something the SEC has acknowledged in this litigation: "The SEC admits that the SEC organizes a full season of football competition that culminates in the SEC championship game that has been held in Atlanta, Georgia for a number of years." See *Answer and Additional Defenses of Defendant Southeastern Conference*.

[56] For example, "The Outback Bowl Organization is comprised of a tax-exempt 501(c)(3) corporation: The Tampa Bay Bowl Association dba The Outback Bowl. The organization annually manages and operates the Outback Bowl game and numerous affiliated events throughout the Tampa Bay communities. It is governed by an approximately forty-member volunteer Board of Directors. The board oversees a full-time staff of five employees, including the President/CEO of the bowl." See "About the Bowl," Outback Bowl (outbackbowl.com), (http://bit.ly/1wTBG04).

create a single-purpose limited liability corporation[57] to run a 7-game post-season comprised of a 3-game playoff and four ancillary bowl games.

55. By this process, the entire SEC season is created either by agreement among members of the SEC or by contractual agreements between the SEC, post-season game organizers, or other conferences. For football, the NCAA plays virtually no role in the creation of the schedule, the arrangement of the financial terms for intra-conference or inter-conference games, etc.[58] The same is true for basketball other than the NCAA's role in organizing the post-season cross-conference tournaments.

56. Understanding that the NCAA does not play the role of a sports league with respect to the production of FBS football or Division I men's and women's basketball, and does not even play the role of a post-season tournament organizer with respect to FBS football, is important because in its past efforts to claim the NCAA restraints on competition are pro-competitive, the NCAA has applied arguments suitable for sports leagues to itself as if the NCAA itself produces college football as a league. It does not and those arguments are economically inappropriate for the NCAA.

4.9 TITLE IX CREATES HIGHER DEMAND FOR WOMEN'S BASKETBALL ATHLETES THAN MIGHT OTHERWISE EXIST

57. Title IX is one of the most important pieces of sports-related legislation in the history of the United States. Though the actual requirements of the law are often misunderstood, it is still hard to overstate the impact this legislation has had on women's sports in the United States. The law is directly relevant to the questions of class-wide issues in this case because of the elements of Title IX that speak to the requirements that payments

[57] In its current incarnation, I understand this entity to be called "CFP Administration, LLC" See "FAQS," College Football Playoff (collegefootballplayoff.com), (http://bit.ly/1PxIoFd).

[58] The NCAA stipulated to these facts in *O'Bannon*:

- "The NCAA does not negotiate broadcast agreements for, or receive any revenue from, regular season Division I FBS football and men's basketball games."
- "The NCAA does not negotiate broadcast agreements for, or receive any revenue from, post-season Division I FBS football games (such as 'bowl' games and national championship games)." See "Stipulation of Undisputed Facts Regarding Where Broadcast Money Goes" (*O'Bannon*).

to male and female athletes be made in ratios the federal government considers "substantially proportionate."[59] Thus, it is important to recognize how Title IX affects demand for male and female athletes at FBS football and Division I basketball schools, and why this effect is common to all class members.

58. Title IX is often portrayed as requiring equal spending on men's and women's athletics, or requiring that all men and all women athletes receive identical GIAs. Both of these are false according to the Department of Education:

> "…The Policy Interpretation does not require colleges to grant the same number of scholarships to men and women, nor does it require that individual scholarships be of equal value. What it does require is that, at a particular college or university, 'the total amount of scholarship aid made available to men and women must be substantially proportionate to their [overall] participation rates' at that institution. Id. at 71415. It is important to note that the Policy Interpretation only applies to teams that regularly compete in varsity competition. Id. at 71413 and n. 1."[60]

59. Title IX imposes many regulations on college sports, including tests for whether the ratio of male versus female participation is appropriately proportional, but for the specific issues in suit, Title IX matters most in its requirement that the ratio of financial aid provided to male versus female athletes be within one percentage point of the ratio of male to female participation:

> "In order to ensure equity for athletes of both sexes, the test for determining whether the two scholarship budgets are "substantially proportionate" to the respective participation rates of athletes of each sex necessarily has a high threshold. … If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong

[59] Footer, Nancy, "Dear colleague letter: Bowling Green State University," July 23, 1998, Office for Civil Rights, U.S. Department of Education (www2.ed.gov), (http://1.usa.gov/1eX9Jzr).

[60] Footer, Nancy, "Dear colleague letter: Bowling Green State University," July 23, 1998, Office for Civil Rights, U.S. Department of Education (www2.ed.gov), (http://1.usa.gov/1eX9Jzr).

> presumption that an unexplained disparity of more than 1% is in violation of the 'substantially proportionate' requirement."[61]

60. Economically, this rule operates exactly like a mandatory matching fund – every dollar that is used to pay male athletes for their services in the form of a GIA creates a legal obligation to make proportional payments to female athletes. Though this will only be an exact dollar-for-dollar requirement if the schools' male and female athlete participation ratio is 1 to 1,[62] in my previous report, I showed that in the period of time spanned by Dr. Ordover's data, the middle two-thirds of FBS schools' matching payment to women for each dollar of male payments ranged from 69% to 81%.[63] Across all of Division I, most schools fell within the range of 75-108%.[64]

61. The result of this requirement for proportionality is that downstream market demand for male athletes is effectively divided into demand for both male and female athletes. If a school values a male athlete's services at such a high level that it would pay, say, $50,000 in an unconstrained market, and happened to have a male/female participation ratio of 60/40, then Title IX would tend to dampen the market clearing price to $30,000, and convert the other $20,000 into demand for female athletes to meet the Title IX proportionality requirement. In *Walk-on*[65] and in *White*,[66] the NCAA's experts both argued the same point – that demand by schools for male athletes would drive up demand and spending on women's sports in relatively similar proportions and as a consequence temper

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[61] Footer, Nancy, "Dear colleague letter: Bowling Green State University," July 23, 1998, Office for Civil Rights, U.S. Department of Education (www2.ed.gov), (http://1.usa.gov/1eX9Jzr).

[62] Which is very rare in Division I sports.

[63] The women-to-men athletic aid funding rate across all FBS schools ranges from 54% to 108%. See *Rascher Injunctive Report*, Section 6.2.2.

[64] Across all of Division I, women's athletic aid corresponds to 14% to 186% of equivalent funding for men. See *Rascher Injunctive Report*, Section 6.2.2.

[65] *Declaration of Professor Janusz A. Ordover in Support of the NCAA's Opposition to Plaintiffs' Motion for Class Certification* (*Walk-on*), May 25, 2005, p. 21 (FN 43). Ordover adds that when opportunity costs are included "the cost of an additional scholarship player is likely to be several multiples or more of the cost of an additional non-scholarship player."

[66] NCAAGIA02217097 – 220 (*Expert Report of Robert D. Willig*, September 6, 2006), ¶¶83-84. (Internal citations omitted, emphasis added).

the demand for male athletes and keep their unconstrained market prices lower than in a world without Title IX. Professor Robert Willig cited multiple industry participants for the idea that:

> "… Title IX compliance would require that the additional athletics-based financial aid used to fund cost of attendance would also have to be given to other athletes such as members of the women's basketball team."[67]

62. The result of Title IX's requirement for proportionality is that women's basketball athletes are paid, in part, as a function of aggregate spending on male athletes. Because Plaintiffs' and Defendants' experts agree that that aggregate spending on male athletes will increase in a but-for world with Title IX requirements,[68] this implies that aggregate spending on women will also increase in the but-for world. This is true even though, as Dr. Ordover showed in the injunctive class certification phase of this case, NCAA accounting data claims that every single women's basketball program in Division I loses money.[69] It is for this reason that most women basketball athletes in Division I receive full GIAs and, why it is no surprise that every school I am aware of that has announced that it plans to provide COA payments to men (whether in football or basketball) has also announced that it will provide equivalent COA payments to women.

5. EACH STEP OF THE PRIMARY LIABILITY CASE ANALYSIS IS AMENABLE TO COMMON PROOF

63. I understand the NCAA is typically judged under the Rule of Reason standard. Typically, the goal of an economic analysis in rule-of-reason antitrust liability allegations is to determine whether the alleged anticompetitive actions caused harm to competition.

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[67] Quoted from NCAAGIA02217097 – 220 (*Expert Report of Robert D. Willig*, September 6, 2006), ¶84. (Internal citations omitted, emphasis added).

[68] Expert Report of Janusz A. Ordover, Ph.D., April 29, 2015 (herein *Ordover Injunctive Report*), ¶86. Available as redacted at Docket Number 216-2 (4/30/15)

[69] *Ordover Injunctive Report*, ¶75: "all Division I women's basketball programs have consistently higher expenses than revenues." Emphasis in original.

At the class certification stage of the process, the examination of the alleged restraints should focus on whether there is commonality in the methods used to determine antitrust liability. In other words, rather than asking whether there is evidence that proves liability, the analysis asks: if each member of the three classes put forth her/his own lawsuit, would the evidence and methods used to determine liability be similar for all?

64. Under a rule of reason case, the traditional steps[70] for conducting an economic analysis of liability are (1) determining whether the conduct in suit has caused anticompetitive harm in a relevant market, which can be shown directly ("Direct Effects"), or through a series of indirect steps including (a) determining relevant product and geographic markets, (b) determining market power in the relevant market(s), and (c) determining whether the defendants' market power was maintained (or enhanced) by anticompetitive conduct. To the extent one determines the alleged conduct caused harm to competition, then one should (2) account for any reasonable pro-competitive justifications for the alleged conduct/restraints and determine whether they outweigh the previously established anticompetitive harm. To the extent that the Defendants demonstrate this is true, then (3) Plaintiffs may suggest less restrictive alternatives that accomplish those pro-competitive goals with less anticompetitive harm.

5.1 MARKET DEFINITION AND MARKET POWER

65. Issues of market definition and market power are all merits issues and they are generally similar or identical to issues proven in *O'Bannon*, and/or conclusions underlying the certification of the injunctive classes in this case. Through those previous rounds, it

[70] This burden shifting process was described in *Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, pp. 49-50 as "Plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'… If the plaintiff satisfies this initial burden, 'the defendant must come forward with evidence of the restraint's procompetitive effects. … Finally, if the defendant meets this burden, the plaintiff must 'show that 'any legitimate objectives can be achieved in a substantially less restrictive manner.'"

has been well established that the issues and methods of proof related to liability in an NCAA rule-of-reason case are common to all class members.

66. I do not repeat that analysis here, but instead simply provide a summary of the conclusions. To the extent Defendants challenge any of these findings, the same arguments that I or Dr. Noll made in *O'Bannon,* or we and Dr. Lazear made in the injunctive certification phase of this case can be re-made for a third time. Thus in summary, the following liability proof elements are well established as common to the classes.

5.1.1 A Direct Effects Analysis is Common to all Members of Each Class

67. In antitrust litigation, economists look for market power (and in turn look for a market in which that market power was exercised) to show that if the parties were to collude to restrain trade, their efforts would have a high likelihood of success.[71] If market power in a relevant market is necessary for collusive conduct to succeed, then the success of that collusive conduct proves the existence of market power in a relevant market. The question then becomes whether sufficient evidence exists to provide the foundation for the Direct Effects approach – namely can it be shown that the restraint in suit was binding on the marketplace. Here, there is no doubt the conduct occurred successfully – the restraints in suit are enshrined in NCAA bylaws, and the NCAA argues that their enforcement is necessary to "… allow the creation of a 'product' – amateur college athletics – that would otherwise not exist …."[72] Their essentiality of these rules, which the NCAA unambiguously re-asserted in September 2015,[73] would make no sense if they were having no effect on the marketplace. But to the question at hand, the steps by which that successful imposition of a restraint has been shown in past litigation, and will be shown at the merits

[71] For example, price fixing without market power will tend to cause the firms in question to lose sales to competitors outside of the conspiracy.

[72] *Defendant National Collegiate Athletic Association's Response and Answer to Second Amended Class Action Complaint*, August 30, 2013, p. 11.

[73] "This litigation is about whether college sports, as a non-professional sports product, will continue to exist." (Joint Case Management Statement, September 24, 2015, p. 5.)

phase of this case, is clearly the same for all class members. Therefore, it is suitable to proof by means of class-wide evidence.

5.1.2 The Indirect Process of Identifying Relevant Markets (both Product and Geographic) and Demonstrating Market Power is also common to All Members of Each Class

68. This Court has already found there exists relevant antitrust markets for the recruitment of FBS football and Division I men's basketball athletes:

> "In short, non-FBS and non-Division I schools do not compete with FBS and Division I schools in the recruiting market…"[74]

> "As explained above, viewed from this perspective, the sellers in this market are the recruits; the buyers are FBS football the product is the combination of the recruits' athletic services and licensing rights; and the restraint is the agreement among schools not to offer any recruit more than the value of a full grant-in-aid …"[75]

The Court also found these markets to span the United States (but not beyond).[76,77]

69. As discussed above, though the current complaint uses the term Labor Market, and the Court referred to the same market in which athletes sell their talent to schools as a recruiting market, this is a difference of terminology, not substance.

70. There also exists a similar distinct relevant antitrust market for women's Division I basketball, driven in part by inherent demand for the sport, and in part by the requirements of Title IX that require schools that compete in the other two relevant markets to make substantial, proportional expenditures on female Division I athletes. In the injunctive phase of this case, Defendants did not contest that this market existed and the Court certified the women's basketball class for injunctive relief.

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[74] *Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, p. 53 (Emphasis added).

[75] *Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, p. 62 (Emphasis added).

[76] See *Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, p. 7: "Plaintiffs allege that the NCAA has restrained trade in two related national markets" (emphasis added).

[77] See *Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, p. 66: "The evidence presented at trial and the facts found here, as well as the law, support both [monopoly and monopsony] theories."

71. Just as the process for establishing these markets exist was common to all class members in *O'Bannon*, the evidence is the same here and so too will be the process of establishing these markets by means of common evidence. This obvious conclusion was not even contested by Defendants at the injunctive class certification phase of this case.

5.1.3 Analysis of Barriers to Entry is common to each class

72. To succeed, sports leagues need to attract fans, owners, and television networks. While the league can be comprised of owners from the start, often a chicken-and-egg situation develops where networks may want to see fan interest before partnering with a new league and fans may need television coverage to develop a deep rooting interest in the new league. While this is not an insurmountable barrier, and while the scarcity of television outlets has been much reduced since the earlier days of televised sports, nevertheless, a new league can face difficult barriers to entry because of these network effects. In the case of college sports, these barriers to entry are higher still because entry into a new college sports league requires fans, television networks, and team owners *who also own colleges*.

73. The result is clear: once a specific college sports sanctioning body obtains market power, it is economically challenging for a rival college sports body to develop from scratch to challenge it, which then makes the monopoly/monopsony power of that sanctioning body more enduring. In essence, by cartelizing the top 350-plus basketball schools into Division I and the top 130 football schools into FBS, and then admitting whatever few schools think they are ready for the jump each year (with the important exceptions of 2001-2003 and 2007-2011[78]), the NCAA has successfully monopolized the full range of colleges eligible to form an economic rival, and is able to absorb potential entrants into its restraint regime before a critical mass of would-be rivals emerge.

[78] Copeland, Jack, "Moratorium lets Division I pause to ponder growth," The NCAA News, August 27, 2007, NCAA (ncaa.org), (http://on ncaa.com/11gK8ha).

74. The sort of evidence needed to prove this is clearly common to all class members: evidence of the costs of running Division I-quality conferences, and the historical evidence of the NCAA's successful imposition of its so-called "moratorium" from 2007-2011 and the similar two-year moratorium in 2001-02 and 2002-03[79] are clearly the sorts of evidence each Plaintiff would use individually to prove the same concept in the absence of a class.

5.2 ANTICOMPETITIVE HARM CAN BE DEMONSTRATED BY COMMON PROOF

75. As with market definition and market power, the economic evidence needed to establish that, but for the restraints in suit, schools and conferences would have competed for talent by offering GIAs in excess of the Pre-2015 Capped GIA Level is clearly common to all members of each class. The proof of this element of the liability case comes from analysis of the NCAA's stated purposes for restricting price, and from the obvious impact such restraints have had on competition. As just two examples, consider the explicit statements by then-NCAA VP Wally Renfro that the purpose of rules such as the restraints in suit is to restrain the would-be unilateral conduct of the market participants, the schools and conferences that are NCAA Division I members, from acting in their own economic self-interest:

> "… the short-term self-interest of bringing together talented student-athletes with experienced and innovative coaches in the hope of having a winning season in a given sport is in the nature of a competitive environment. We can easily justify the short-term self-interest of an institution to take advantage of a confluence of talent, experience and opportunity to produce breakthrough moments on either the academics or athletics side of the campus."[80]

76. Similarly, evidence in the record shows schools recognize that economic competition among schools would increase, but for the NCAA restraints. Multiple efforts

[79] In a market with low entry barriers, the refusal of the dominant firm to increase the number of outlets would generally be an opportunity for competitors to grow at the incumbent's expense. In the case of the NCAA moratorium though, schools patiently waited for the 4-year ban on entry to end, and then several new entrants joined Division I and FBS as soon as the collective restrictions on new entry were lifted.

[80] Renfro, Wallace, "What Will Drive Us: An Examination of Values as a Balance Point Between Self-Interest and Self-Denial in Decision Making," (NCAAGIA01961854 – 878, at 859-60).

from 1976 through 2014 to end the restraint in suit and allow additional competition were thwarted.[81] Many employees of Defendants or of their members have long argued that but-for the collective agreement not to, they would have acted in their own best interest (and that of their athletes) by providing higher compensation. As just one example of this very common refrain, in 2015 then-Commissioner of Defendant SEC, Mike Slive, explained:

> "…this is something we've always wanted, going way back, we've always wanted full cost of attendance."[82]

77. Such a collective restraint is anticompetitive because it results in classic harms to the market outcome: consumption by buyers/output by sellers is reduced, price is non-optimal, and would-be welfare-enhancing transactions[83] fail to occur, not because of the individual decisions of individual marketplace actors, but because all buyers in the market agree to restrain their own unilateral demand so they can achieve a collectively more profitable outcome that is not in the individual parties' own rational self-interest to adhere to, absent the threat of collective punishment. More importantly, the process of laying out this sort of evidence on anticompetitive impact would be identical for all class members.

5.2.1 The NCAA and its Members Recognize the Restraints in Suit Cause this Harm to Market Competition by Design

78. The sole stated goal of the 1975-76 convention process at which the challenged restraint was imposed was cost containment. The belief, expressed in 1975 by then-NCAA President John A. Fuzak was that was that the market outcome needed to be altered by collective action to avoid costs:

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[81] See Section 6 above.

[82] Ching, David, "Auburn's cost of attendance explained," June 18, 2015, ESPN (espn.com), (http://es.pn/243ZUbM). Other Defendant conferences' commissions have made similar statements. For example, John Swofford, the commissioner of Defendant ACC, explained Full COA GIAs are "very appropriate and long overdue." See Sherman, Mitch, "Full cost of attendance passes 79-1," January 18, 2015, ESPN (espn.com), (http://es.pn/1ufRdwk).

[83] Generally speaking, if a buyer and a seller are willing to exchange goods and services and money, and outside forces prevent that transaction, economic welfare will be reduced.

> "Due to the intense competitive nature of the intercollegiate athletics, it seems the only way to successfully curtail costs is at the national level. … The NCAA, to be an effective instrument, must adopt measures to curtail costs which may well guarantee the continuation of intercollegiate athletics. … all must cooperate in cutting back in attempting to guarantee the survival of intercollegiate athletics. … We 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."[84]

79. This florid metaphor makes clear why collective cost containment is anticompetitive and has been found to violate the antitrust laws: It values industry stability over economic variety and market choice.[85] Evidence that this remains a goal of the Defendants – removing market choice and replacing it with a collectively chosen outcome – has not changed over the 40-year history of the restraint. In 2007, then-NCAA vice president David Berst expressed a similar distrust of market mechanisms in 2007 when he argued that a Full COA scholarship would harm athletes by injecting money into the recruiting discussion:

> "Increasing the GIA to include some undefined and unregulated amount of cash (i.e. cost of attendance) would inject negotiations over cash sums into the recruiting process."[86]

80. In 2012, Boise State, now a member of the Defendant Mountain West Conference expressed a similar distrust of the market-driven choice that competition prefers, arguing against competition for athletes services:

> "When you combine 2001-97 with 2001-96 it creates a culture of brokering. For a prospective student-athlete, the decision as to where to attend college and participate in athletics is most likely the biggest decision they will make at that point in their lives. That tough decision becomes more complicated when the student and his/her family have to factor in what school 'offers the best deal' versus where they may want

[84] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384359.

[85] The NCAA Division I A/E/C Subcommittee on Financial Aid Deregulation noted "Every full grant-in-aid shall have an equivalent value across institutions so a student-athlete is able to select an institution based on academic and athletics choices," thus removing price as an element of competition. (NCAAGBIA00059800).

[86] Declaration of S. David Berst (*White*), October 18, 2007, ¶20.

> to attend if all offers were for one year without the enticement of 2,000."[87]

81. In 2014, Jim Delany, commissioner of the Defendant Big Ten Conference, testified at the *O'Bannon* trial to the same distrust of (and desire to collectively restrain) price-driven market mechanisms:

> "I think students should be choosing where they want to go to college, where they want to play, who their teammates are, who their classmates are, where they want to live, and where they want to go with their future, not about whether or not that choice should be influenced by a small amount of money or a large amount of money."[88]

82. Outside of Delany's isolated niche in the university-based economy, Defendants' member schools ask all high school students and their families to factor economics into their choice of college, charging different prices, offering different packages of grants and loans, and asking students and their families to balance the best fit and the cost of schools. The choice of college is not, generally, held apart from normal commercial concerns, such as the typical trade-off between quality and price. It is not pro-competitive economic conduct to remove the ability to negotiate over price from a purchase decision, just because it is an important purchase. When the Ivy League sought to remove the element of price from applicants decision process by colluding on the level of financial aid each would provide, the schools were forced to sign a consent decree acknowledging that they would cease the conduct.[89]

83. As a matter of economics, removing price from the college decision process is anti-competitive, not pro-competitive. Demonstrating that the stated goal of the NCAA's restraints in suit is the sort of evidence that will be necessary (and sufficient) to show at

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[87] *Override Period (October 2011 meetings): Override Summary for Proposal Nos. 2011-96 and 2011-97* (NCAAGIA01072731 - NCAAGIA01072775, at 768-9)

[88] Trial Transcript 10, p. 2083.

[89] "In the decree, filed in federal court in Philadelphia, the eight schools--while admitting no wrongdoing--also promised not to discuss or agree on future tuition or faculty salary increases." See Ostrow, Ronald, "8 Ivy League Schools Sign Collusion Ban," May 23, 1991, LA Times (latimes.com), (http://lat.ms/1PVsIwU).

the merits stage of this case to establish that the intent and effect of the restraint in suit is to impose anticompetitive harm on the entire market. Because it is market-wide evidence, it is inherently common to all class members. Making a supplier's or consumer's choice more "complicated" by broadening his/her set of options or by allowing price to be considered as part of the choice process is the sort of pro-competitive conduct the antitrust laws specifically encourage. Limiting that choice, as Defendants repeatedly espouse throughout the history of the restraints in suit, is not pro-competitive as economics defines the term. This explanation of the pro-competitiveness of choice is the same for all class members.[90]

5.2.2 The process of addressing procompetitive justifications and less restrictive alternatives is common to all class members

84. Having established that the methodology for testing each step of the rule-of-reason for liability is common to the proposed damages classes, the next step in the liability process, the effort to establish whether any pro-competitive justifications exist that outweigh the negative effects of the anticompetitive restraint, falls to Defendants rather than Plaintiffs. Beyond that, if such pro-competitive justifications are proven, Plaintiffs then have the ability to counter-prove that less restrictive alternatives exist that would achieve similar pro-competitive benefits with less anticompetitive harm.

85. To test whether such Defenses are valid and thus whether any less restrictive alternatives even need to be considered, and then to test such less restrictive alternatives, requires Defendants to first make those arguments. To the extent these pro-competitive justifications follow the NCAA's traditional claims (such as in the *Joint Case Management*

[90] As explained by the Supreme Court and quoted in *Law v. NCAA*: "… the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . This judgment recognizes that all elements of a bargain–quality, service, safety, and durability–and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. …"
Norman Law, et al., v. NCAA, No. 96-3034, U.S. Court of Appeals, Tenth Circuit (http://bit.ly/11eCZhp).

Statement[91]), it is obvious that these defenses and less restrictive counter arguments must be common to all class members. Thus, to the extent the NCAA tries in its opposition motion to argue that even though COA worked without a hitch in 2015-16 that it would have been fatal to college football and basketball in 2014-15, it would be the same (incorrect) argument for every single class member. Individualized inquiry into the specific facts of any one plaintiff is unneeded to present evidence (assuming it exists) supporting the connection between the restraints in suit and preserving "amateurism," and to the extent the Court is convinced the restraints in suit do preserve consumer demand through "amateurism," it would not do so for just some members of either class.

86. Because all of the previously advanced pro-competitive justifications have already been found to be common to the classes and because any new arguments from Defendants have yet to be advanced, I defer the analysis of defenses and less restrictive alternatives to my reply report, awaiting the new arguments, if any, by Defendants that their Defenses are not common to all class members. However, out of an abundance of caution, I have written Appendix C, in which I use past NCAA arguments from other matters to anticipate what those pro-competitive justification arguments may be, and demonstrate how it is my opinion that none of the pro-competitive justifications advanced to date create issues of class conflict. In that appendix, I address each of the following points:

(a) The evidence as to whether collusive enforcement of amateurism enhances consumer demand is common to all class members.[92]

(b) The evidence as to whether the rules in suit improve or harm academic integration is common to all class members.[93]

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[91] See *Joint Case Management Statement*, September 24, 2015, pp. 5-6.

[92] "This litigation is about whether college sports, as a non-professional sports product, will continue to exist" (*Joint Case Management Statement*, September 24, 2015, p. 5.)

[93] "… preserving the student-athletes' focus on academics…" and "… fostering the integration of student-athletes into the academic communities of their colleges and universities" (*Joint Case Management Statement*, September 24, 2015, p. 6.)

(c) The absence of evidence that the restraints improve consumer demand by generating improved competitive balance is common to all class members.[94]

(d) The evidence of that the NCAA restricts output in the sports in suit and in other sports (rather than expand it) is common to all class members.[95]

(e) The evidence related to whether prohibiting Full COA GIAs plays a role in Standard Setting is common to all class members.[96]

87. To the extent those questions are shown to be common to all class members, as was the case in *O'Bannon* and in the injunctive phase of this case,[97] the next question for certification of the damages classes is whether the impact of the restraint in suit is common to these classes. I take this up in great detail in the following section, as this issue involves new evidence and somewhat different facts than have been presented in past cases, highlighted most notably by the fact that the Court now has the benefit of a year without the Pre-2015 cap in place, and can evaluate the arguments of the parties in light of this new (and still developing[98]) evidence.

6. THE RESTRAINTS IN SUIT CAUSED COMMON IMPACT TO ALL MEMBERS OF EACH CLASS

88. In the period from 1976 through 2014, athletes on Full GIAs (as then defined) were limited to the Pre-2015 Capped GIA Level. Because the Pre-2015 restraint did not allow a school to provide a scholarship that covered the full cost of attendance, market participants experienced a short-fall relative to the Full COA level. The NCAA's expert

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[94] "…intended to help foster competitive balance within that division …" (*Joint Case Management Statement*, September 24, 2015, p. 6.)

[95] "…encouraging colleges and universities to distribute their athletics-based financial aid among a large number of student-athletes, rather than concentrating their spending on the recruitment of a handful of superstar players" (*Joint Case Management Statement*, September 24, 2015, p. 6.)

[96] "…establishing a common scholarship cap for all schools within each division…" (*Joint Case Management Statement*, September 24, 2015, p. 6.)

[97] Dr. Ordover did not claim that these elements of the liability case were anything but common. See *Rascher Injunctive Report*, ¶182.

[98] Defendants have already begun the process of making GIA offers to the next set of Division I athletes, and I anticipate that by the time of merits reports, and certainly by trial, the parties will have the benefit of a second year's worth of empirical data on adoption of Full COA GIAs.

in this matter, Dr. Janusz Ordover, explained in previous litigation how the Pre-2015 cap differed from Full COA.

Exhibit 3. Ordover's explanation of GIA and COA differences (taken from *White*)

Table 1
Components of Maximum Allowable GIA and Cost of Attendance

Component	Included in Maximum Allowable Grant-in-Aid	Included in Cost of Attendance
Tuition	X	X
Required Fees	X	X
Room and Board	X	X
Required Books	X	X
Supplies		X
Transportation		X
Personal Expenses, including rental of a personal computer		X
Child care (if applicable)		X

Sources: NCAA Bylaw 15 and http://studentaid.ed.gov

Source: NCAAGIA02216448 – 501 Corrected Declaration Of Professor Janusz A. Ordover in Support of Defendant NCAA's Opposition to Plaintiffs' Renewed Motion for Class Certification (White), p. 17.

89. Every 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. Prior to the relaxation of the Pre-2015 Capped GIA Level, no class member was able to negotiate athletic aid in excess of the Pre-2015 cap. No athlete could demand, as a condition of accepting an athletically-based GIA offer, that he/she be paid an amount of athletic aid that covered her/his transportation costs. No athlete was allowed to negotiate in advance for a non-need-based payment for supplies. This was a market-wide restraint that had direct, market-wide impact on the specific transactions in suit: the offering and agreeing to accept a GIA to play football or basketball in FBS/Division I.

90. Thus, all members of the proposed classes 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 competitive than otherwise might have been the case). For those athletes who were sufficiently in demand in the past to receive the then-maximum allowed payment from a school that has since indicated it will raise that cap, the evidence is clear that they also suffered direct pecuniary harm because they experienced a collusive shortfall they would not have, but for the alleged restraints.

6.1 HARM TO THE MARKET IS A FORM OF COMMON IMPACT

91. In an antitrust case, where the primary concern is with harm to competition itself (rather than to specific competitors), to the extent the restraint in suit changed the market structure and led to a change in the rate of compensation generally, it had an impact on every participant in the market.[99] Price fixing is inherently a whole-market phenomenon, every athlete was deprived of the ability to negotiate for Full COA. Defendants acknowledge that:

- They fixed the total athletic aid provided to class members below COA.[100]
- Athletes would have gotten more, perhaps a lot more, but-for the restraint.[101]

Empirically, thousands of athletes have gotten more once the restraint was lifted, including some even in FCS schools.[102]

92. The result of these facts is that the entire market structure has shifted, with market prices shifting monotonically upward, changing the market for everyone, both class members and all other market actors, since the adoption of the new, higher Full COA GIA.

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[99] And potentially those excluded from the market due to anticompetitive conduct.

[100] See every set of Bylaws of the NCAA from 1976 through 2014, for example.

[101] Dr. Ordover testified that "… in the event that the rules get changed and what happens, in my view, is that other schools, including the powerhouses, are going to be spending – would be spending more in the but-for world because the student-athletes, some of them will become vastly more expensive." (*Ordover Deposition*, p. 72.) See also *Ordover Injunctive Report, ¶18.*

[102] For the evidence of this, see Exhibit 6 below showing the pervasive adoption of Full COA GIAs.

Prior to 2015, no market participant was able to demand that his/her Full COA Gap be covered in exchange for his/her athletic services. No market participant was allowed to negotiate for more than the Pre-2015 Capped Grant-in-Aid Level. Even asking for more (as was the case when Cam Newton's father Cecil supposedly requested $180,000 for his son to attend Mississippi State[103]) was considered a violation of NCAA bylaws – that is, negotiation itself was banned by the restraint in suit and ancillary rules designed to enforce it.

93. The same economics are true in a monopsony case when supplier choice is limited. The restraint in suit is universal. It harmed every participant in the industry, because it is a binding constraint on the market price for athlete services. Even athletes who did not receive the maximum allowed under the Pre-2015 restraint were affected; economically, prices for inferior substitutes for Full GIA athletes (such as partial GIA recipients or walk-ons) tend to be depressed when the price of the superior product (Full GIA athletes) is capped. While these recipients of partial aid are not class members, it is worth noting that the alleged collusion harmed the market as a whole, and therefore also had economic (if not pecuniary) impact on them as well. Therefore in this section (focused on common impact) I address both the broad antitrust impact as well as the specific form of direct pecuniary impact on class members.

94. In assessing the impact of the restraints in suit on the classes I apply a benchmark methodology, also known as a before-and-after methodology.[104] This methodology begins by looking at periods of time in which the restraint did not exist, or existed in relaxed form, as comparables for how the but-for market would have behaved. To the extent that a

[103] "The documents indicate Newton's father, Cecil Newton, and ex-Mississippi State player Kenny Rogers sought from $120,000 to $180,000 for the quarterback to sign with the Bulldogs out of junior college …." See Associated Press, "Auburn releases Cam Newton docs," November 5, 2011, ESPN (espn.com), (http://es.pn/1FiKcwY).

[104] I discuss the benchmark and yardstick methods in the NCAA context at ¶¶15-17 of in *Expert Report of Daniel A. Rascher*, September 25, 2013, available in redacted excerpts in *O'Bannon* Docket Numbers 909-1 (11/22/13), 905-2 (11/21/13), 1002-3 (2/27/14).

significant portion of the Defendants' members provided compensation in excess of the Pre-2015 Capped GIA Level before 1976 or after 2014, this is strong evidence that the market during the 1976-2014 period was constrained, and therefore all participants experienced negative economic impact, especially during the period of time covered by the statute of limitations. Thus, I first lay out this evidence, and then in Section 7 demonstrate the formulaic calculation of damages that flows from the benchmark methodology.

6.2 PRE-1973 CONDUCT ILLUSTRATES THE LIKELY IMPACT IN THE BUT-FOR WORLD

95. The historical record provides evidence, common to all class members, that the restraint was binding on the market, and the payment of GIAs in excess of the cap was sufficiently prevalent to make the collective reduction down to the 1976-2014 level an effective tool for cost containment. Many Division I schools quickly saw the move as contrary to their unilateral interest and voted (in vain) to repeal it. If the restraint had not been binding, or had not been pervasive, it would not have served the stated function and it would make little sense that the period afterwards was filled with repeated efforts to end the restraint, including cases in which the majority of the NCAA members voting felt the collective outcome was suboptimal compared to the more competitive outcome, but because a super-majority was required, the restraint remained in place.

96. This history makes clear that prior to 1976, in an era where the revenue generated by college football was substantially lower (even adjusting for inflation) than it is today, demand for athletes was sufficiently high to raise the market price above the pre-2015 cap.

97. NCAA members were very clear that they felt that the unconstrained optimal price for GIA athletes was higher than the Pre-2015 Capped Grant-in-Aid Level. The historical record contains many statements by industry actors explaining that while costs felt overwhelming, if they could not agree on a more restrictive maximum level, they would find a way to incur the costs of being competitive. That is, these schools explained that they saw the best competitive response in a more open marketplace was to increase their

competitive offers for athletes' services beyond the level defined as the Pre-2015 Capped GIA Level, increasing competition in the relevant markets.

98. With the higher economic benefits that accrue from producing college football and basketball today (nearly fifty-fold increase in athletic department revenues from 1970 to 2012), with the inflation-adjusted GIAs growing at less than half that rate),[105] Division I schools' conduct in the pre-1976 relevant markets provide excellent historical evidence for establishing that the lower-bound of market prices during the damages period was above the old GIA cap.

99. However, because the evidence from the 1970s is preserved more as a historical record than a comprehensive economic database, the analysis it affords is primarily qualitative. That is, it is difficult to say with precision which schools provided laundry money, though the record makes clear that the practice was pervasive, and that the Defendants and their member schools recognized that (a) industry-wide cost savings were possible if laundry money and school supplies were eliminated from the standard GIA, which only makes sense if the practice was common across most Division I schools, (b) collective agreement was necessary if the reduction was to work, which only makes sense if schools saw a competitive disadvantage to reducing their GIA unilaterally. Ideally, the NCAA would have a record of which schools did and did not provide laundry money, but in the absence of that data, the evidence that remains provides a solid economic picture of general, market-wide adoption. I lay some of that out in the following paragraphs.

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[105] Average in-state GIAs for Class A Institutions (FBS) were $1,638 in 1969. (Raiborn, Mitchell H., An Analysis of Revenues, Expenses and Management Accounting Practices of Intercollegiate Athletic Programs, NCAA, 1970, p. 165). By 2012 average in-state GIAs for public institutions were $26,000, a sixteen-fold change (Fulks, Daniel. NCAA Division I Intercollegiate Athletics Programs Report 2004-2012, NCAA, 2013, p 18). The relevant numbers for these categories for out-of-state GIAs were $2,042 and $39,000 (nineteen-fold change).

For the 10% figure, compare an analysis of NCAA members financials, Raiborn shows median athletic department revenues at $1.161 million in 1970 (Raiborn, Mitchell H., "Revenues and expenses of intercollegiate athletic programs," 1978, at 126) and at $55.976 million in 2012 (Fulks, Daniel L., "Revenues and Expenses, 2004-2012, NCAA Division I Intercollegiate Athletics Programs Report," April 2013, p.17).

100. Even before the GIA itself had been defined in the 1950s, laundry money was commonly provided. Legendary LSU quarterback, Y.A. Title received laundry money prior to the imposition of the "Sanity Code":

> "… A hot topic lately is salary-like payments to college football players because colleges and college coaches are making money by the multi millions because of rich television contracts. … Players were not paid salaries, but they still earned money in the early days in addition to their scholarship, which bestowed books, tuition, room and board. At this time, each athlete, including those in non-football sports, received $15 a month for walking-around money and to cover incidentals like laundry. These stipends, which became known as 'laundry money,' came in very handy.
>
> 'It gave us a chance to have a Coke or go to a movie or buy a hamburger or a beer,' Y.A. Tittle, who was LSU's quarterback from 1944-47 before a Hall of Fame NFL career, said in a phone interview from his San Francisco home."[106]

101. During the "Sanity Code" era, when all payment, including laundry money, had been banned:

> "The major southern conferences – the Southern, Southeastern, and Southwest Conferences – gathered in May 1949 ...to discuss whether the Sanity Code served the needs of southern schools. The conclusion was that it did not, that financial aid should be increased to include not only tuition and fees but also room, board, books and laundry expenses. The three conferences even discussed withdrawal from the NCAA, considering if any one conference could do so and compete successfully."[107]

102. Other evidence of the pervasiveness of the practice includes the statements of many athletes from the time who received laundry money. Among them are Defendant Big Ten Commissioner Jim Delaney.[108] In 1974, the Stanford Daily quoted former Ohio State quarterback Rex Kern:

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[106] "Veterans mixed on paying college players," The Times (Shreveport, LA), July 17, 2011. ("Veterans mixed on paying college players.pdf")

[107] Smith, R.A. (2011). Pay for Play. Urbana, Chicago: University of Illinois Press, p. 97. Emphasis Added.

[108] "Delany spoke about the decision to eliminate the laundry money in 1972 [sic], "The first thing they did was they cut out the $15 a month laundry money. Now, I had graduated two years before, but I can tell you **that $15 a month was about two-thirds of my cash** between the money I got from my mom and dad at home and that $15." Emphasis added. See Sterling, Kent, "Big Ten commish Jim Delany calls

> "'If you took a football scholarship, which covers room board, tuition, books and laundry money,' said Rex Kern when he quarterbacked Ohio State, 'and put it on a job scale, we probably make less than a dollar an hour. There are days you simply don't want to do it.'"[109]

103. Many of the iconic coaches of the previous or current generation were college athletes in the pre-1976 period. Their own receipt of laundry money is well documented and additional evidence that each class member could bring to bear on the question of impact to show the pervasiveness of the practice. Examples include Frank Beamer (Virginia Tech football),[110] Gary Williams (Maryland basketball),[111] Jim Boeheim (Syracuse basketball),[112] Phil Fulmer (Tennessee football),[113] Ralph Friedgen (Maryland football),[114] Melvin Watkins (UNC-Charlotte basketball),[115] Ray Greene (Akron

for student-athlete stipends," July 25, 2013, The Kent Sterling Show, CBS Sports (kentsterling.com), http://bit.ly/1R3ekBH).

[109] Heimlich, Philip, "Source of problem: The four-year rule," May 3, 1974, The Stanford Daily (stanforddailyarchive.com), (http://bit.ly/1SP2pv0).

[110] "Payday was revered. 'When I went to pick up my $15,' said Virginia Tech football coach Frank Beamer, a player with the Hokies in the 1960s, 'it was an important time for me.'" See Johnson, Dave, "Laundry money debate in wash again," April 4, 1990, Daily Press (dailypress.com), (http://bit.ly/2442ZIH).

[111] "The figure Williams suggested was $200 a month -- based, he said, on the fact that when he played at Maryland in the mid-1960s, he and other athletes got $15 a month spending money as part of their scholarship." See Steele, David, "Maryland's Gary Williams: colleges can pay players, and should," September 22, 2010, AOL NCAA Basketball Fanhouse (ncaabasketball fanhouse.com), (http://bit.ly/1PVvUsq), retrieved November 24, 2010.

[112] "When Boeheim played for Syracuse in the early 1960s, he received $15 a month for "laundry," a nationwide practice…" See Lawrence, Mitch, "Pay to play or not pay to play," July 7, 1985, The Day (theday.com), (http://bit.ly/1QfN5qF and http://bit.ly/1RDzgkZ).

[113] "A good numbers of years back, coaches were just not paid to the level that they're paid now," he said. "There wasn't that much money brought in outside of attendance, and that's not the case now. A number of years ago it was a scholarship and $15 – for us, it was called laundry money." See McIntyre, Jason, "Phillip Fulmer agrees with Steve Spurrier: Time to pay college football players," June 2, 2011, The Big Lead (thebiglead.com), (http://bit.ly/1R3h0iO).

[114] Duggan, Dan, "Rutgers coach Kyle Flood against pay-for-play, but favors more benefits for players," May 5, 2014, NJ (nj.com), (http://bit.ly/1WlJe9W).

[115] "Older coaches remember fondly the $15 stipend they received as college players. The NCAA outlawed the stipend -- called "laundry money'' -- in a cost-cutting move in 1973. "We lined up and couldn't wait to get that check,'' said Texas A&M coach Melvin Watkins. "I would have no problem with (paying athletes) at all. I know they say we've got a valuable scholarship, but they're putting in a lot of time.''" Associated Press, "Athletes deserve their share, survey says," February 24, 2003, ESPN (espn.com), (http://es.pn/1PLqQ6m).

football),[116] Steve Fisher (Division II [at the time] Illinois State basketball),[117] Gene Stallings (TAMU football),[118] Dan McCarney (Iowa football),[119] Steve Spurrier (Florida football),[120] Frank Broyles[121] and Barry Switzer[122](Arkansas football), Mack Brown (Florida State football),[123] Mike Clark (Cincinnati football),[124] Billy Tubbs (Lamar basketball),[125] Nolan Richarson (UTEP basketball),[126] and Lou Henson (New Mexico State basketball).[127] Athletes who have left the industry, including Senator Richard Burr (Wake Forest football), novelist Pat Conroy (Citadel basketball),[128] high school teacher Will Hetzel (Maryland basketball),[129] Jim Kennedy (Missouri basketball),[130] Rex Kern (Ohio

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[116] Grotjahn, Jessica, "Former AAMU head coach talks about game changers," September 5, 2015, WHNT News (whnt.com), (http://bit.ly/1QfOJZo).

[117] Schwartz, Michael, "Changing the NCAA: a case for the Olympic model," September 3, 2013, SDSU Sports MBA Blog (sportsmbablog.com), (http://bit.ly/1ThzMFh).

[118] McCarter, Mark, "What does former Alabama coach Gene Stallings think about talk of unionizing players," March 28, 2014, AL (al.com), (http://bit.ly/20xDJWI).

[119] Associated Press, "Most coaches recommend compensation for players Big 12 coaches teleconference," September 23, 2003, Amarillo Globe-News (amarillo.com), (http://bit.ly/1QBucZs).

[120] Paige, Woody, "Paige: Pay-for-play? Area college football coaches are on board," June 10, 2011, The Denver Post (cubuffs.com), (http://bit.ly/1SP5Jq6).

[121] Lowitt, Bruce and Hal Bock, "Bottom Line In $Candal$ Comes Down To Dollars," Lexington Herald-Leader, December 1, 1985. ("BOTTOM LINE IN $CANDAL$ COMES DOWN TO DOLLARS.pdf").

[122] Durning, Dan, "Barry Switzer's bottle boy: the Arkansas years," October 5, 2013, Eclectic (At Best) (eclecticatbest.com), (http://bit.ly/1PVCEGA).

[123] Humes, Mike, "College football: transcript of media conference call with Mack Brown and Danny Kanell," August 26, 2014, ESPN Media Zone (espnmediazone.com), (http://es.pn/1Tk3F9b).

[124] "Pay for play? Here's one coach's take," July 19, 2011, D3football.com (d3blogs.com), (http://bit.ly/1ThCpH5).

[125] Lawrence, Mitch, "Making Allowances: Majority of Division I College Coaches Favor Stipend for Student-Athletes," March 31, 1986, Dallas Morning News. ("MAKING ALLOWANCES Majority Of Division I College Coaches Favor Stipend For Stude.pdf").

[126] Barnhouse, Wendell, "Spectacle of Final Four Showcase Stirs Debate on Money for Players," April 3, 1995, Tulsa World. (Spectacle of Final Four Showcase Stirs Debate on Money for Players.pdf).

[127] Ed Sherman, "Paying Athletes Out of the Question, Schools Say," Chicago Tribune, March 26, 1991. ("PAYING ATHLETES OUT OF THE QUESTION SCHOOLS SAY.pdf").

[128] Conroy, P. (2011). *My Losing Season: A Memoir*. New York: Dial Press Trade Paperbacks, pp. 122-123.

[129] "'I was fortunate enough to come from a family with money,' Hetzel says. 'But some of the guys were basically starving, and they worked so hard. Really, the $15 they gave for laundry money wasn't enough.'" See Richardson, Nicole, "Former player returns for doctoral degree, recalls ups and downs with team," March 5, 2002, Maryland Newsline (newsline.umd.edu), (http://bit.ly/2449SJX).

[130] Underwood, John, "The Student," April 5, 1976, Sports Illustrated (si.com), (http://on.si.com/1LoHOW8).

State football),[131] and Louisiana legislator/secretary of state Jim Brown[132] (University of North Carolina) have spoken of their receipt of laundry money as a college athlete.[133] Oregon,[134] Weber State,[135] and Alabama[136] athletes were given laundry money.[137] An article in a Duke University law journal from 1973 noted that "the majority of student-athletes are purchased by university-firms in the NCAA for the standard 'full ride' (tuition, room, board, books, and $15 per month for 'laundry money')."[138] A 1974 article in a La Salle University quarterly magazine discusses scholarship usage in the athletics department, noting how "standard" laundry money was: "These standard NCAA grants cover tuition, room and board, fees, and $15 per month laundry money."[139]

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[131] Heimlich, Philip, "Source of problem: The four-year rule," May 3, 1974, The Stanford Daily (stanforddailyarchive.com), (http://bit.ly/1SP2pv0).

[132] Brown, Jim, "College Football Heaps Up Cash; Players Get Scraps," April 3, 2014, Bayou Buzz (bayoubuzz.com), (http://bit.ly/1Oai8N5).

[133] "At Wake Forest, let me say, today a scholarship is worth $45,600 in tuition in fees, $15,152 in room and board, $1,100 in books. I will say to my good friend from Tennessee, I am not sure if there is still $15 of laundry money a month that exists under a scholarship. That is what it was when I was there. I daresay I hope it is more than that today because I do not think you can do laundry for $15 a month." See Burr, Richard, and Lamar Alexander, "Transcript of comments from U.S. Senators Richard Burr, Lamar Alexander," April 11, 2014, NCAA (ncaa.org), (http://on.ncaa.com/1gmGtCY).

[134] "I noticed the note and the checklist posted outside the equipment room. The Oregon Ducks were reminded to pick up their 'laundry money.'" See Terry Frei, "Scholarships should come with stipend, not whining," Denver Post, August 3, 2003. ("Scholarships should come with stipend not whining.pdf").

[135] "At Weber, we were allowed to grant scholarships for room and board, books and tuition and $15-a-month laundry money. The university issued a check for the laundry money and the players had to come to my office to get it." See Hubert Mizell, "No Sense Paying Amateurs," St. Petersburg Times, May 10, 1994. ("NO SENSE PAYING AMATEURS.pdf").

[136] There is evidence that all Alabama football players on the 1958 team received laundry money. See Barra, A. (2005). See *The Last Coach*. New York: W.W. Norton & Company, p. 212. There was laundry money at Southwestern Louisiana Institute too. See also "J.C. Reinhardt," Louisiana Sports Hall of Fame (lasportshall.com), (http://bit.ly/1WlQNNF).

[137] There is evidence that Florida State and/or West Virginia gave players laundry money: "'Even back in the 1960s we gave them books, tuition and $15 a month and called it laundry money,' said [Bobby Bowden] the coach of the nation's top-ranked team. 'We did it back then and nobody thought about amateur status.'" See "Major's Back Home, But This Year's Pitt is World Away from His Champs," Chicago Tribune, September 19, 1993. ("MAJOR'S BACK HOME, BUT THIS YEAR'S PITT IS WORLD AWAY FROM HIS CHAMPS.pdf").

[138] Koch, J.V. (1973). A troubled cartel: the NCAA. *Law and Contemporary Problems, 38*(1), p. 140.

[139] Beans, B. (1984). Don't they block traffic on Olney Avenue Anymore? *La Salle Magazine, 18*(2), p. 18.

104. Moreover, it is my understanding that discovery with respect to the NCAA's historical archives that relate to the question of the maximum GIA and the debate around revoking laundry money is not yet complete. When discovery is complete, I anticipate even more common evidence will be available as to the impact of the imposition of the restraint and of the more open market that existed prior to 1976.

6.2.1 The 1975 vote to establish the prohibition on paying COA was explicitly and exclusively aimed at collective cost containment

105. Although it is likely the Defendants will offer a series of procompetitive justifications for the restraints in suit, the historical record makes clear that these justifications were not expressed until well after the fact. While sometimes economic actors have incentives to misstate their intentions – to emphasize a positive justification for undertaking an otherwise negative action – the statements by the Defendants and their member schools through the 1970s and 1980s go *against* that incentive by demonstrating the negative: the anticompetitive intent of cost containment.

106. The restraint in suit was adopted at the NCAA's 1975 Second Special Convention which the NCAA Council had called specifically "to consider proposals and questions with regard to economy."[140] The proposal aimed to reduce the value of a GIA by removing both "course-related *supplies"* and *"incidental expenses not in excess of fifteen dollars per month"* (a.k.a. "laundry money") from the allowable compensation to athletes.[141] The vote was "approved by a show of paddles" and it was sufficiently obvious that the measure had sufficient votes that no tally was taken or recorded.

107. This vote at the "Second Special Convention" did not come out of nowhere. From approximately 1968, the NCAA and its members had expressed a strong desire to find

[140] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384361.

[141] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384403. Italics in original as a means of noting these are deletions from the bylaws.

means of collective agreement to contain costs,[142] as explained by J. Neils Thompson, a representative of the University of Texas, Austin (on behalf of the NCAA Council):

> "For a substantial number of years – extending back to 1968 – a number of college administrators have urged athletic leaders to address themselves to cost factors . . . You may recall that the NCAA appointed a special committee to deal with some of these issues, under the chairmanship of William J. Flynn, Boston College, and that committee, in 1971, recommended many of the measures which were finally presented for a vote at the Second Special Convention this summer in Chicago. … It was at the 66th Convention that the NCAA at Hollywood, Florida, in January 1972, postponed certain economy proposals until reorganization [of the NCAA into divisions] could take place and that eventually led to the First Special Convention of the NCAA in Chicago, August 1973, to bring about divisional reorganization…. My point here is that this history inevitably led us to considering detailed economy measures once reorganization was accomplished and, against that history, it is understandable why the membership would press forward to address these problems of cost savings."[143]

108. As Dean Smith (former UNC basketball coach) put it "the 1972 NCAA convention—known as the "cost-saving convention"—resulted in changes to college athletics that in my opinion have been harmful to student-athletes."[144]

109. As part of this movement, on April 24-25, 1975, the NCAA convened a "Special Meeting" in Kansas City, where its headquarters were then located. The special meeting's topic was "Economy in Intercollegiate Athletics"[145] and "Approximately 50 persons from representative colleges and universities across the nation were invited to this meeting to discuss ways and means of effecting economies in intercollegiate athletics."[146] Among the

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[142] This same process also led to the restraints to "Place limitations upon the number of athletically-related scholarship and grants-in aid which may be awarded by a member institution" and "Limit financial aid award to a period of one year" (*NCAA Convention Proceedings 1972 66th Annual Convention* (NCAAGIA000384226-345, here NCAAGIA000384338-39) which are the subject of separate litigation (*Rock*).

[143] *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351289.

[144] Smith, D, Kilgo, J., and Jenkins, S. (2000). A Coach's Life: My Forty Years in College Basketball. New York: Random House, p. 279.

[145] NCAAGIA00045390. As a history commissioned by the NCAA explains: "Concern about spiraling costs prompted the NCAA to schedule the second Special Convention in Association history for summer 1975. Cost-containment alternatives dominated the agenda." See AB06.pdf

[146] NCAAGIA00045391.

means of achieving this goal that were proposed was "A removal from 'commonly accepted' educational expenses of the $15 per month allowance and supplies."[147] My understanding is that it was at this meeting (convened specifically to address cost containment), that the restraint in suit was proposed for the consideration by the NCAA Council[148] and afterwards was sent to a full membership vote at the Second Special Convention.[149] As was made clear to all:

> "The agenda for this Convention in August was specifically limited to proposals which could effect economies in athletics."[150]

110. When August arrived, then-NCAA President John A. Fuzak of Michigan State University opened the Second Special Convention with a specific rallying cry to the membership on the need for collective cost reduction in disregard of each school's unilateral optimal interest:

> "Due to the intense competitive nature of the intercollegiate athletics, it seems the only way to successfully curtail costs is at the national level…. The NCAA, to be an effective instrument, must adopt measures to curtail costs which may well guarantee the continuation of intercollegiate athletics. … We 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

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[147] NCAAGIA00045393-94.

[148] NCAAGIA0004593.

[149] "The 69th NCAA Convention last January [1975] mandated the Association to hold a special meeting on economy and intercollegiate athletics. This meeting was held in April [1975] in Kansas City. From that meeting came the call for the Second Special Convention which was held in Chicago in August [1975]. The agenda for this Convention in August was specifically limited to proposals which could effect economies in athletics." From *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351272.

[150] *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351272. Emphasis added. See also NCAA News July 1975.pdf: "The Special Convention grew out of the Meeting on Economy, which was attended by representatives of the three divisions of the Association in April. A substantial number of proposals were recommended to the Council for submission to the membership, due to the economic pressures on intercollegiate athletics and higher education. The Council held a special meeting in June to review the proposed legislation, which has been placed in the topical groupings of **financial aid and maximum awards**; recruiting; personnel and squad limitations; playing and practice seasons; income distribution; and miscellaneous. … 'The agenda for the Special Convention is limited to legislative proposals directly related to economy issues affecting a substantial segment of the membership, or of a division,' said President John A. Fuzak." (emphasis added)

> intercollegiate athletics may survive. It is probably better to cut off the hand than to die."[151]

111. Arkansas's Ross J. Pritchard colorfully described the economically competitive outcome that would result without collective cost controls as:

> "… rambunctious urges to keep up with the competition, the escalating belief, if we can match bigger athletes, staffs, equalize more intensive programs of recruiting, provide a more extravagant set of facilities, the belief that those that play in blue shirts will fill our stadiums or arenas and our pocket books. In all of this is a peculiar regeneration of expected difficulties not unlike the drunk who increases his drinking to forget he is a drunk."[152]

112. This refrain that schools put to the side their economic self-interest in the name of collective cost containment – a textbook example of collusive anticompetitive conduct – was also included in a summary of the "Division I Round Table" also held on August 14, 1975:

> "Several delegates expressed their appreciation to the NCAA Council for calling a special Convention to consider proposals and questions with regard to economy. All members were encouraged to set aside special interests which might be affected by the proposed amendments so that meaningful legislation could be adopted to cut costs in intercollegiate athletics."[153]

113. Many delegates spoke of the proposal as means of cost containment. For example, Mike Mullally, a representative of Eastern Illinois University, stated that

> "I am going to discuss a couple other proposals that were submitted, and those were to eliminate the $15 a month incidental for laundry money, and some of the other incidentals or related educational expenses. Now, to eliminate these is fine. We will save money, that is true…"[154]

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[151] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384359.

[152] *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351324.

[153] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384361.

[154] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384366.

114. Hollis Moore of Bowling Green University (a member of Defendant MAC) summed up the point: this was not about growing consumer demand and revenue – it was purely about finding the spot the schools could maximize their cost savings:

> "We know that the generation of new income is unlikely, if not impossible. It is only the number of grants, the source of funds and the revised basis for grants that any real economies can be made. For most of us, a good many of the other proposals here are nickel and dime stuff, when we are talking about real dollars, we are talking about grants-in-aid."[155]

115. To my knowledge, none of the delegates expressed any of the purported procompetitive benefits the NCAA has proposed in their filings in this (and other) matters. Specifically, I looked in vain for <u>any</u> mention of <u>any</u> consumer benefits from the reduction in the maximum allowed GIA.[156] Instead, what was common was to see delegates (such as Duke's Carl James), decry the elimination of money for personal expenses and supplies as being insufficiently draconian:

> "I think we have a tremendous obligation to go away from this Convention not with savings on books and supplies and eliminating coaches and sports, participation, I think we need to get involved with saving big dollars."[157]

116. It should be said that some members recognized the perils of collective cost containment. Nebraska's Keith Broman warned that how much each school should spend ought not be a collective decision, and could lead to the NCAA making decisions better left to individual members:

> "We are here to institute economy in intercollegiate athletics. . . . It seems we have to reduce expenditures, but I think we should reduce expenditures in our own ways. . . . Those rules, if adopted, it seems to me, lead to the dismissal of institutional control. I believe the NCAA

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[155] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384367.

[156] Discovery is not complete in this matter and I look forward to the opportunity to review any more of the historical record in Defendants' possession not yet produced for any evidence of contemporaneous assertion of the purported pro-competitive rationales for the restraints in suit.

[157] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384368.

> Council has used our common goal of economy as a means to gaining greater control for intercollegiate athletics."[158]

117. Despite this warning, the majority of the Defendants' and their co-conspirators paddles were lifted in anonymous approval of collective cost containment and thus began the forty year history of this specific version of the restraint in suit.

6.2.2 Post-1975 efforts to relax the restraint were repeatedly rejected by collective agreements (votes) of the Defendants and other NCAA members

118. Almost as soon as the restraint was passed, some schools recognized it had negative consequences for the industry and their individual schools. Father Edmund Joyce of Notre Dame University made it clear the level of compensation had been set well below the market rate:

> "[Parents of recruited players] know as well as we do that their son's efforts will generate far more revenue for the school than the cost of his grant-in-aid."[159]

119. Father Joyce also explained why athletes in the sports of football and basketball were fundamentally different from athletes in other sports, even prior to the explosion of television revenue in the wake of Board of Regents:

> "I can find no justification in my own mind for using operating or endowment income to bring in a good wrestler at the cost of losing a fine mathematician. In Division 1, however, you have an entirely different situation, particularly in those institutions which have major programs in football and basketball. To understand this, you have to be prepared to admit that college football and basketball are unique phenomena on the American cultural scene. This is openly deplored by some presidents, begrudgingly accepted by others and enthusiastically embraced by practically none. … we do have a unique situation in regard to college football and basketball, and the competition for all national recognition among our institutions is continuing and fierce.

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[158] *NCAA Convention Proceedings 1975 2nd Special Convention* (NCAAGIA000384346-443), here NCAAGIA000384390.

[159] *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351330.

> The starting point of this competition is in the recruiting process. … Remember, we are talking about outstanding athletes, each of whom is being recruited by anywhere from five to 15 institutions."[160]

120. Iowa State explained that the services required from an athlete were increasing in value even as the payment provided was being reduced: "Since 1952 we have put in room, board, books and tuition and $15 a month. At that time we only played nine football games, and we asked the football player to come out September 1st. Now, we ask the football player to lose the month of August, because he cannot work."[161]

121. Despite this disparity between the value of the services provided and the capped price offered, efforts to end the restraint were rejected in 1976,[162] 1977,[163] 1978,[164] 1979,[165] and again in 1980.[166] As part of the 1980 proposal, Chuck Neinas of the Big Eight spoke in favor of a relaxation of the restraint in suit:

> "As you are aware, the Association's membership voted in 1973 [sic] to eliminate the $15 per month incidental allowance. We all recognize that $15 did not have the same purchasing power in 1978 [sic] as it did in 1952. In fact, a review, based upon an economic evaluation, indicates an individual would need approximately $45 today to equal the same purchasing power of $15 in 1952. The Big Eight Conference recently conducted a survey of its membership in an attempt to determine the difference between the listed cost of education, as published in each

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[160] *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351330.

[161] *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351314.

[162] Proposals 104 and 105 from *NCAA Convention Proceedings 1976 3rd Special Convention and 70th Annual Convention* (NCAAGIA000351258-452), here NCAAGIA000351334.

[163] "In 1977, two such proposals were defeated. One would have reintroduced course-related supplies and incidental expenses; the second would have permitted receiving the use of books and nonexpendable supplies and would have specified that the fees included in the limit were mandatory fees." (NCAAGIA00045522-26)

[164] "The second proposal was reintroduced in 1978 and came close to being approved. The amendment gained a 204-105 majority; however, a two-thirds approval was necessary for it to be adopted." (NCAAGIA00045522-26)

[165] "In 1979, the vote was 281-165, but still short of the two-thirds needed." (NCAAGIA00045522-26)

[166] "In 1980 … the Big Eight Conference suggested adding a $50 per month allowance for incidental fees. The proponents argued that if $15 per month was considered equitable in 1952, $45 would be a comparable figure today due to inflation. After the proposal received a cynical comment that the benefit be extended to all students and a serious argument that the institutions' existing financial burdens should not be increased, it was defeated." (NCAAGIA00045525)

> institution's catalog, and the maximum allowable financial assistance permitted pursuant to the NCAA Constitution.
>
> The listed cost of education in each instance was substantially higher than the permissible full grant award as authorized by the NCAA. The average difference between the catalog cost and a full athletic grant was approximately $800. I would recommend to those of you assembled that when you return home you may wish to run a similar survey. We are fully aware of the impact of Title IX, inflation, declining enrollment in the '80s, and the status of the economy.
>
> We recognize, however, that there is a need to consider the needs of today's student-athlete. Consequently, the Big Eight Conference has voted to sponsor legislation designed to increase the permissible grant award by authorizing a $50 per month incidental fee."[167]

122. Despite Neinas's appeal, the measure was defeated and the restraint remained in place. Two years later (1982), the National Association of Basketball Coaches (NABC) proposed "An amendment to Constitution 3-1-(g)(1) to add a monthly incidental-expense allowance of $50 to the permissible grant-in-aid,"[168] but the NCAA "... Council voted not to sponsor the NABC proposal."[169]

123. The restraint remained in place and further efforts to end the practice were pushed to the 1985 NCAA Convention. In preparation:

> "…[a] special committee authorized Division I financial aid officers to compare the portion of total cost of education that is met by the current NCAA restrictions with the total cost of attendance. Surveys indicated that the current maximum grant-in-aid was $1,400 less than the total cost of education, generally thought to be due to 'miscellaneous personal expenses' and 'transportation' expenses."[170]

124. Despite these findings, the restraint once again remained in place. In 1986, a subcommittee of the NCAA's Committee on Infractions resolved to consider "appropriate definitions of actual expenses of attending college and … discuss whether there is a desire to increase the amount of an athletics grant-in-aid to provide money for identified,

[167] NCAAGIA000351762.
[168] NCAAGIA000383417-585.
[169] NCAAGIA000383542.
[170] NCAAGIA00057122.

necessary expenses beyond the tuition and fees, room and board, and course-related books currently permitted by NCAA legislation."[171] In 1987, the NCAA conducted a survey of financial-aid officers at its members schools which indicated that, *inter alia*, "grant-in-aids [sic] should include personal expense items."[172] In spite of these studies' conclusions, the restraint remained in place.

6.2.2.1 Over time, the focus shifted from laundry money to the full cost of attendance and new arguments against COA were introduced

125. From 1987 onward, debate within the NCAA focused specifically on the gap between COA and GIA, i.e., the collusive shortfall alleged by Plaintiffs in this matter to be the anticompetitive harm from the alleged antitrust violation. Debate was taken up anew in 1988. Members of the NCAA Presidents Commission received a memo on "Financial Aid" stating that

> "[t]he proper basis of financial aid for student-athletes has been a topic in intercollegiate athletics for decades . . . should student-athletes be paid so they share in the moneys [sic] they help generate for the institution? Should they at least be awarded a stipend or 'laundry' money in addition to tuition, fees, room, board and required books (plus Pell Grant money for those who qualify for it)?... The committee is reviewing such matters as actual cost of attendance at institutions, methods of determining need, how aid is generally administered to student bodies, the pressures placed on the system by athletics, the cost-saving implications for athletics, and whether student-athletes should receive more aid than they generally do now; then it will determine what recommendations it wishes to make to the Association."[173]

126. The memo serves as a reminder that the stated focus of those advocating in favor of the restraint had always been, and remained, on "the cost-saving implications" rather than the purported pro-competitive justification advanced by Defendants in litigation.[174]

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[171] NCAAGIA00046827.

[172] NCAAGIA00057122.

[173] NCAAGIA00047170. Emphasis added.

[174] For example, a June 17, 1988 memo to the "NCAA Council" explained that "cost containment" was a factor in the GIA rules, but did not mention consumer demand. (NCAAGIA00043252)

However, around the same time, another NCAA member introduced a new argument that I have not seen in the historical record prior to 1988:

> "Since its initial meeting in July 1987, the NCAA Committee on Financial Aid and Amateurism has devoted a significant portion of its time to a review of appropriate financial aid limitations for student-athletes. … The committee also decided not to recommend amendment of current NCAA legislation to permit a student-athletes to receive a stipend or other financial assistance beyond the value of tuition and fees, room and board, and required course-related books without consideration of the recipient's financial need. …. It was the opinion of the committee that any such award **would be inconsistent with the basic principles and philosophy of the NCAA** set for the in the Association's constitution, **including the principle of amateurism and the concept that student-athletes should be representative of the student bodies at the institutions they attend**. Further, the award of such additional financial assistance would be inconsistent with the general approach of conforming the amount and type of financial assistance awarded to student-athletes with financial assistance provided to students generally."[175]

127. Over a decade after the initial passage of the restraint, as best I can tell this was the first mention of that prohibiting Full COA GIAs was necessary to preserve "amateurism" though there is still no mention of consumers, consumer demand, or any method of improving the popularity of the sport in the historical documents I have reviewed from the twentieth century.

128. By 1989, with the restraint in place, Lehigh University President Peter Likins, a member of the NCAA Presidents Commission, recognized that the then-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."[176] Nevertheless, Likins explained:

> "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."[177]

[175] NCAAGIA00043252 – 256, at 252-253.
[176] NCAAGIA00335719.
[177] NCAAGIA00335720.

129. No mention was made of benefits to consumers, and the restraint remained in place into the 1990s. Early in 1990, Nebraska Coach (and later U.S. Congressman) Tom Osborne made a series of proposals to the College Football Association, a group of many of today's Power 5 Conference schools:

> "He presented six proposals that he said would better the lives of college football players. He said starting with the elimination of $15 per month laundry money from athletic scholarships in the early 1970s, the players have taken the brunt of cost-cutting measures.
>
> One of Osborne's more controversial proposals said that 10 percent of $75 million in bowl money should be directed to a fund that would give football players a $75 per month stipend."[178]

When it came time for the full NCAA to meet, "Osborne's $75 a month plan was not on the agenda for consideration." But "cost-reduction" was.[179]

130. In 1997, by then over twenty years since the restraint was first agreed-upon, Art Cooper, a member of the "Prop 62 Ad Hoc Committee" advocated for its relaxation:

> "… we should never have done away with the $15 laundry money and we ought to restructure the grant in aid so that it is again included, inflated up to a realistic present value."[180]

Yet the restraint remained in place.

131. In 2002, then-NCAA President Cedric Dempsey "discussed the possibility of adding $2,000 in cash to athletic scholarships."[181] Dempsey's term as president was not

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[178] Asher, Mark, "NCAA convention took steps for student-athletes," January 15, 1990, Los Angeles Times (latimes.com), (http://lat.ms/1WlTfUA).

[179] Asher, Mark, "NCAA convention took steps for student-athletes," January 15, 1990, Los Angeles Times (latimes.com), (http://lat.ms/1WlTfUA).

[180] NCAAGIA00032482 – 94.

[181] "Pacific-10 Conference Commissioner Tom Hansen said … 'there is also a fairly unanimous feeling in Division I that there needs to be a significant program for student-athletes. Increasing the value of the scholarship is one consideration that would be prominent in any discussion' … Metro Atlantic Conference Commissioner Rich Ensor … said yesterday that during a meeting … last month, NCAA President Cedric Dempsey discussed the possibility of adding $2,000 in cash to athletic scholarships." See "*NCAA Ponder Paying Athletes: TV Rights Money Spurs Discussion*," Mark Asher, Washington Post, November 20, 1999.

renewed. In the following year, 2003, new NCAA President Myles Brand wrote a letter to the editors of the *Denver Post*, stating that:

> "Ideally, the value of an athletically 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. The Division I membership, which is where the final decision will be made, will continue to address the issue over the next several months."[182]

132. Brand's statement confirmed that the restraint was determined collectively by the members of Division I, including each of the Defendants in this matter. He later added that eliminating the rules preventing payment of Full COA GIAs "strikes me as a reasonable approach."[183] Despite Brand's endorsement of a relaxation of the restraint, the restraint remained in place.

133. In this time period, the NCAA and its members evaluated two different proposals, one known as "Proposal 2002-83-A" and the other as "Proposal 2002-83-B." The former only allowed aid above COA for purely non-athletic reasons, the latter "…would have allowed grants-in-aid to be awarded up to cost-of-attendance."[184] The former was approved and went into effect in August 2004, while the latter was "tabled" (i.e., not approved) and to my knowledge was never re-voted upon.[185]

6.2.2.2 White v. NCAA

134. In the wake of having tabled Proposal 2002-83-B, which would have allowed Full COA GIAs, the NCAA was sued by a class of plaintiffs led by Jason White of Stanford University, alleging that the restraint in suit in this matter was anticompetitive along lines

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[182] Myles Brand, *Welfare of Student-Athletes NCAA's Top Priority*, Letter to the Editor, Denver Post, Aug. 17, 2003.

[183] Alesia, Mark, "Tourney Money Fuels Pay to Play Debate: Fewer than 1% of Athletes Help Make More than 90% of the NCAA's Money," April 1, 2006, Indianapolis Star (indystar.com), (http://bit.ly/20xUuRI).

[184] NCAAGIA02200121-137 (Declaration of Lynn Holzman, *Jason White, et al. v. National Collegiate Athletic Association*, October 20, 2007), ¶53.

[185] NCAAGIA02200121-137 (Declaration of Lynn Holzman, *Jason White, et al. v. National Collegiate Athletic Association*, October 20, 2007), ¶55.

similar to this matter. As best I have been able to determine, this was the first time the NCAA ever advanced the theory that consumer demand for college sports hinged on capping GIAs thousands of dollars below the full cost of attendance.[186] In the spotlight of litigation, the cost savings arguments of the first thirty-some years of the enforcement of the Pre-2015 Capped Grant-in-Aid Level were reduced in importance (though not fully abandoned[187]) and replaced with claims, such as that advanced by Professor Jerry Hausman that "The NCAA's rules are necessary for the differentiation and quality of the college athletics product."[188] Professor Hausman went further, claiming that many elements of COA are not educational and the mere mention of money during the college-choice process would harm amateurism:

> "… the GIA Rule helps to preserve amateurism by maintaining the discussion between prospective SAs and recruiters at the level of the needs of a college education rather than about remuneration. Since the COA Rule includes elements that are not as closely tied to the costs of a college education (e.g. laundry money or other personal expenses, which would be incurred regardless of whether a person is in or out of college are also more subjective and less well-defined), the COA Rule would introduce discussions of the amount of compensation, which would in turn harm the concept of amateurism."[189]

135. Similarly, Lynn Holzman claimed that the proposal to adopt Full COA GIAs was rejected, *inter alia*, because of "concerns of amateurism."[190]

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[186] See for example the Declaration of Lynn Holzman, where she explains that the proposal to adopt Full COA GIAs was rejected, inter alia, "concerns of amateurism."

[187] Professor Hausman argued that "Since many colleges lose money on athletics generally, and many lose money on their football and men's basketball programs specifically, cost is an important economic consideration in the decision [by schools] to participate in DI-A football and DI basketball" and that as a result "… poorer schools would not be able afford the costs of being in these divisions."
See NCAAGIA02216105 - NCAAGIA02216171 (Expert Report of Professor Jerry A. Hausman (*White*), September 6, 2007), p. 14, 19.

[188] See NCAAGIA02216105 - NCAAGIA02216171 (Expert Report of Professor Jerry A. Hausman (White), September 6, 2007), p. 6. Emphasis added.

[189] See NCAAGIA02216105 - NCAAGIA02216171 (Expert Report of Professor Jerry A. Hausman (White), September 6, 2007), p. 30.

[190] NCAAGIA02200121-137 (Declaration of Lynn Holzman (*White*), October 20, 2007), ¶54).

136. The NCAA itself argued that paying COA constituted "pay-for-play" saying the rule prohibiting the payment of Full COA had:

> " … substantial, certainly 'plausible,' procompetitive effects, to: prevent 'pay-for-play'; ensure that student-athletes are students first; protect the NCAA's unique, amateur model of competition for the benefit of consumers and student-athletes; promote competitive balance among schools with widely varying budgets; and establish a clear line its members can understand and follow and prevent the introduction of discretionary expenses more subject to abuse."[191]

137. The NCAA similarly argued that a rule allowing Full COA GIAs was "not a viable … means of achieving the procompetitive benefits that the NCAA's [then] current financial aid rules provide."[192]

138. Contrast these prediction with the simple evidence of reality: the 2015-16 recruiting season was conducted successfully, despite colleges paying their athletes full COA GIAs, and discussing the size of the payment during the recruiting process. To the extent Dr. Hausman was correct that these actions harmed the consumer demand by damaging the concept of "amateurism," then Defendants have been violently harming "amateurism" for the last year and no one has seemed to notice or care. Even absent the pre-2015 restraint, college athletics remains distinct from other sports products such as the NFL and the NBA. For example, I know of no evidence of confusion between last month's national championship game between Alabama and Clemson and the recently held Super Bowl between Charlotte and Denver, even though the athletes in the former had received Full COA GIAs above the level of "pay-for-play" argued in *White*.

139. Provision of Full COA GIAs has not changed that basic fact that college athletics are still produced by athletes in college. This would be true even at higher levels of

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[191] *NCAA's Memorandum of Points and Authorities in Support of Summary Judgment or, in the Alternative, Partial Summary Judgment*, October 22, 2007, p. 40.

[192] *Defendant NCAA's Reply in Support of its Motion for Judgment on the Pleadings* (*White*), October 2, 2007, FN9.

compensation. On this, the NCAA's current expert, Dr. Ordover, explained the fundamental flaw in the idea that pay-levels define college attendance:

"You can pay people more, and they can still go to school."[193]

140. The damages class in *White* was certified, but when the case settled, the settlement did not require the NCAA to end the restraint, and the NCAA chose to continue to enforce the restraint in suit actively until late 2011, and then again from 2012 to August 2015. And so the history of the pre-2015 restraint continued on.

6.2.2.3 The restraint is relaxed (temporarily) in 2011 and again in 2015

141. In October 2011, based on a vote of the NCAA Board of Directors for "Proposal No. 2011-96," for the first time since 1976, Defendants allowed athletes to receive athletic aid above the Pre-2015 Capped GIA Level.[194] The rule allowed athletes to receive grants-in-aid that included a cash payment up to $2,000 or the Full COA, whichever was *lower*. According to the NCAA, in the short time this less restrictive rule was in place, some offers were made at these higher levels, but by mid-January, Defendants and their co-conspirators had gathered enough support (160 override requests) to suspend the rule, and at the NCAA's annual convention, the "NCAA listened to those members' concerns" and the proposal was "tabled" once again.[195] Defendants reverted to the more restrictive rule that had been in force for the previous 35-plus years.

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[193] *Deposition of Janusz A. Ordover*, May 21, 2015 (*herein Ordover Deposition*), pp. 327-328. To the extent Defendants have qualms about athletes with too much money in their pockets losing focus on their studies or choosing to isolate themselves off campus, there are substantially less anticompetitive means of better ensuring these outcomes do not occur. Payment could be deferred until after completion of eligibility. Payment could be made conditional on good grades. On-campus residency could be a requirement for payment. Mississippi State has chosen to address this issue by mandating that financial education be required for all athletes receiving COA payments. The idea that price fixing is the only way to ensure college athletes take college seriously is false. See Solomon, Jon, "Mississippi State plans to educate players who receive COA money," June 16, 2015, CBS Sports (cbssports.com), (http://cbsprt.co/1GLscwU).

[194] "Post-Presidential Retreat Updates," January 25, 2012, NCAA (ncaa.org), (http://on.ncaa.com/1ohuRc1).

[195] Jones, Todd, "NCAA convention: reforms made, but an annual stipend tabled," January 15, 2012, The Columbus Dispatch (buckeyeextra.dispatch.com), (http://bit.ly/1ohv6UG).

142. The public got a rare glimpse at the inner workings of the NCAA when the arguments against the MEA were published online.[196] While other arguments were also advanced (such as a claim that the MEA "amounts to 'tattoo money'"[197]), one of the most commonly expressed reasons for opposition was that it would weaken the NCAA's collective efforts to contain costs.

(a) American University:

> "[O]ur institution does not have the resources to cover the additional cost, so this proposal would put us at a disadvantage."

(b) Boston University:

> It would be "compelled to reallocate financial aid in this direction in order to be competitive in recruitment."

(c) Gardner-Webb University:

> Citing "cost concerns."

(d) Miami University (Ohio):

> Referencing "the question of where to find the additional revenue to pay for this 'allowance ….'"

(e) Santa Clara University:

> "The intent of the proposal is admirable, but the strain of appropriating additional funds for full scholarship student-athletes makes the struggle to fund scholarships across all sports that much more difficult."

(f) University of Maryland, Baltimore County:

> "Trying to legislate cost saving [sic] in other areas, while adding this potential hugh [sic] expense to institutions."

(g) University of Texas, Pan American:

> "With so many budget cuts and the decrease in funding across college campuses this additional $2000 will only hurt those institutions who are already struggling to fully fund their programs."

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[196] *Override Period (October 2011 meetings): Override Summary for Proposal Nos. 2011-96 and 2011-97* (NCAAGIA01072731 - NCAAGIA01072775, at 767)

[197] *Override Period (October 2011 meetings): Override Summary for Proposal Nos. 2011-96 and 2011-97* (NCAAGIA01072731 - NCAAGIA01072775, at 767). A similar sentiment was expressed more recently at the 2015 *IMG SBJ Intercollegiate Forum*, where Alabama athletic director Bill Battle expressed a concern that COA money given to athletes might be spent on "tattoos and rims." See Casagrande, Michael, "Alabama AD Bill Battle explains 'frivolous' comments about athletes wasting money on 'tattoos and rims,'" December 9, 2015, AL (al.com), (http://bit.ly/1IWa5lK).

143. And so, with 160 members voicing disapproval of a somewhat less restrictive alternative, the pre-2015 restraint was reinstated. The reinstated rule remained in place through *O'Bannon* and for almost a year after the filing of the present case, despite testimony from employees of several Defendants in the current matter, of their desire to see the restraint relaxed. NCAA President Mark Emmert testified:

> "Q. In your view, if the NCAA were to change its rules to cover the full cost of attendance, would that be inconsistent with the NCAA's principle of amateurism?
> A: No.
> …
> Q. And then you also put forward the options of permitting large schools to give stipends of $2,000; is that correct?
> A. That was a proposal that came from a student well-being working group, yes.
> Q. All right. And you supported that proposal?
> A. Yes, still do. … It was never referred to as a "stipend," by the way. It was referred to as something to cover close -- more closely the full cost of attendance …."[198]

144. Dr. Emmert repeated his endorsement of Full COA GIAs in his testimony to the United States Senate:

> "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."[199]

145. Big Ten Commissioner Delany went further in *O'Bannon*, testifying both that he supported moving to Full COA GIAs:

> Q: Do you support a change on the definition of the "full cost of attendance"?
> A. I do. … I believe that the full cost of education is the – the appropriate way for us to go forward in the future. And that should provide the full cost of actually going to any particular institution in this country as arrived at by that institution."[200]

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[198] Trial transcript, Volume 9, pp. 1742, 1820-1.

[199] Rachac, Greg, "Ash: Full cost of attendance stipends good for athletes," April 21, 2015, Missoulian (missoulian.com), http://bit.ly/1JQgjZk.

[200] Trial Transcript 10, pp. 2085-6

and, that the reason his conference had not done so was because of the collective vote of the NCAA members, to which the Big Ten adhered despite its disagreement:

> "Q. Do you agree with every position that every other member takes?
> A. No.
> Q. Do you agree with everything the NCAA has ever said?
> A. No.
> …
> Q. Do you advocate for your position?
> A. Yes.
> Q. And then eventually, it goes to a vote?
> A. Yes.
> Q. And the members, they live by that vote.
> A. Try to."[201]

146. Of course, it bears noting that when Mr. Delany testified to this effect in *O'Bannon*, his employer, the Big Ten Conference, had already been named a Defendant in this case. It was only after the current lawsuit was filed that the NCAA reorganized its rules-setting structure,[202] to allow a sub-set of five conferences (the so-called Power 5) to set a collective price cap higher than the Pre-2015 Capped GIA Level, and then after this Court's issuance of an injunction against collusion on pay levels below the Full COA (with respect to name, images, and likenesses) that in January 2015, the Defendants finally changed their rules (effective August 2015) to allow athletic aid up to the Full Cost of Attendance. Some Defendant conferences then immediately <u>mandated</u> such payments.[203]

147. The 2015-16 football season was played with thousands of athletes receiving athletic aid up to the Full COA. The 2015-16 men's and women's basketball seasons are currently ongoing with even more schools' athletes also receiving athletic aid up to the Full COA.

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[201] Trial Transcript 10, pp. 2084-5

[202] A then yet-to-be-completed effort to which Mr. Delany also testified, see Transcript 10, p. 2085.

[203] The Big 12 announced: "These actions were unanimously adopted as Conference bylaws, requiring member institution adherence, and go into effect August 1, 2015. As such, Big 12 members are committed to provide: Athletics aid based on the maximum amount permitted by NCAA bylaws. It is anticipated the maximum amount will increase from Full Grant-in-Aid to Cost of Attendance through the Autonomy legislative process this January. …" See "Board of directors announces student-athlete initiatives," December 1, 2014, Big 12 Conference (big12sports.com), (http://bit.ly/1oCqoAz). See also FNs 228-231 on non-FBS conferences that mandate Full COA.

148. This history reveals several important economic factors:

(a) The provision of Laundry Money was a common practice prior to the 1975 vote that prohibited such payments.

(b) The restraint was adopted and defended solely on the basis of cost containment. Specifically, I have seen no mention of academic integration or protection of consumer demand for college sports anywhere in the minutes, memos, or other historical documents of the 1970s.

(c) Defendants, their employees, and the co-conspirators repeatedly voted to maintain the restraint.

(d) Since 2003, both presidents of the NCAA have publicly acknowledged that the pro-competitive benefits of a world with Full COA GIAs would outweigh any benefits of restrictions on GIAs below that level, with Myles Brand calling Full COA "ideal" and then Mark Emmert stating "… that schools should be allowed the opportunity to provide student-athletes with resources to cover the full cost of attendance"[204]

(e) Even as late as 2012, when a super-majority of Division I schools overrode the MEA on the basis of cost concerns, cost containment remained a dominant reason why schools imposed this restraint on programs willing to pay athletes Full COA.

(f) When the restraint was finally relaxed in 2015, college football and basketball continued to be produced successfully, consumer demand remained high, and there was no noticeable reduction in any academic integration of athletes.

6.3 POST-2014 CONDUCT ILLUSTRATES (BUT UNDERSTATES) THE LIKELY IMPACT IN THE BUT-FOR WORLD

149. With the 2015 relaxation of the key restraint in suit, the NCAA has provided an excellent natural experiment to test the impact of the restraints in suit, one for which much more precise data collection is possible that can be achieved by combing the NCAA's historical archives as to pre-period conduct.

150. As discussed above, adoption of rules by the NCAA and Defendant Conferences that now allow (and in some cases mandate) that athletic scholarships provide more than the Pre-2015 Capped GIA Level, has led to increased competition among schools competing in the FBS/D1 relevant markets. The result of that increased competition – upward pressure on the price paid to athletes for their services to the Full COA level – has

[204] Rachac, Greg, "Ash: Full cost of attendance stipends good for athletes," April 21, 2015, Missoulian (missoulian.com), (http://bit.ly/1JQgjZk).

been very rapid, faster even than the adoption of multi-year scholarships in 2012. Even with the preliminary state of discovery, it is clear from the evidence that this adoption has extended well beyond the Power Five conferences, and includes most of the FBS Defendant Conferences (for football and both men's and women's basketball) and a good number of non-FBS schools and conferences with respect to men's and women's basketball. Even a few FCS football programs have adopted Full COA GIAs.[205]

6.3.1 The analysis of impact and damages is hampered by the fact that discovery is not yet complete

151. This analysis is being performed prior to the close of fact discovery and as a result not all of the relevant data that is in the hands of Defendants or their members schools, is available to Plaintiffs to prove the class-wide nature of impact and damages through an exhaustive data-driven demonstration.

152. As an example, it is my understanding that the NCAA hosts on its servers a database known as the Compliance Assistant (discussed above in Section 4.5 as a "cartel facilitating device").[206] This database houses the data from of a large number of Division I schools' "Financial Aid Form Detail" (FAFD) reports. This report essentially gathers together every element of data required to ensure compliance with the restraint in suit. The school identifies all types of aid that meet the NCAA's definition of athletic aid, of other "countable aid",[207] and of aid outside of those definitions. In particular, if a school chooses

[205] See Roussel, Scott, "Liberty will be the first FCS program to cover cost of attendance for student athletes," Football Scoop (footballscoop.com), April 13, 2015, (bit.ly/1dKXEzR). North Dakota State (also FCS) has announced that it plans to investigate providing COA payments to FCS athletes. See Kolpack, Jeff, "Colleges look at providing athletes more money," The Dickinson Press (thedickinsonpress.com), June 14, 2015, (bit.ly/1d2cf9u). North Dakota and South Dakota have also announced plans to follow suit. See Schlossman, Brad, "Update: UND to pay all scholarship athletes stipends in 2016-17," September 2, 2015, Grand Forks Herald (grandforksherald.com), (http://bit.ly/1R3vsam), and also Poe, Barry, "University of South Dakota to award stipends to student-athletes," September 4, 2015, Sioux City Journal (siouxcityjournal.com), (http://bit.ly/1mBGSY0).

[206] My understanding is that the NCAA has taken the legal position that it need not produce these data nor has access to the Compliance Assistant software itself been provided to Plaintiffs.

[207] As I understand it, as used in this context, countable aid is aid that might not be athletic, *per se*, but which NCAA rules treat as applying against the cap on athletic aid if the athlete meets certain criteria.

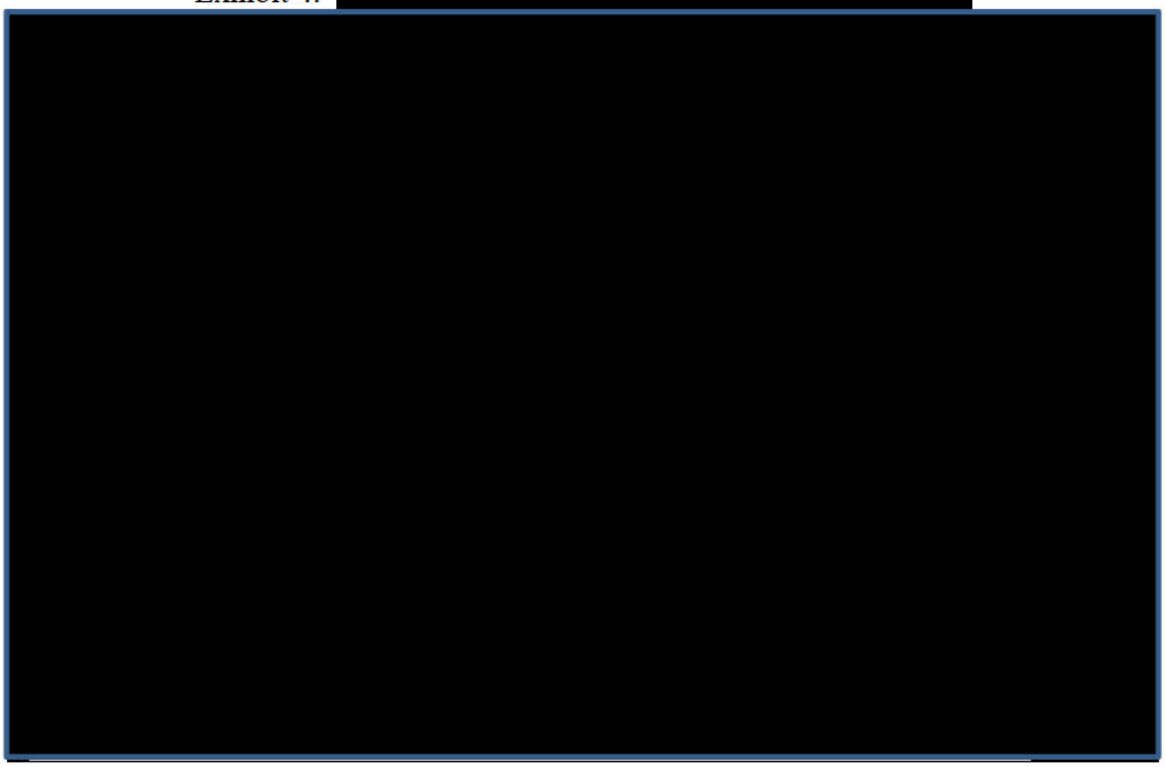
to use this report, it can also enter in all Pell Grant money the athlete received, all Student Assistance Fund (SAF)[208] money received, and all forms of other non-athletic grants, and even student loans. Because the report provides every data point needed to calculate an athlete's historical gap between COA and GIA, as well as any funds that could be considered potential offsets to this gap, if I were given access to the system and access to those schools' data that already exist in the system,[209] I could summarily calculate damages.

153. As a single example, a quick inspection of a FAFD report that [redacted] provided for one of its full GIA women's basketball athletes ([redacted]), makes clear how the FAFD is truly "one-stop shopping" for the determination of both damages and any net-out required for offsets or mitigation. With the aid of a simple four-function calculator (or a very basic spreadsheet), the impact of the restraint on [redacted] can easily be determined from her FAFD report entries:

[208] See Section 7.5.3.

[209] I understand the NCAA contends that in some cases, schools enter data into the system that is not final. To the extent this is true, such schools could be identified by a simple verification process and their best version of the data substituted for those housed in the NCAA's database.

Exhibit 4. [redacted]



154. Based on my preliminary understanding of the NCAA's software, I understand that I could use the existing NCAA software tools to produce a report showing each athlete's damages. I could do the same with an extract of the data even without access to the software the NCAA has developed. **This database and its accompanying software is, in and of itself, proof of a common formulaic method for calculating damages in this case.** Thus, though my understanding is tempered by the fact that both the software and the database itself are hidden from me behind a password-protected NCAA entry portal and no 30(b)(6) depositions have yet been scheduled, my preliminary conclusion is that this same software, used in the regular course of Defendants' business to ensure compliance with the restraint in suit, could easily be repurposed as a test of impact, a model for estimating damages, and also of the potential validity of, and quantification of, any proposed Defendant offsets. Plus, it already exists, though it has not yet been produced.

155. Moreover, as an added benefit, it is my understanding that if the data were produced in a single dataset from the NCAA, this would eliminate the need to know athletes specific

names or other personal identification subject to the FERPA laws. Because I understand the NCAA could globally replace the existing identification with a unique disguised code, privacy could be much more easily protected than through data provided by third-parties, where a name is needed to allow matching with other sources of data.

156. Nevertheless, in the absence of the production of that "one-stop shop" for data and pre-existing damages calculation software tools, counsel for Plaintiffs have begun the process of developing a similar dataset by issuing third-party subpoenas to the more than 120 individual members of Defendant conferences. These subpoenas were served in late November through mid-December; almost all of the responses have come in within the last four weeks. Processing the data can be quite time consuming; a full set of a school's three teams of data can take over twenty person-hours to enter and proofread. My staff and I have put in a great deal of time performing substantial amounts of data entry,[210] but we have not yet re-entered half of the relevant data provided by schools in non-database format (such as via print outs and non-machine-readable PDFs). That data work is on-going, with the aim to be finished by the close of fact discovery.

157. The data available to me (some of which is now data-entered) covers most of the FBS schools, though it still is incomplete even for that subset of Division I. Several schools have not yet produced their data or produced only in paper form in ways that are not conducive to being scanned. In addition, I understand that given the time table of this case, the process of subpoenaing the remainder of Division I schools will continue through the close of discovery, which is set beyond the deadline for this report. Therefore, I understand the current data issues to be a question of logistics and timing, not economics, and that by the close of discovery I anticipate the parties will have developed a clean, standardized

[210] The fact that my staff and I have had to undertake a substantial data entry process is unrelated to the question of common impact or class-wide damages, other than the fact that it has slowed the process of testing the question. As I understand the terms as used in the law, typing individual athletes' standardized data into a common database is not the same thing as "individualized inquiry."

data set, especially if the NCAA produces the existing data in the standardized format in which it maintains those data on its servers.

158. The current state of production and data entry does not make my analysis impossible or unreliable. When discovery is complete, the same analysis, same formulas, and same calculations will apply and the same broad conclusions will be reached. Until then, I have created the best available dataset I can for addressing these questions of common impact and of class-wide, formulaic damages, relying at times on estimates to fill the temporary gaps in the discovery record. None of my temporary reliance on estimates speaks to the ability or inability to show class-wide impact or develop a common, formulaic method to calculate damages. Instead, it speaks to a deadline for class certification reports that preceded the production of data in the possession of Defendants or their member schools and to the cumbersomeness of retyping data back into a computer when produced in a non-database format. At merits, with full discovery of the most relevant data for the questions at hand and sufficient time for complete data entry, the data issue should vanish and the calculations will be a matter of arithmetic rather than estimation.

6.3.2 Using Data on 2015-16 Conduct as a natural experiment

159. The post-2014 world serves as a natural experiment for testing many of the hypotheses which have been advanced about the college sports labor market over the years. Over the years, the NCAA has argued a variety of claims as to how complex a world would be if the Pre-2015 Capped GIA Level were raised, and each has been tested in the last year's experiment. These claims include:

- Even if allowed to pay Full COA to their athletes, many major programs would choose not to. In *O'Bannon*, Defendant NCAA put in expert opinion that Ohio State and Iowa, *inter alia*, might elect not to provide anything more than the pre-2015 cap.[211]

[211] See Expert Report of Lauren J. Stiroh, Ph.D. (*O'Bannon*), March 14, 2013 (available as redacted at docket number 684-3 (03/14/13), ¶40: "It is possible that, even absent the NCAA rules that Plaintiffs are implicitly challenging, some schools may still choose to maintain their current amateurism

- If schools were allowed to pay more than the Pre-2015 Capped GIA Level to athletes, they would lower the payments to the least valuable members of the team, in order to fund the most valuable athletes' GIAs.[212]
- If the Pre-2015 Capped GIA Level were raised, many schools might leave Division I.[213]
- If the Pre-2015 Capped GIA Level were raised, consumer interest in the sport would wane[214] or vanish completely.[215]
- A substantial number of athletes would be displaced from their teams in a "cascade effect" of "reshuffling" or "substitution."[216]
- The paperwork required to allow a Full COA GIA would be overwhelming, increasing costs so that the net benefit to the school and athlete of receiving such an award would be negative.[217]

160. Even with the preliminary state of fact discovery as to how 2015-16 played out, it is clear that these speculative claims were baseless with respect to the specific impact and damages allegations around provision of the Full COA. In essence, by raising the cap, Defendants and the other Division I conferences have already adopted a less restrictive alternative to the cap that existed prior to 2015. The rapid adoption of the new cap by many

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policies…" Dr. Stiroh specifically pointed to The Ohio State University, the University of Washington, Ball State University, and the University of Iowa, each of which I have determined has changed its "amateurism policies" and now provides payments above the Pre-2015 cap.

[212] *Ordover Injunctive Report*, ¶18: "…many putative class members would be harmed by the requested injunction because they would receive less athletics-based compensation in the but-for world than they currently receive."

[213] *Ordover Injunctive Report*, ¶18: "… some institutions would respond to the changing circumstances by reducing the number of scholarship athletes in their Division I FBS football and/or Division I basketball programs, by reducing scholarship awards to certain athletes, or **by ceasing to participate in Division I FBS football and/or Division I basketball altogether**." (emphasis added)

[214] "I find that the 'distinct' product exists in its current and successful form [the Pre-2015 version of the restraint] due to the NCAA's rules, including the GIA Rule, which restricts 'pay for play.' Without rules of this type, the distinction between professional and amateur college athletics would be blurred. Consumers would be harmed by the decrease in differentiation in the athletics market." See NCAAGIA02216105 - NCAAGIA02216171 (Expert Report of Professor Jerry A. Hausman (White), September 6, 2007), p. 26.

[215] "This litigation is about whether college sports, as a non-professional sports product, will continue to exist." See Joint Case Management Statement, September 24, 2015.

[216] I discuss this effect, and my sources for the quotations, in Section 7.4 below.

[217] See NCAAGIA02216105 - NCAAGIA02216171 (Expert Report of Professor Jerry A. Hausman (White), September 6, 2007), p. 30: "The students would have to keep receipts, the schools would have to verify and process those receipts, and, where questions arose, the NCAA would have to rule on whether receipts for certain types of expenses (e.g. dry cleaning as 'laundry') qualify for reimbursement. Given the greater economic costs to all parties, I find that a move to COA would be inefficient."

schools shows that the old cap was binding on all schools that have now paid more than was previously allowed. Virtually all of the Power 5 schools, most of FBS and many non-FBS schools instantly adopted the new Full COA limit, jumping from the old maximum to the new for all full GIA athletes for the sports in suit. No schools have exited Division I. There has been no evidence produced of a decline in consumer interest in the sport. There has been no evidence produced of any athletes being displaced by the hypothetical "cascade" of "reshuffling." And the documents produced so far in discovery show that the paperwork involved with provision of COA grants is *de minimis* (especially in contrast with the NCAA SAF (and similar funds), where reams of receipts have been produced through discovery).

161. Instead, what has happened is exactly what rational (non-alarmist) economics predicts. An industry with a price cap on an input relaxed the cap to a somewhat less restrictive level, and prices rose without negative impact on output, consumption, or consumer demand for the downstream product.

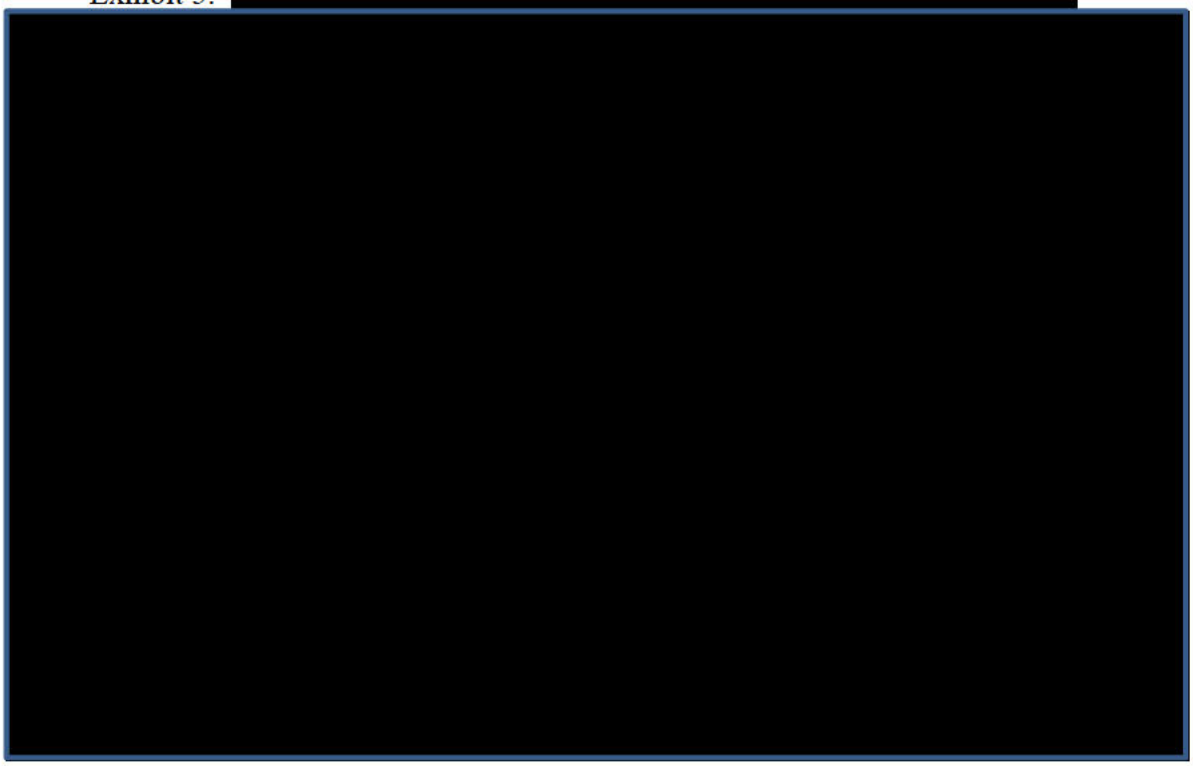
162. The natural experiment is also useful because it provides a strong benchmark for assessing the common impact of the restraint in suit (by demonstrating the likely lower bound of adoption of Full COA GIAs) and for measuring damages. How the industry behaved in 2015 is an excellent lower-bound benchmark of the rate of industry adoption of the new pay level, demonstrating how (at the very least) schools would have behaved in the recent past had the Pre-2015 cap not been in place. The process of unwinding 40 years of conspiracy will rarely be instantaneous, but generally speaking the differences between the economic environment in 2015-16 and in 2010-11 through 2014-15 are sufficiently unimportant that, as a first approximation, 2015-16 conduct is an excellent model for damages period conduct in the conservative but-for world I have assumed.[218]

[218] Where it is off the mark, it will tend to underestimate the set of COA adopters, rather than over-estimate.

163. For example, from third-party data produced by the University of Florida (Florida),[219] it is easily determined that:

(a) Florida instantly adopted Full COA GIAs;
(b) each GIA athlete on the team received his/her Full COA;
(c) all Full COA recipients who earned a Pell Grant kept all of their Pell and all of their COA money; and
(d) there are many examples where Full COA recipients also received SAF money (even if they also received a Full Pell Grant as well), as seen from the 2015-16 Florida men's basketball data.

Exhibit 5. [redacted]



164. This is strong evidence that but-for the Defendants' alleged collusion, in 2014-15 (and stretching back to 2009-10), Florida and other comparably situated schools would have competed for talent by paying Full COA GIAs (just as they did the moment the restraint was lifted), would have allowed those athletes to keep any and all Pell money granted to them by the Federal Government, and would have continued to offer the same categories of SAF money to those athletes who merited that money in the actual world.

[219] See Florida's produced documents: 00003546.to.00003579.pdf and 2015-16 COA data.pdf

165. This proves two related points: (1) Florida athletes all suffered common impact because their pre-2015 pay was restrained by a binding price cap agreement, and (2) that in the but-for world, Florida athletes would have received the full value of their actual collusive shortfall, without any need for an offset of Pell or SAF payments. Florida's present conduct provides tangible evidence consistent with the testimony Florida's athletic director, Jeremy Foley, gave in *White* in 2007, as to Florida's but-for conduct:

> "Q: … You'll see in the column we were looking at COA difference. The column to the left of it is GIA. You have an understanding that GIA is grant-in-aid?
> A: Yeah.
> Q: And you see the number that -- there's a difference there of $3,060 for Exhibit 81. Do you see that?
> A: Yeah.
> Q: If NCAA rules permitted Florida to offer a grant-in-aid to cover up to the full cost of attendance, that $3,060 difference, do you believe the University of Florida would do that?
> A: Uh-huh.
> Q: That's a yes?
> …
> A That's a yes.
> Q: Is that also true on the football side?
> A: The way we run our program here, it would be true in every sport at a significant cost.
> Q: When you say significant cost, do you have an estimate of what that number would be?
> A: $5-, $600,000 a year.
> Q: And that's throughout the whole athletic department?
> A: I think so. …"[220]

166. Recognizing that 2015-16 conduct of each school will tend to broadly follow, but to understate, the level of adoption as of 2009-2010 in the but-for world, the real-world of 2015-16 can be assessed across important dimensions, such as whether the adoption was instantaneous and at the level of the full COA. This leads to the following categories:[221]

(a) Instant Adopter: Schools that have Instantly Adopted Full COA GIAs across all Full GIA athletes.

[220] Deposition of Jeremy Foley (Ex. 35, taken from public docket in *White*) March 5, 2007.
[221] See Appendix D for precise details of my assignment of schools to each category.

(b) Delayed/Partial Adopters: Schools that have adopted COA GIAs, but have either done so on a delayed or partial basis.[222],[223]

167. It is my opinion that to the extent a school has adopted some level of COA as part of its GIA, or has announced its intent to do so in the coming years, this is strong evidence it would have adopted Full COA payments throughout the but-for damages period. Thus, for the purposes of demonstrating anticompetitive harm (as per Section 5.2 above), the evidence of many schools adopting COA (whether immediately and completely or only partially or on a delayed basis), show the restraint in suit led to anticompetitive harm – the market price was perverted by Defendants' collective restraint. That this anticompetitive harm occurred is abundantly clear from the benchmark year of 2015-16 in which scores of schools have adopted the new, higher cap. The same is true for evidence of common impact.

168. This opinion that these schools would have adopted Full COA GIAs in a but-for world in which the 1976 restraint was never imposed, applies to both the Instant Adopters and smaller number of schools that fall into the Delayed/Partial category. In my opinion, based on just one year of evidence since the lifting of the restraint in the real-world, these schools' conduct is strong, common economic evidence that they also would have provided Full COA GIAs to all of their full GIA athletes by the start of the damages period but-for the imposition of the pre-2015 version restraint in 1976. Thus, while these small segments of the three classes have only seen partial recovery to the competitive equilibrium,[224] in the but-for world they would have been commonly and completely made whole, as would the

[222] I have also identified a small number of schools adopting a "Wait and See" approach, that have not adopted COA GIAs "at this time," either for philosophical, competitive, or budgetary reasons, but have generally indicated that they are waiting to see whether adoption in the future makes sense.

[223] In addition, solely due to the timing of this report versus the completion of discovery, some schools fit into an "unknown" category, but I have assigned them to the other categories as a stand-in until discovery is completed, as discussed in Sections 6.5.1.

[224] Based on the definition of the class period and my estimate of the but-for world, these class members' damages have continued past the date of the adoption of the new rule. See Section 6.4 for a discussion of the economic concept of lingering effects.

athletes who attended Instant Adopter schools.[225] For the small number of schools that have indicated a more wait-and-see attitude,[226] I have adopted the conservative approach of not calculating pecuniary damages for their athletes, though as the market evolves and discovery is completed, I anticipate re-assessing these few schools based on, *inter alia*, their future statements and actions.

6.3.2.1 Common Economic Impact, Part One: Market-wide Harm

169. For establishing common impact, the pervasiveness of the change in schools' conduct is sufficient to show that the market-wide equilibrium was severely perverted by the Defendants' anticompetitive agreement. Again, there is abundant, market-wide evidence that the relaxation of the Pre-2015 Capped GIA Level has led to a far more competitive landscape, with most Power 5 schools offering higher payments to all athletes in the sports in suit, and with this resulting in upward pressure on payments in non-power 5 conferences. For example, [redacted].

[225] In Section 7.2.3, I discuss how during the current recruiting season for the 2016-17 year, we are seeing some Delayed/Partial Adopter schools raising their GIA offers up closer to Full COA than the year before. In other words, they are progressing toward Full COA.

[226] Nine schools with Division I basketball (but not in FBS), including James Madison, Delaware, and Elon, announced that the schools have agreed not to offer cost of attendance "at this time." Though the letter seems to cast this as a philosophical opposition to COA, the schools clarified that it is more a of a wait-and-see approach. For example, James Madison's president said the letter is "a reflection of our current circumstances – not of what we might do in the future," adding that "[l]ike many other issues in intercollegiate athletics, cost of attendance remains a complex and fluid issue…As such, we look forward to participating in a continued national discussion on these issues through the foreseeable future." See Alger, Jonathan, "Another presidential perspective on college athletics," September 21, 2015, James Madison Athletics (jmusports.com), (http://bit.ly/1HDh3eX). Other signatories expressed a similar desire to assess the market as it evolves, such as Elon College ("…at Elon we're waiting to see how all that shakes out.") and Delaware, where both the head football coach and the athletic director said that they would keep monitoring the "ever-changing landscape." See Smith, Adam, "Cost of business: Elon holds purse as schools decide on cost of attendance rule," May 31, 2015, The Times News (thetimesnews.com), (http://bit.ly/244mFfr); and also Tresolini, Kevin, "Cost of attendance money clouds sports recruiting," October 13, 2015, Delaware Online (delwareonline.com), (http://delonline.us/1PdbfjQ).

170. Other conferences, even those outside of FBS, have also adjusted their competitive offers. The Metro Atlantic Athletic Conference (MAAC), which consists of relatively smaller private colleges such as Niagara and Saint Peter's (many of which have or had a religious affiliation), and is not generally considered a basketball powerhouse nevertheless, in the wake of the Power 5 conferences' adoption of the Full COA GIA limit, decided to follow suit, requiring its members to pay all Full GIA athletes their Full COA as well.

> "… with the big five conferences pushing through a rule allowing for schools to cover the full cost of attendance for student athletes, MAAC commissioner Rich Ensor said that the conference will require it for both men's and women's basketball.
>
> 'As a league we have said that basketball is our premiere sport, and as such, we're going to support it in a way that it remains competitive with the other leagues in our region," Ensor said."[227]

171. To date, none of the MAAC schools' data on individual athlete's payments have been produced, but when they are produced, I suspect the data will reveal those schools to be Instant, Team-wide, Full COA adopters. Other non-FBS conferences that have gone from a prohibition on such payments to mandating them include the Atlantic 10,[228] the (new) Big East,[229] the Big South,[230] and the Horizon League.[231]

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[227] Restivo, Ryan, "MAAC reviewing their approach as power five control NCAA," February 16, 2015, Big Apple Buckets (nycbuckets.com), (http://bit.ly/1dP0SSD).

[228] "Both schools are in the Atlantic 10, and said they voted along with their peers earlier this year to mandate schools give stipends to men's and women's basketball players." See Hobson, Will, "Cost-of-attendance stipends show which sports colleges want to spend on," May 22, 2015, Washington Post (washingtonpost.com), (http://wapo.st/213xYCc).

[229] "The Big East broke new ground in the world of college athletics back in May when the conference mandated its 10 programs give cost-of-attendance stipends to its men's and women's basketball programs." See Roberson, Pierce, "How Seton Hall (and the Big East) is setting the 'Pay-for-Play' precedent," August 27, 2015, SB Nation (bigeastcoastbias.com), (http://bit.ly/1OaBth7).

[230] "The Council previously approved the mandatory implementation of Cost of Attendance for Big South men's and women's basketball student-athletes, effective immediately." See "Big South Conference's new strategic plan approved," June 10, 2015, Big South Network (bigsouthsports.com), (http://bit.ly/1J6KndB).

[231] "The Horizon League Board of Directors unanimously passed cost-of-attendance legislation on Friday, mandating the measure in men's basketball and for at least an equal number of female student-athletes in a League-sponsored sport or sports." See Potter, Bill, "Horizon League board of directors passes cost of attendance," April 13, 2015, Horizon League (horizonleague.org), (http://bit.ly/1frUSAY).

172. Thus, as a matter of economics, analysis of the 2015-16 benchmark year, even in the incomplete state of discovery, shows that the FBS football and Division I men's and women's basketball markets have been substantially altered by the relaxation of the Pre-2015 Capped GIA Level. This is common evidence of common impact to the entire market. Every athlete who sold (or sought to sell his/her services) in this market was harmed by the Pre-2015 cap's perversion of the market equilibrium, even athletes outside of the classes. But most importantly, every athlete who received the maximum allowed under the Pre-2015 cap was harmed because his or her payments were specifically capped.

173. This is strong evidence of economic harm and thus impact that is common to all class members.

6.3.2.2 Economic Impact, Part Two: Pecuniary Harm

174. Separately, impact can also be measured in the form of pecuniary harm, which is an important subcategory of economic harm (but not the only form of such harm). Pecuniary harm is a direct loss of money relative to what one would have received but for the alleged misconduct. To show pecuniary harm in this matter requires an additional step above identifying the other forms of economic harm that all class members faced. This is a showing that the athlete would have earned a GIA (between 2009-10 and 2015-16) that can reasonably be estimated to have exceeded the Pre-2015 Capped GIA Level.

175. It is my opinion that all class members who attended schools that have already begun to pay, or in the near future will begin to pay, their athletes with a GIA that covers some or all of their athletes' "COA gap," would have received a Full COA GIA in the but-world. The 40-some years that the cap would not have been in place in the but-for world would have been much more than ample time to reach an equilibrium whereby even the Delayed/Partial Adopters would have gotten up to Full COA.

176. Each of these class members' pecuniary damages is equal to the difference between their Full COA and the GIA they received, which was capped at the pre-2015 level. To

specifically identify each class member will only require the completion of discovery related to each Division I school's 2015-16 conduct. Every school maintained a Squad List identifying all Full GIA (as defined pre-2015) recipients and maintained records of their aid levels.[232] Ongoing discovery is adding to this the appropriate COA level in place for each year as well as data to measure, if appropriate, individual athlete's offsets to damages, if any.

177. Working with the current state of discovery, I have determined that almost all Defendant conference schools have adopted Full COA GIAs, as have many NCAA members not in Defendant conference. For the purposes of demonstrating my proposed damage methodology I have focused on this set of schools whose preliminary discovery makes clear that they have either instantly adopted Full COA GIAs or have done so on a delayed or partial basis, and thus would have in the but-for world. I provide a summary of my categorization of the FBS schools (for which I have sufficient data[233]) below:

[232] Generally, Full GIA athletes are indicated as having an "Equiv" of 1.0, although in some cases, additional arithmetic may be needed to show the aid provided was a Full GIA. Athletes that attended for a partial year will also usually look to have a fractional GIA until adjusted pro rata.

[233] That is, data either from a Squad List, from the response to a third-party subpoena or based on review of the school's website explanation of its cost of attendance.

Exhibit 6. Impact Categorization – No Extrapolation

FBS

		Impact 2015-16			
Conference 2015-16	**Total**	**Instant**	**Partial**	**Wait**	**Unknown**
AAC	11	6	3	0	2
ACC	14	12	1	0	1
Big 12	10	6	0	0	4
Big Ten	14	6	0	0	8
CUSA	13	0	3	4	6
Division I-A Independents	2	1	0	0	1
MAC	13	5	4	0	4
Mountain West	11	6	2	0	3
Pac-12	12	6	0	0	6
SEC	14	11	0	0	3
Sun Belt	11	0	4	3	4

Division I MBB

		Impact 2015-16			
Conference 2015-16	**Total**	**Instant**	**Partial**	**Wait**	**Unknown**
America East	9	0	0	0	9
AAC	11	6	2	0	3
Atlantic 10	14	0	1	0	13
ACC	15	14	0	0	1
Atlantic Sun	8	0	0	0	8
Big 12	10	7	0	0	3
Big East	10	0	0	0	10
Big Sky	12	0	0	0	12
Big South	11	0	0	0	11
Big Ten	14	8	0	0	6
Big West	9	0	0	0	9
CAA	10	0	0	1	9
CUSA	14	2	3	3	6
Horizon League	10	0	0	0	10
MAAC	23	4	4	0	15
MEAC	13	0	0	0	13
Missouri Valley	10	0	0	0	10
Mountain West	10	8	1	1	0
Northeast	22	0	0	0	22
Pac-12	12	6	0	0	6
Patriot League	8	0	0	0	8
SEC	14	12	0	0	2
Southern	10	0	0	0	10
Southland	13	0	0	0	13
SWAC	10	0	0	0	10
Summit League	9	0	0	0	9
Sun Belt	11	1	3	3	4
West Coast	10	1	0	0	9
WAC	8	0	0	0	8

Division I WBB

		Impact 2015-16			
Conference 2015-16	**Total**	**Instant**	**Partial**	**Wait**	**Unknown**
America East	9	0	0	0	9
AAC	11	6	2	0	3
Atlantic 10	14	0	1	0	13
ACC	15	13	0	0	2
Atlantic Sun	8	0	0	0	8
Big 12	10	6	0	0	4
Big East	10	0	0	0	10
Big Sky	12	0	0	0	12
Big South	11	0	0	0	11
Big Ten	14	9	0	0	5
Big West	9	0	0	0	9
CAA	10	0	0	1	9
CUSA	14	2	3	3	6
Horizon League	10	0	0	0	10
MAAC	23	4	4	0	15
MEAC	13	0	0	0	13
Missouri Valley	10	0	0	0	10
Mountain West	10	8	1	1	0
Northeast	22	0	0	0	22
Pac-12	12	8	0	0	4
Patriot League	8	0	0	0	8
SEC	14	12	0	0	2
Southern	10	0	0	0	10
Southland	13	0	0	0	13
SWAC	10	0	0	0	10
Summit League	9	0	0	0	9
Sun Belt	11	2	2	3	4
West Coast	10	1	0	0	9
WAC	8	0	0	0	8

Notes:

[1] Squad List reported "Team_Full_Grant_Amt" within a thousand dollar range of the reported COA limits are considered COA Limits.

[2] Ivy League Schools and Service Academies are excluded from this analysis.

Sources:

Third-Party Subpoena documents

Squad List from Ordover Report Back Up

Updated Squad List (NCAAGIA02263617)

Individual School Financial Aid Websites (See back-up)

178. The full list, by school, is contained in the backup to this report (without extrapolation). As I show below, in Section 6.5 for the purpose of using the existing data to make a preliminary, class-wide estimate of total damages (the need for which should vanish once discovery is complete), I have used the public statements of the schools with incomplete discovery and my own economic analysis to categorize those Division I schools for which discovery has not been completed. At the close of discovery, this estimation will not be necessary – each school's 2015-16 conduct should be known precisely, and each school's announced future conduct can be determined. With this complete level of discovery, the identity of all commonly damaged athletes can be determined.

179. For the vast majority of athletes who played the sports in suit for the schools in suit, the simplest way to determine whether they received a Full GIA is simply to look at the relevant Squad List and see whether the athlete received total countable aid equal to (or in excess of) the school's Full GIA limit. There are two notable exceptions.

180. The first is for schools which list the full year Full GIA limits even for athletes that attended for one semester or one or two quarters, so that, for example, a one-semester grant for an athlete who graduated in December might look like a 0.5 on a Squad List. The second is for athletes at schools that treat certain forms of aid, usually from the state government, as being offsets to GIAs (prior to the adoption of Full COA GIAs) but who do not classify that aid as "countable" on their accounting statements. When this happens, an athlete whose Full GIA elements were fully paid will show up on a Squad List as having received less than a Full GIA. For example, [redacted]. Economically, despite the accounting, athletes like this are Full GIA recipients.

181. In the impact study I have performed, I have limited my definition of Full GIA recipients to the first set of athletes: those with total countable aid at 100% or more of the "Full Grant-in-Aid" field. In my damages calculations, I also add those athletes with

exactly 50% of a GIA, as in virtually every case I could test, these proved to be athletes on a full grant for a half year, rather than a half grant for a full year. For the purposes of this report, I did not include athletes in the third category, where accounting issues turn their Full GIA into an "Equiv" less than 100% of the definition of a Full GIA. By excluding them from my damages calculations, I have therefore calculated a conservative estimate, but at merits, with complete data, a finer categorization will allow these athletes' damages to be included as well.

6.4 UNWINDING A PRICE-FIXING CARTEL TAKES TIME

182. There is substantial economic evidence, theoretical and empirical, that the transition into the use of Full COA GIAs by the members of FBS should not be expected to have occurred instantaneously for all schools, but will occur over a matter of years. As I described in some detail in my work in *Rock*, the adoption of an innovation can take many years.[234] The economics literature of competition explains that when a long-running cartel is broken up, the market correction is rarely instantaneous. This is often referred to as the "lingering effect"[235] of collusive conduct. Joseph Harrington has written a series of articles on this topic, mostly related to price fixing among output cartels.[236] He notes that "the post-cartel price series does not reveal a big drop upon the collapse of the cartel but instead a gradual decline over several years,"[237] in reference to a graphite electrode pricing cartel lasting from 1992 to 1997. Moreover, "in sum, graphite electrode manufacturers after having cartelized and raised price by more than 50%, were still pricing 20% above the pre-

[234] See Expert Report of Daniel A. Rascher on Class Certification (*Rock*), Section 9.4, pp. 220-229.

[235] *The Economics of Collusion: Cartels and Bidding Rings*, Robert C. Marshall and Leslie M. Marx, 2012, section 1.5.

[236] Harrington, Jr., J.E. (2004). Cartel pricing dynamics in the presence of an antitrust authority. *RAND Journal of Economics, 35*(4), pp. 651-673. Harrington, Jr., J.E. (2004). Post-cartel pricing during litigation. *Journal of Industrial Economics, 52*(4), pp. 517-533. Harrington, Jr. J.E. (2006). Behavioral screening and the detection of cartels. Presented at the 11th EU Competition Law and Policy Workshop in Florence, June 2-3, 2006.

[237] Harrington, Jr., J.E. (2004). Post-cartel pricing during litigation. *Journal of Industrial Economics, 52*(4), pp. 520.

cartel level two years after the cartel's demise."[238] Harrington goes on to explain that his theory as to why prices wouldn't immediately adjust to competitive levels is consistent with prices fully adjusting "as litigation is gradually settled."[239] Finally, he shows that the effects are greater "the longer the cartel was in place and the more concentrated is the industry." Typical price cartels last about six years,[240] yet the cap on GIAs by the NCAA lasted four decades.

183. Marshall and Marx discuss how a vitamin cartel "show[ed] a period of lingering effects on price from the cartel conduct after the period of explicit collusion ended," and that this was present for all vitamin products, lasting several years with the longest time period for the most highly concentrated vitamin market.[241] Erutku empirically tests data from a retail gasoline cartel in Canada and concludes that post-litigation higher pricing (presumably from residual collusion) cannot be ruled out.[242]

184. Within sports, but outside of the NCAA, this process of the slow unwinding of collusion can be seen in the movement of Major League Baseball (MLB) salaries after the end of the reserve clause. MLB went from a pay capped system in 1975 to free agency where many (not all) players could compete in a competitive labor market. As I showed in the *O'Bannon* case (and show again in Exhibit 7 below), MLB players' pay took years to get up to the equilibrium of 50% of revenues.

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[238] Harrington, Jr., J.E. (2004). Post-cartel pricing during litigation. *Journal of Industrial Economics, 52*(4), pp. 520.

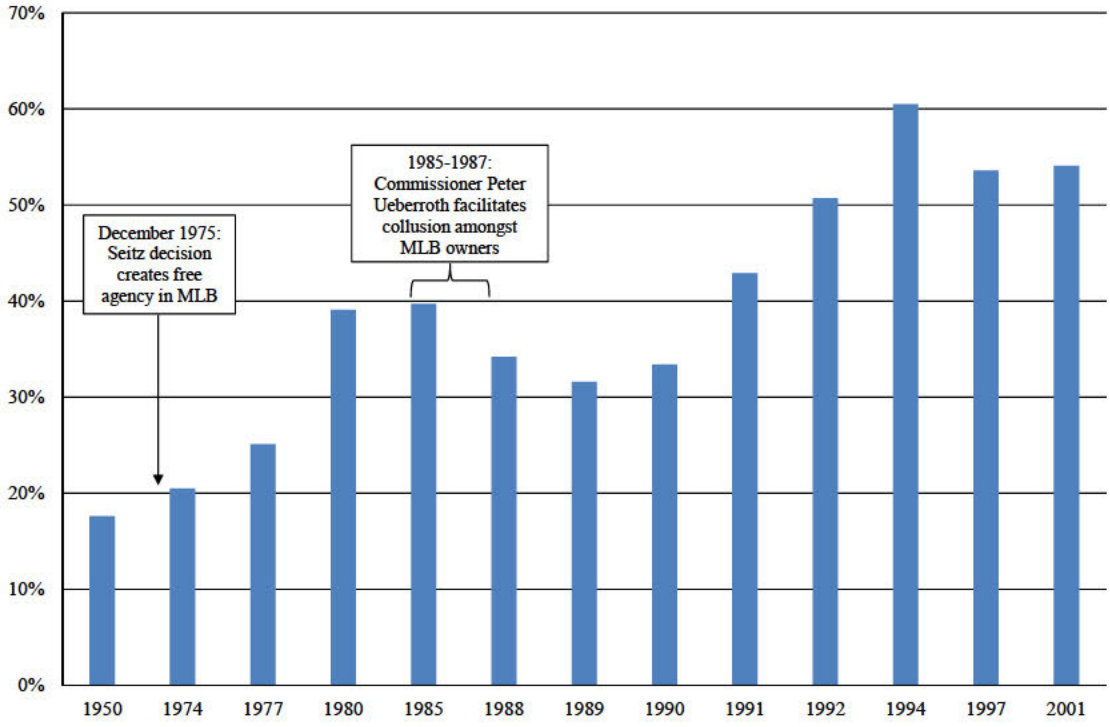
[239] Harrington, Jr., J.E. (2004). Post-cartel pricing during litigation. *Journal of Industrial Economics, 52*(4), pp. 521.

[240] Harrington, Jr., J.E. (2004). Post-cartel pricing during litigation. *Journal of Industrial Economics, 52*(4), pp. 530.

[241] *The Economics of Collusion: Cartels and Bidding Rings*, Robert C. Marshall and Leslie M. Marx, 2012, p. 18.

[242] Erutku, Can, "Testing post-cartel pricing during litigation," *Economics Letters*, p. 342.

Exhibit 7. MLB Players' Pay as a Percentage of Total MLB Revenues



Source: Haupert, Michael "The Economic History of Major League Baseball" EH Net Encyclopedia, edited by Robert Whaples December 3, 2007
URL http://eh net/encyclopedia/article/haupert mlb

185. Within the college sports industry, there have been several major breaks in the usual conduct of business, some brought about by innovation, some by the termination of anticompetitive conduct by a court order. As an example of the former, I showed in my expert report in *Rock*, the adoption of multi-year scholarships, while accelerating in pace, has been consistent with other past adoptions, such as the adoption of the GIA concept, which took from 1936 (when the SEC adopted) to 1961 (when the Big Ten did), before the concept was broadly adopted.[243] In addition, some price rigidities (or "sticky prices") occur in industries where there are costs to actually changing prices ("menu costs"). These can include the internal managerial costs of changing budgets that can take substantial time.[244]

[243] For a good summary of the scholarly and empirical work in the economics of innovation diffusion, see Rogers, Everett M., "Diffusion of Innovations," Fourth Edition, The Free Press, New York, 1995 (http://bit.ly/1xzRwkp).

[244] *Imperfect Competition and Sticky Prices* by N. Gregory Mankiw and David Romer, MIT Press. 1991.

186. More recently, when the NCAA's television cartel for football was found to violate the antitrust laws in the mid-1980s, the thirty-years of collusive impact were not erased overnight. The immediate effect of the ruling was to free the FBS schools to compete amongst each other for television rights and to massively expand industry output. Rather than a limited game or two per weekend on one network, now CBS broadcast Big Ten and Pac-10 games, while ABC broadcast games played by members of the CFA (College Football Association), which included the SEC, SWC, ACC, Big Eight, WAC, Notre Dame, and Penn State.[245] In essence, the monopoly of the NCAA had broken into a duopoly. In 1987, the two networks switched between these two groups of schools, but it wasn't until Notre Dame broke from the CFA ranks in 1990 by signing a separate deal with NBC, that the system began to move toward the truly more competitive market we know today.[246] This break up was also helped by the fact that the FTC sued the CFA and ABC in October 1990:

> "…charging that the CFA had 'entered into restrictive telecast agreements, much like those condemned in Board of Regents … through the collusion with and among its members.'"[247]

187. This is a perfect example of how something which is clearly a less restrictive alternative to previously enjoined conduct could, in turn, be challenged as anticompetitive on its own merits once sufficient time had passed for analysis. By 1994, the SEC had left the CFA for a CBS contract (a relationship it has to this day), the Southwest Conference collapsed in the wake of this move, with most of its teams joining the SEC or the Big 8 (which renamed itself the Big 12), and soon the broadcast world began to take the shape we see today, with each conference with its own television contract, negotiated without

[245] Keith Dunnavant, *The Fifty-Year Seduction: How Television Manipulated College Football, from the Birth of the Modern NCAA to the Creation of the BCS*, (herein "Dunnavant") p. 203.

[246] Dunnavant, p. 216.

[247] Dunnavant, p. 237.

coordination with its competitors. This took a decade after the initial antitrust breakup in 1984.

188. One further innovation, the development of the conference-only cable network, was launched in 2006,[248] which in turn triggered the latest surge of television deals and conference realignment that has left us with the current mix of national network deals with ESPN/ABC, Fox, CBS, and NBC, plus conference networks such as the Pac-12 and SEC Network. This process continues to evolve as the ACC is considering its own conference network fully ten years after the Big Ten launched its network.[249]

189. When the Supreme Court banned the NCAA monopolization of the college football television market, the world did not jump immediately to the current, non-collusive outcome. Old collusive habits die hard – witness the FTC's two years of litigation with the CFA – and innovations, such as a single-team or single-conference contract, or even conference-only network. As with broadcast TV, it does not make sense to assume that the overhang of around 40 years of GIA collusion should have ended instantaneously in January or August 2015.

190. One of the reasons the literature finds for slow adoption is the ongoing, less explicit forms of collusion that can persist. For example, after COA was allowed, NCAA Vice president Oliver Luck actively cautioned schools not to adopt the measure instantly, explaining to an assembly of Athletic Directors that:

> "You may want to err on the side of caution because you can't put the toothpaste back in the tube. Maybe you don't go out with 100 percent of the full cost. You might exercise some restraint there."[250]

[248] Nocera, J. and Strauss, B. (2016). *Indentured: The Inside Story of the Rebellion Against the NCAA,* New York: Penguin Random House, p. 189.

[249] Zemek, Matt, "The ACC Doesn't Want to Rush the ACC Network into Existence," July 22, 2015, Awful Announcing (awfulannouncing.com), (http://bit.ly/1QBTV3P).

[250] Smith, Michael, "Good Luck: ADs have new ally at NCAA," February 2, 2015, *SportsBusiness Daily* (sportsbusinessdaily.com), (http://bit.ly/20y2uSx).

191. Leaving aside whether such a suggestion constitutes ongoing collusion, nevertheless such encouragement may be a reason that not all schools have moved as quickly as the Instant Adopters. David Berst testified in *Rock* to having encouraged a similar level of behind-the-scenes coordination between some of the Division I conference adoption of multi-year GIAs.[251]

192. With a Full COA cap, the but-for world would have worked through these growing pains long before the start of the damages period, given the competitive nature of the schools in Division I. Former NCAA Vice President, David Berst testified (in *Rock*) "everything in Division I is considered to be a competitive issue among the members."[252] He also testified:

> "It's difficult for institutions to restrain themselves in the face of some possible advantage that the school next door may be involved in." When asked "And you meant spending money wise?" he testified "Well, at least related to some spending issues."[253]

193. He further explained:

> The broader membership of Division I often believes that somehow, you know, if one institution serves bagels, then the next one wants to know if they can put something on them. And the next one wants to know if they can have bread. And the next one wants to know if they can do it, you know, more than once a day or, you know, not just after games. So it becomes sort of a spending frenzy. And those that are unable to keep up worry about those kinds of issues. And there again, using the word knee-jerk reaction, typically is maybe we need to limit those folks at the top. And it's really not possible, frankly, because you can say they can't do bagels, but you can't keep them from buying more blocking sleds or other things that they might spend the money on while the other institution simply doesn't have any money to do more than just do the bagels. So there's always a push and tension between what the competitive influences are that give one program advantages over the other, and there has to be a balance to that in some fashion. And financial pressures often come into that sort of a – the expenses often

[251] *Deposition of David Berst* (*Rock*), October 21, 2014, pp. 212-14.
[252] *Deposition of David Berst* (*O'Bannon*), May 25, 2012, p. 19.
[253] *Deposition of David Berst* (*O'Bannon*), May 25, 2012, pp. 202-203.

> come into play in those discussions, but I don't frankly see a way of having much impact on that.[254]

194. Schools themselves explained to the NCAA during the process of repealing the MEA ($2,000 partial COA payments) in 2011-12, that even if payments above the old GIA cap were initially adopted only by some schools, the forces of competition would work to eventually make the practice commonplace. These explanations came from, *inter alia*:

(a) East Tennessee State University:

> "While the legislation is permissive as written, it is mandatory in its practical application. Some conferences and institutions have already mandated the MEA for all or selected sports; those without a conference or institutional mandate must respond in kind to avoid a substantial recruiting disadvantage."

(b) Lafayette College:

> "While this is interpreted as permissive legislation, this will become a mandatory requirement for providing full scholarship [sic] at any level in Division I."

(c) University of North Carolina, Asheville:

> "Though framed as 'permissive' legislation, the $2,000 extra stipend becomes mandatory as institutions recruit to compete with their peers – The $2,000 stipend is only a beginning and will surely increase over time."

(d) University of South Carolina Upstate:

> "Although this legislation has been described as permissive, in order to remain competitive in recruiting this will become mandatory for any institution desiring to compete with its peers."

(e) University of Tennessee at Martin:

> "Let us all remember that there's nothing that says we 'must' give a student-athlete a scholarship and allow him or her to keep full Pell Grant … But most of us do, at least in our high profile sports, because our competition does." (Emphasis in original)

(f) Winthrop University:

> "The labeling this legislation as 'permissive' is a misnomer, considering all 'permissive' legislation leads to required legislation to compete with peers, particularly in recruiting … This legislation will not stop with $2,000/yr, and will likely increase in the future, which would lead to even more budgetary constraints."

[254] *Deposition of David Berst* (*O'Bannon*), May 25, 2012, p. 37. (Emphasis added)

195. One final cause for non-instantaneous adoption rates is the simple fact that college sports budgets are set within the framework of a university environment. For some schools, this may mean that budgets are locked into place one or two years in advance. Many schools, including Appalachian State, Nevada, Old Dominion, and Texas State, specifically indicated that an impediment to their immediate adoption of COA payments was not so much a lack of money, but a lack of time to allocate the money via the school's budget process.[255] As more data becomes available for the COA offers made to the 2016-17 recruits, many of these schools will likely work through the budgetary issues and begin competing more intensely.

6.5 A CATEGORIZATION BASED ON WHETHER A SCHOOL HAS ADOPTED (OR ANNOUNCED IT WILL ADOPT) COA GIAS ESTABLISHES A CLASS OF COMMONLY IMPACTED ATHLETES IN EACH SPORT

196. As 2015 plays out, we are seeing that most FBS schools (both in and beyond the Power 5 Conferences) have adopted COA for some or all of their athletes (which can mean more than twenty teams' worth), despite the increase in their total "wage" bills (by an amount that can exceed $1 million per year). As shown above, for schools categorized as Instant Adopters, Full COA payments are going to all class members attending those schools, and I have seen no evidence of athletes who had their GIA reduced because of the relaxation of the Pre-2015 restraint.[256] For schools that have adopted a partial COA payment or have announced their intent to adopt COA on a delayed basis, the same facts

[255] Wilkerson, Brant, "Appalachian State's Doug Gillin says stipends, ECU game, nationwide branding part of strategic plan in Sun Belt," July 12, 2015, Winston-Salem Journal (journalnow.com), (http://bit.ly/1LZoXV0); Murray, Chris, "Pack won't pay cost of attendance in 2015-16, will thereafter," May 14, 2015, Reno Gazette-Journal (rgj.com), (http://on rgj.com/1IDpgme); Teel, David, "ODU anticipates cost-of-attendance scholarships and stadium decision in 2016-17," August 6, 2015, Daily Press (dailypress.com), (http://bit.ly/1Ljw2kk); Vozzelli, Joe, "Developing story: Texas State to supply cost of attendance stipend for student-athletes in 2016," July 21, 2015, San Marcos Daily Record (sanmarcosrecord.com), (http://bit.ly/1Jv7WNa).

[256] That is, to my knowledge, there has been no evidence of any of the hypothesized "substitution effect" occurring.

hold: class members pay has or will rise, and no athletes have seen their pay reduced because of the relaxation of the restraint in suit.

197. As economics predicts, there is a correlation between the rapidity and level of adoption of COA payments and schools' historical success in recruiting. Among the instant adopter schools are most (if not all) members of power conferences, but included among these instant adopters are schools striving to make it into the elite levels, such as Boise State and South Florida.[257] For non-FBS schools, though the data have not yet been produced through discovery, based on public statements and preliminary data, I would anticipate that many of the elite basketball programs at non-FBS schools will also be shown to be instant adopters of COA for their basketball programs. It is economically rational for schools to focus their money on the sports with the greatest potential for generating a return, and for the non-FBS schools with high quality basketball programs, basketball is that focal point (and has many fewer athletes for whom to pay COA). As Chris Massaro of Middle Tennessee explained during the period in which the MEA (a partial COA payment) was available:

> "… making the option available to its coaches [is] … a priority. … If something is a priority, you shift your resources around enough to make allowances for it.'"[258]

198. This correlation can be seen in the historical recruiting data of these instant adopter schools. Among the schools that have produced individual data on their COA payments, instant adopters accounted for 96% of all 4- and 5-star signings in FBS football and 98% in Division I Men's Basketball prior to the adoption of Full COA.[259] Thus, while the

[257] Notably, Boise State was quite vocal in its opposition to allowing COA, and yet has adopted it wholeheartedly. This is a perfect example of how a school benefits from the collusion, but once it is relaxed, the unilateral incentive is to compete to not get left behind. See Cripe, Chad, "Kustra to fight NCAA reforms, but says Boise State must 'pay up' to compete," May 21, 2014, Idaho Statesman (idahostatesmen.com), (http://bit.ly/1LoVCAe).

[258] NCAAGIA01149043.

[259] This result shows the flaw in the argument that if Full COA were adopted, the schools that could afford it would get almost all of the best talent, as that argument falsely assumes that is not the case already.

recruiting data shows that the Instant Adopters are the schools who were already recruiting the true college "superstars," it is also the case that they are the schools paying all athletes their Full COA, rather than reducing payments to their less well-regarded recruits to focus their efforts on the crème de la crème of the recruiting class. Yet again, the empirical data disproves one of the Defendants theories, the so-called "Superstar Effect," as put forth by Dr. Ordover,[260] which posited that equal payments to stars and role players alike were unlikely to occur at those schools recruiting "superstars."

199. These empirical results demonstrate that virtually everyone on this upper echelon of college sports is still underpaid relative to the value they bring to their school, and that supposed claims of poverty notwithstanding, competition has driven up the price to the new cap without any reduction in the quantity of athletes acquired. This further confirms the standard economics prediction that I explained during the injunctive phase of the case (as did Drs. Noll and Lazear) and provides further contrary evidence to Defendants' theories in the injunctive phase of this case as regards class conflict.

200. For the set of schools who adopted COA but on a delayed or partial basis, their level of recruiting is, on average, less competitive than that of the instant adopters,[261] but is also substantially higher than the small number of schools that have announced they will not adopt COA payments "at this time."[262] In essence, these data lay out what economists call a demand curve – a schedule of Division I schools' willingness to pay for talent, and a gradual reduction in the quantity any individual firm (i.e., school) demands at the market clearing price. However, this also shows that for schools with lower demand, the solution is not to stop playing football or to relegate themselves to a lower division. (Again, providing empirical evidence against a key claim made by Defendants at the injunctive phase of this case.) Instead, as standard economics predicts, we see schools that do not

[260] *Ordover Injunctive Report*, ¶¶45-48.

[261] See back-up to Exhibit 9.

[262] Alger, Jonathan, "Another presidential perspective on college athletics," September 21, 2015, James Madison Athletics (jmusports.com), (http://bit.ly/1HDh3eX).

feel they gain sufficient value from providing Full COA GIAs to their athletes choosing to provide some COA payments, or to delay adoption until they can fund Full COA or in rare cases, sticking with the old GIA cap. But as discussed above, there is strong economic theory to predict that over time, their actual-world conduct will converge toward full adoption, and that therefore in the but-for world they would have already reached this steady state prior to the start of the damages period.

6.5.1 A method for categorizing schools with currently insufficient data until discovery is complete

201. Solely because discovery is not yet complete, I have developed a method to categorize the impact on athletes whose schools' data production is incomplete. This is a stop-gap measure to cover the time between the date this report is due and the date when discovery will be complete. I anticipate that this element of my class certification analysis will not be necessary at the merits phase; at that point, each school's conduct will be known and can speak for itself.

202. In the interim, I have adopted the following algorithm for assigning schools to an impact and damages category, which allows me to determine the set of athletes with pecuniary impact and damages at all but 71 non-FBS schools. Generally, I favor produced financial and squad list data and so if a school's produced data specifically for 2015-16 clearly establishes its status as an adopter or not, I rely on that. When a school's data is insufficient to determine the school's 2015-16 conduct or in those cases where the school has publicly stated it plans to delay adoption by at least a year (so data for 2015-16 cannot provide insight into the school's real-world conduct for 2016-17 or beyond), I fall back on the school's public statements.

203. When I have neither financial data nor public statements, I take advantage of the correlation between historical recruiting success and the rapidity and completeness of COA adoption discussed above to assign schools to categories based on their recruiting behavior

in prior years. However, even using this extrapolation method, some schools simply are so silent (as are their recruiting peers) that no categorization is possible, and thus my analysis excludes 71 non-FBS schools entirely, until discovery can be completed.

204. This algorithm results in the following categorization, based on each combination of data evidence and public statements, and as a fallback, recruiting data.

Exhibit 8. Categorization Method for Schools with Insufficient Data

Financial Data	**Public Statements**				
	Instant	Partial	Delayed	Wait	Unknown
Full	Instant	Instant	Instant	Instant	Instant
Partial	Partial	Partial	Partial	Partial	Partial
No	Wait	Wait	Partial	Wait	Wait
Unknown	Instant	Partial	Partial	Wait	Use Recruiting

205. Using this system, I have assigned the remaining schools for the three sports,[263] summarized by conference as follows.

Exhibit 9. Categorization of Schools into Impact Categories

MFB

		Impact			
Conference 2015-16	**Total**	**Instant**	**Partial**	**Wait**	**Unknown**
AAC	11	7	4	0	0
ACC	14	13	1	0	0
Big 12	10	10	0	0	0
Big Ten	14	14	0	0	0
CUSA	13	1	11	1	0
Division I-A Independents	2	2	0	0	0
MAC	13	7	6	0	0
Mountain West	11	8	3	0	0
Pac-12	12	12	0	0	0
SEC	14	14	0	0	0
Sun Belt	11	0	7	4	0
Total	125	88	32	5	0

[263] See Appendix D for precise details of my assignment of schools to each category.

MBB

Conference 2015-16	Total	Impact			
		Instant	Partial	Wait	Unknown
America East	9	1	1	5	2
AAC	11	8	3	0	0
Atlantic 10	14	11	3	0	0
ACC	15	15	0	0	0
Atlantic Sun	8	3	1	0	4
Big 12	10	10	0	0	0
Big East	10	10	0	0	0
Big Sky	12	0	1	7	4
Big South	11	8	3	0	0
Big Ten	14	14	0	0	0
Big West	9	1	2	2	4
CAA	10	2	1	5	2
CUSA	14	3	9	2	0
Horizon League	10	4	1	0	5
MAAC	23	10	5	3	5
MEAC	13	0	1	11	1
Missouri Valley	10	5	0	4	1
Mountain West	10	8	2	0	0
Northeast	22	6	2	5	9
Pac-12	12	12	0	0	0
Patriot League	8	1	1	3	3
SEC	14	14	0	0	0
Southern	10	1	3	5	1
Southland	13	2	0	3	8
SWAC	10	0	0	0	10
Summit League	9	0	3	3	3
Sun Belt	11	2	6	1	2
West Coast	10	3	2	3	2
WAC	8	1	1	1	5
Total	340	155	51	63	71

WBB

Conference 2015-16	Total	Impact			
		Instant	Partial	Wait	Unknown
America East	9	1	1	5	2
AAC	11	8	3	0	0
Atlantic 10	14	11	3	0	0
ACC	15	15	0	0	0
Atlantic Sun	8	3	1	0	4
Big 12	10	10	0	0	0
Big East	10	10	0	0	0
Big Sky	12	0	1	7	4
Big South	11	8	3	0	0
Big Ten	14	14	0	0	0
Big West	9	1	2	2	4
CAA	10	2	1	5	2
CUSA	14	3	9	2	0
Horizon League	10	4	1	0	5
MAAC	23	10	5	3	5
MEAC	13	0	1	11	1
Missouri Valley	10	5	0	4	1
Mountain West	10	8	2	0	0
Northeast	22	6	2	5	9
Pac-12	12	12	0	0	0
Patriot League	8	1	1	3	3
SEC	14	14	0	0	0
Southern	10	1	3	5	1
Southland	13	2	0	3	8
SWAC	10	0	0	0	10
Summit League	9	0	3	3	3
Sun Belt	11	3	5	1	2
West Coast	10	3	2	3	2
WAC	8	1	1	1	5
Total	340	156	50	63	71

Notes:

[1] Squad List reported "Team_Full_Grant_Amt" within a thousand dollar range of the reported COA limits are considered COA Limits.

[2] Ivy League Schools and Service Academies are excluded from this analysis.

Sources:

Third-Party Subpoena documents

Squad List from Ordover Report Back Up

Updated Squad List (NCAAGIA02263617)

Individual School Financial Aid Websites (See back-up)

Public Statements from School Officials or Media Sources

Rivals.com

206. It is essential to emphasize that I am only performing this extrapolation of the assignment process because discovery is incomplete. The need to estimate any of these schools was caused by the fact that I do not yet have access to their COA payment data for 2015-16, nor do I have their statements as to whether they will adopt COA in the future. Once known, each school can be categorized without the need for this temporary, fallback method.

6.5.1.1 There are only a small number of schools identified as adopting a Wait-and-See approach

207. The set of schools for which data production and public statements has been sufficient to identify them as not having adopted COA is fairly short. In a few cases, a school like Montana State has indicated it is waiting to see if a specific conference rival makes the jump after which they plan to follow.[264] As a second example, nine schools on the East Coast, including James Madison and Elon College, announced they had agreed[265] not to adopt COA "at this time."[266] Importantly, none of these schools has chosen to leave Division I or to reduce their GIA level below the pre-2015 levels. This wait-and-see approach was actively encouraged by NCAA vice president Oliver Luck:

> "You may want to err on the side of caution because you can't put the toothpaste back in the tube. Maybe you don't go out with 100 percent of the full cost. You might exercise some restraint there,"[267]

and schools' comments reflect this language. These limited examples show how a school-level or conference-level competitive model could work more generally, with

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[264] Wilson, Kurt, "UM, MSU saying no to full cost of attendance scholarships for now," September 12, 2015, Missoulian (missoulian.com), (http://bit.ly/1QgpDTK).

[265] Notably, these schools are not members of a single conference, but reached this agreement despite the language of the *O'Bannon Permanent Injunction* (August 8, 2014) stating that that the NCAA's "member schools and conferences…are hereby, permanently restrained and enjoined from agreeing to…[p]rohibit the inclusion of compensation for the licensing or use of prospective, current, or former Division I men's basketball and FBS football players' names, images, and likenesses in the award of a full grant-in-aid, up to the full cost of attending the respective NCAA member school..."

[266] Alger, Jonathan, "Another presidential perspective on college athletics," September 21, 2015, James Madison Athletics (jmusports.com), (http://bit.ly/1HDh3eX).

[267] Smith, Michael, "Good Luck: Ads have new ally at NCAA," February 2, 2015, SportsBusiness Daily (sportsbusinessdaily.com), (http://bit.ly/20y2uSx).

schools that think their brand is best suited to a lower-level of payment than is adopted generally still able to continue to produce their sports and compete against teams paying higher compensation levels, without needing to impose their opposition to such payments on the system as a whole. They also indicate that even a school that has not yet committed to a COA approach could easily do so:

> "Montana or Montana State, if one of us were to jump in the fray, the other is probably 24 hours behind. If that." -- Montana State AD Peter Fields.[268]

208. The athletes who attended these schools adopting a "wait and see" approach were still harmed, economically, by the restraint that was in place prior to 2015, by virtue of the restriction of their market choice. As the anticompetitive effects of the market unwind, many of these schools may find the trigger point that encourages them to adopt Full COA GIAs as well.

209. However, as a conservative measure of damages, I have chosen not to model damages for any school in this category, abbreviated above as "Wait." Upon the completion of the discovery process, this list of wait-and-see schools can be formally assessed, and to the extent the Court determines the damages classes are better defined to exclude athletes who attended these schools, they can be easily identified and removed from the calculations, though of course removing any individual with zero damages has no impact on the class-wide damages total.

6.6 THE TITLE IX IMPACT OF FULL COA GIAS IS WORKING AS PREDICTED BY STANDARD ECONOMICS RESULTING IN COMMON IMPACT TO ALL FEMALE CLASS MEMBERS

210. As discussed above, rather than being an impediment to class-wide adoption of COA, economically Title IX serves to convert demand for male athletes into higher

[268] Wilson, Kurt, "UM, MSU saying no to full cost of attendance scholarships for now," September 12, 2015, Missoulian (missoulian.com), (http://bit.ly/1QgpDTK).

demand for female athletes.[269] The result that is predicted by this economic analysis is that as the cap on male athletes is relaxed, that a similar relaxation on female athletes pay would generate pay increases for women as well. That is, Title IX's economic effect in a world in which male athletes' compensation is capped is to spread that harm to the women who would have received matching payments.[270]

211. It is also worth noting that to the extent that relaxing the restraints in suit reallocates money from coaches or facilities to male athletes, the result is a proportional increase in total female funds, because as I understand it, the proportionality requirement Title IX places on financial aid does not apply for coaches' pay or facilities spending, but does for athletes' receipt of financial aid.

7. THERE IS A DAMAGES METHODOLOGY COMMON TO THE CLASSES, AND CAPABLE OF CALCULATION BY MEANS OF A CLASS-WIDE COMMON FORMULA

212. As discussed above in Section 4.3, the harm alleged is not whether a specific payment was "enough" or "fair" or "valuable," but rather what matters to determine the pecuniary harm related to the alleged antitrust injury is whether the price paid for services was lower than what would have arisen in the market in the absence of such rules.

213. As alleged, from 1976 through 2014, Defendants' agreement to limit athlete compensation to the Pre-2015 Capped GIA Level resulted in a shortfall relative to the Full COA level that directly impacted (lowered) the money athletes would have otherwise received. This difference is what I have identified as an athlete's collusive shortfall: the difference between the school's estimate of an athlete's total cost of attendance and the amount the NCAA allowed schools to provide in the form of an athletic grant-in-aid under the restraint in suit. Because the evidence above establishes strong, common evidence that

[269] A point where my opinion is in accord with previous NCAA experts such as Dr. Ordover and Dr. Willig.

[270] It is perhaps a sad fact that one spot in which gender equality has been achieved through Title IX is that both men and women were commonly harmed by the restraint in suit.

all such pecuniarily impacted athletes would not have experienced this shortfall in the but-for world, damages for any impacted class member is simply:

$$Damages = (\text{Collusive Shortfall}_{actual} - \text{Shortfall}_{butfor})$$

214. For each class member where my proposed model of the but-for world presented above shows that he/she would have received additional compensation such that his/her collusive shortfall would be zero, there is no specific need for a precise estimate of what the "COA Gap" at his/her but-for school would have been, because whether the athlete is assumed to stay at his/her same school or to move in the but-for world, the but-for gap remains zero, and thus this damages equation simplifies down to:

$$Damages = \text{Collusive Shortfall}_{actual}$$

215. A quick example will help show why the but-for level of the COA Gap is irrelevant to damages for those athletes who would have received a Full COA Gap in the but-for world. Consider an impacted athlete at a school with a COA Gap of $3,500 who attended an instant adopter school. Because the model predicts her but-for shortfall to be zero, her damages are simply $3,500 for that year – equal to the collusive gap she actually experienced. Now consider the argument that she might have switched schools because of some envisioned "reshuffling" of talent, but recognize she has already demonstrated she is good enough to earn a Full COA GIA at an instant adopter school. Therefore, even if her hypothetical new school's COA Gap is only, say, $2,000, nevertheless because the model predicts her but-for GIA would cover that COA gap, her damages are still equal to her collusive shortfall of $3,500 less her but-for shortfall of zero. Damages thus remain $3,500 in the but-for world; this athlete would not have had any shortfall regardless of which of the two schools she attended.

216. One can analogize this to a class of shoppers offered a coupon for a free gallon of milk who allege they did not receive the offered discount. In the *actual world*, many different consumers may have shopped at many different stores and paid many different

prices for the milk. But in the *but-for world*, regardless of where they shopped, the but-for price was zero. In such a case, damages does not hinge on any form of but-for conduct (would consumers change the store where they bought, would the price of milk change?) because in the *but-for world*, the consumer does not bear any of the variability in cost across stores from that proposed "reshuffling." Thus, their harm is simply equal to the actual harm in the *actual world* where they paid some dollar amount for milk. Similarly here, the athletes are damaged because of harm they experience in the actual world. The harm is gone in the but-for world. Differences in but-for COA levels that might be driven by supposed switching across schools are irrelevant because the harmed athletes do not incur a shortfall in the but-for world. This leads to a straightforward, simple means of calculating both total damages and each injured class member's individual damages by means of a common, formulaic approach.

217. Note how this is different than in the *O'Bannon* case where an athlete (had they really been reshuffled to another school) could have potentially been worth a different amount to that new school (in terms of the value of his NIL), so that knowing which school he would have attended in the but-for world could have been relevant to damages. In the current case, there is a $0 shortfall regardless of which school the athlete attends in the but-for world. Only in the actual world do different players experience different shortfalls, but that actual world gap is well documented and easily calculated; no economic modeling is required to subtract two existing data points available from an NCAA or school's financial aid database. Even in a situation where the school might choose to develop highly complex formulas to determine the athlete's specific COA level in the but-for world, the dollar value provided in the but-for world is going to zero out the but-for shortfall, therefore causing this term to drop out of the calculations.

218. What remains is simple: calculating the actual collusive shortfall each athlete experienced. As discussed in the impact section above and based on the partial discovery

available at this preliminary stage in the process,[271] I have identified the set of athletes that experienced direct pecuniary impact and damages. I categorize these class members based on the rapidity and completeness of their schools' adoption of Full COA GIAs between:

(a) Instant Adopter: Schools that have Instantly Adopted Full COA GIAs across all Full GIA athletes.

(b) Delayed/Partial Adopters: Schools that have adopted COA GIAs, but have either done so on a delayed or partial basis.[272]

219. Schools that have adopted COA, whether partially, on a delayed basis, or instantly and fully, would have done the same for their athletes throughout the damages period. Similarly, because all athletes at those schools have demonstrated themselves to be of sufficient quality to immediately merit a Full COA payment from a COA adopter school in the post-conspiracy period, my model predicts all athletes who attended these same schools during the damages period as being of sufficient quality to receive such a grant, either from their incumbent school, or from another comparable school willing to compete via payment of Full COA. Therefore, I model the damages of all class members attending these schools that would have received a Full COA scholarship in the but-for world, and only need to know what each of these schools' best estimate of each athlete's COA gap was for the years in which he/she was damaged.

220. For the Instant Adopters, the basis for concluding each suffered damages equal to the collusive shortfall is obvious – the moment these schools could pay more than previously allowed, they immediately jumped from the old Pre-2015 Capped GIA Level directly to the new cap. For the Delayed/Partial adopters, the story is similar. For many, the reason for the delay or phase-in of the payment is essentially a timing/budget issue

[271] It bears emphasis that the current state of discovery is far from complete. While the methodology I apply here is likely to remain unchanged once discovery is complete, it is possible that the yet-to-be produced data allows for refinements or improvements. Obviously, to the extent those changes are called for, I plan to adopt them as discovery is completed.

[272] I have also identified a small number of schools adopting a "Wait and See" approach, that have not adopted COA GIAs "at this time," either for philosophical, competitive, or budgetary reasons, but have generally indicated that they are waiting to see whether adoption in the future makes sense.

between the athletic department and the school. Many of these schools have made public statements to this effect.[273] We are still in the middle of the transition to a fully competitive equilibrium, consistent with the explanation given by NCAA Executive Vice President of Regulatory Affairs Oliver Luck, that both four-year scholarships and full cost of attendance stipends "will filter down" from the Power Five to smaller schools.[274] That filtering process is not yet complete, but it is moving rapidly. I anticipate that during the pre-trial merits phase of this case, a second year of post-restraint data will be available and that additional schools will be shown to have adopted payments above the Pre-2015 restraint.[275]

221. These are damages, which I understand is the extent of Plaintiffs' burden to prove. To the extent Defendants argue that other forms of aid that were available in the actual world served as offsets to damages or as a form of mitigation, I understand that to be Defendants' burden to prove. However, it should be noted that to be an offset, any source of money in the actual world would need to be proven to not be available in the but-for world. So if a given athlete got money from her parents or the Federal Government, unless there is evidence that the parents or the government would not have given that money in the but-for world, or credible evidence the NCAA would have, in essence, confiscated those outside payments (but only in the but-for world), those funds are not offsets to damages from an economic perspective. That is, in the but-for world, because any athlete could have gotten both Full COA and money from his/her parents, the parental money is not an economically valid offset to damages.

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[273] Nevada and Hawaii both state that they are going to do it either next year (Nevada) or in a stepwise fashion (Hawaii). See Murray, Chris, "Wolf Pack's battle for the full cost of attendance," May 18, 2015, Reno Gazette-Journal (rgj.com), (http://on.rgj.com/1IFP0yq); and also Lewis, Ferd, "UH hopes to offer stipends to athletes this fall," May 22, 2015, Star Advertiser (staradvertiser.com), (http://bit.ly/1KQhcT6).

[274] IMG World Congress of Sports 2015, "Rapid-Fire Roundtable: Unscripted Opinions on the Headlines of the Day" panel (Apr. 8, 2015), audio on file.

[275] As just two such examples, Troy State and Nevada have both announced that, despite not paying COA stipends in 2015-16, they will begin doing so in 2016-17. See Wise, Jeremy, "Troy athletes to receive cost of attendance stipends," January 21, 2016, Dothan Eagle (dothaneagle.com), (http://bit.ly/1PtvJ2Q); and also Murray, Chris, "Wolf Pack's battle for the full cost of attendance," May 18, 2015, Reno Gazette-Journal (rgj.com), (http://on rgj.com/1IFP0yq).

222. The only offsets that can have any economic effect on damages must come from sources of money that were actually provided in the actual world during the damages period but that can also be proven would not have been made in the but-for world. For many of these proposed offsets, such as Pell Grants and SAF money, the empirical evidence from 2015-16 strongly suggests those sources of money are not economically valid offsets to damages, as they continue to be paid even to Full COA athletes.

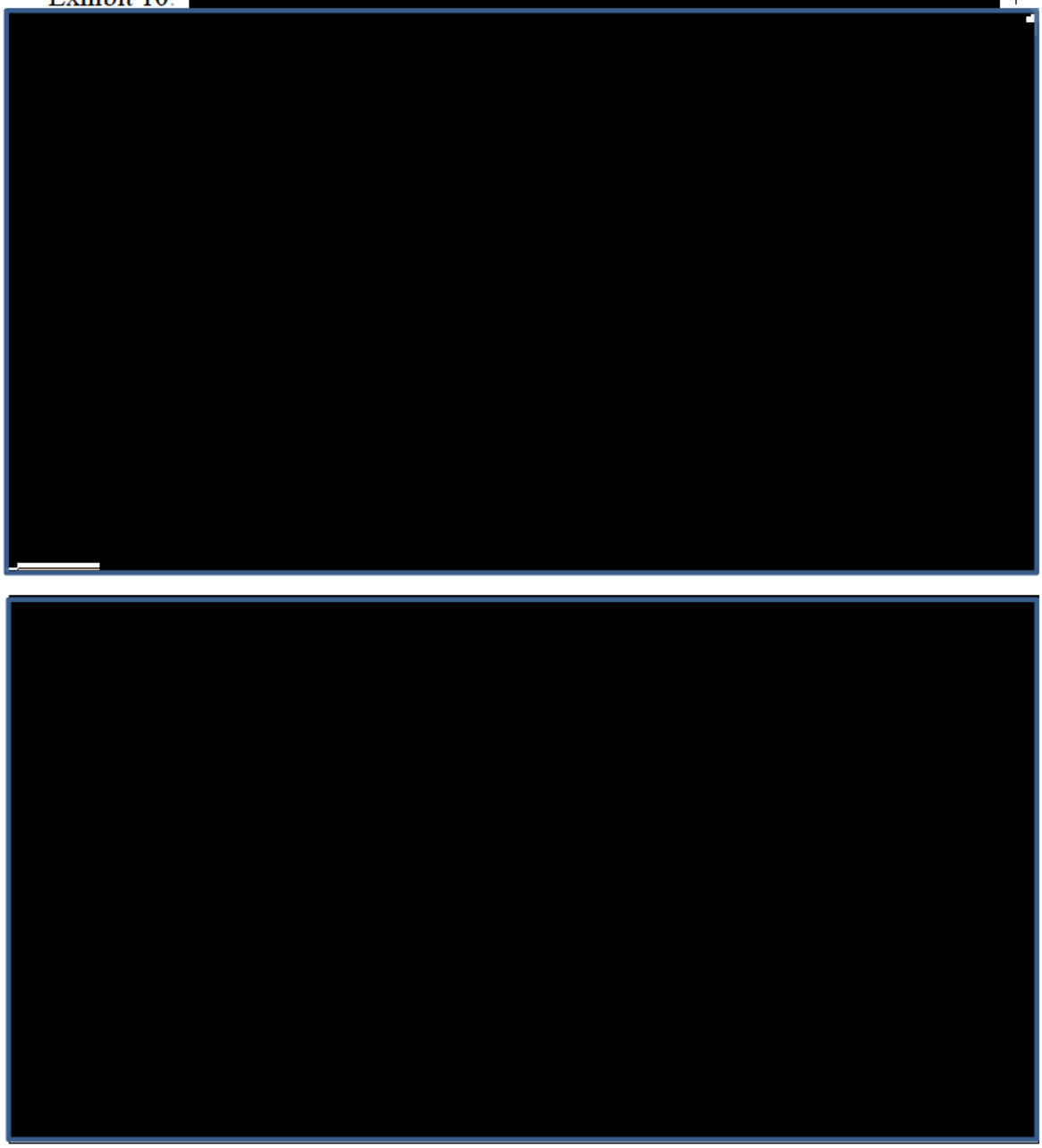
223. However, anticipating the claim that such offsets would make formulaic damages calculations impossible, after I demonstrate how class-wide, formulaic calculations of Plaintiffs' damages can be estimated, I then provide examples of how, to the extent Defendants prove the validity of any type of offsets, that those offsets can also be calculated by means of common, class-wide formulas.

7.1 BUT FOR THE RESTRAINTS IN SUIT, RECIPIENTS OF FULL (PRE-2015 CAPPED LEVEL) GIAS WHO ATTENDED CORE OR DELAYED/PARTIAL ADOPTER SCHOOLS WOULD HAVE RECEIVED FULL COA GIAS

224. With the ongoing caveat that the period of post-2014 conduct is still in its infancy, and therefore tends to understate the steady-state equilibrium that would represent the but-for world, nevertheless, the impact analysis discussed above also lends itself naturally to a conservative calculation of damages in this case. The categorization I have performed in Section 6 on impact identifies the set of schools whose athletes' damages are arithmetically equal to each athletes full Cost of Attendance, as estimated by their school, less the maximum athletic aid they were allowed to receive in the year in question. This is a mechanical task that consists of gathering discovery of Defendants (and their member schools') records, data entry, and basic arithmetic no more complex than addition and subtraction of the proper categories.

225. Before presenting the aggregate results, a few example calculations using real data from individual schools may help to illustrate the general method applicable to all schools.

Exhibit 10. [redacted]



226. Each of the schools above uses the Compliance Assistant software created by the NCAA, uses NCAA-provided formulas, and has its data housed at the NCAA on NCAA servers. As discussed above, I did not have access to that database, but I relied on data subpoenaed from the individual schools and my own (and my staff's) data entry. Nevertheless, once the data entry was done for these schools, calculating damages was a matter of subtraction.

227. For other schools whose data are also available, even though they may not all use the NCAA's servers to house the data and may use a different format to display them, once the data are accessed, the method of calculating damages is identical.[276] I present the damages for three different schools for different sports and years, to show how easily the calculation follows, even for schools using different data storage formats.[277]

[276]

[277] For these schools the SAF and Pell amounts are also obvious, but I have seen no evidence of any of the other sort of potential offsets.

Exhibit 11. [redacted]

[redacted]

7.2 EXTRAPOLATION BEYOND THE PRODUCTION

228. As discussed above in section 6.5.1, solely because discovery is not yet complete, I have had to extrapolate beyond the set of schools that have produced financial data. This stop-gap measure likely won't be necessary at the merits phase; at that point, each school's post-2014 COA conduct will be known and can speak for itself. However, as I explained above, in the interim, I have adopted a method for assigning schools to an impact and damages category, based on financial data, public statements, and recruiting success.[278] In the (temporary) absence of such data, this relationship provides a solid method of assigning schools for which data discovery has been (temporarily) insufficient to make a categorization to one of the three categories for the purposes of estimating a preliminary class-wide damage method.

229. Taken together, the steps above produce a straightforward damages calculation, both for the schools with sufficient data and also beyond those, to all of FBS football and almost all of Division I basketball. In the tables that follow I present first the damages for

[278] Because of the high correlation between these two measures, I believe this is a reasonable method to extrapolate from the existing data to a fuller set of class members' estimated damages, especially considering that my task here at this stage is not to develop a precise estimate of damages, but rather to demonstrate that a damages method is feasible. This analysis also shows how unlikely it is that an athlete who attended a "wait and see" school in the actual world would be in a position to switch to an instant adopter in the but-for world.

all impacted athletes, divided across the three sports. The damages tallies includes all adopting schools, both those that adopted Full COA instantly, and those adopted partial COA payments or which have announced an intent to adopt COA but did not make these payments in 2015-16. [redacted][279]

230. It is my opinion that had the restraints in suit never been in place, that by the start of the damages period, any ramp-up that has needed to reach full COA, and any follow-on competitive effects, such as those described by Oliver Luck (full cost of attendance stipends "will filter down" from the Power Five to smaller schools[280]) would have worked their way through the system, and in the but-for world that Arkansas State would be paying Full COA GIAs rather than covering just 88 percent of the COA Gap.

231. Therefore, I have included schools like Arkansas State and other delayed/partial COA Adopters, in my calculation of damages. But-for the misconduct, these athletes would also have received Full COA payments from the start of the damages period in 2010.

232. I have also used the extrapolation method discussed above to assign schools with incomplete production to appropriate impact categories until discovery is complete and they can be assigned relying on data.[281] Because of incomplete discovery, for these schools I have also developed a lower bound (LB) and upper bound (UB) of the Full COA value (based on the minimum of on-campus COA and off-campus COA, and maximum of those two numbers, respectively), though as can be seen, the variance between the ends of that

[279] [redacted]

[280] IMG World Congress of Sports 2015, "Rapid-Fire Roundtable: Unscripted Opinions on the Headlines of the Day" panel (Apr. 8, 2015), audio on file

[281] Note that even with this extrapolation, some non-FBS schools have produced so little data their COA conduct in 2015-16 remains categorized as "unknown."

range is not large relative to total damages. This results in an estimate of damages for the classes which I lay out below, first by sport and by conference, in which I have included damages for athletes at all adopting schools, whether full or partial, immediate or delayed.[282] After these tables, I have provided a summary by sport and by type of actual-world adoption, where I have tallied separate subtotals for the Delayed/Partial schools' athletes and of the Instant Adopters.

[282] Note that for athletes attending schools that provided partial or delayed COA GIAs in 2015-16, there are additional damages equal to their ongoing shortfall, until their schools reach Full COA. While I have not provided a tally of these damages, these athletes' ongoing damages follow the identical formula as damages prior to 2015-16, the Full COA less the GIA each received, for each year after 2014.

Exhibit 12. Damages Estimates (by Conference)

MFB

		Impact				*Damages*	
Conference 2015-16	**Total**	**Instant**	**Partial**	**Wait**	**Unknown**	**Total LB**	**Total UB**
AAC	11	7	4	0	0	$17,554,565	$18,617,324
ACC	14	13	1	0	0	$16,760,907	$17,479,122
Big 12	10	10	0	0	0	$14,447,744	$14,937,610
Big Ten	14	14	0	0	0	$16,415,388	$17,367,175
CUSA	13	1	11	1	0	$11,937,233	$14,095,198
Division I-A Independents	2	2	0	0	0	$2,209,387	$2,209,387
MAC	13	7	6	0	0	$10,988,409	$11,638,679
Mountain West	11	8	3	0	0	$14,320,869	$16,283,109
Pac-12	12	12	0	0	0	$17,083,987	$19,531,424
SEC	14	14	0	0	0	$19,825,392	$20,405,777
Sun Belt	11	0	7	4	0	$6,888,073	$8,110,030
Total	125	88	32	5	0	$148,431,955	$160,674,836

MBB

		Impact				*Damages*	
Conference 2015-16	**Total**	**Instant**	**Partial**	**Wait**	**Unknown**	**Total LB**	**Total UB**
America East	9	1	1	5	2	$112,494	$182,394
AAC	11	8	3	0	0	$2,850,347	$3,011,706
Atlantic 10	14	11	3	0	0	$1,843,466	$2,026,681
ACC	15	15	0	0	0	$2,950,188	$3,106,198
Atlantic Sun	8	3	1	0	4	$730,602	$744,374
Big 12	10	10	0	0	0	$2,334,286	$2,414,168
Big East	10	10	0	0	0	$1,348,051	$1,552,293
Big Sky	12	0	1	7	4	$386,994	$386,994
Big South	11	8	3	0	0	$2,008,944	$2,439,441
Big Ten	14	14	0	0	0	$2,631,953	$2,784,465
Big West	9	1	2	2	4	$557,993	$567,600
CAA	10	2	1	5	2	$656,742	$687,153
CUSA	14	3	9	2	0	$2,389,299	$2,888,972
Horizon League	10	4	1	0	5	$961,285	$1,098,612
MAAC	23	10	5	3	5	$2,017,964	$2,261,837
MEAC	13	0	1	11	1	$195,542	$212,867
Missouri Valley	10	5	0	4	1	$996,513	$1,051,756
Mountain West	10	8	2	0	0	$2,418,576	$2,766,393
Northeast	22	6	2	5	9	$1,691,307	$2,122,884
Pac-12	12	12	0	0	0	$2,745,520	$3,125,663
Patriot League	8	1	1	3	3	$176,288	$182,748
SEC	14	14	0	0	0	$3,238,210	$3,334,404
Southern	10	1	3	5	1	$1,067,790	$1,089,340
Southland	13	2	0	3	8	$437,204	$470,505
SWAC	10	0	0	0	10	$0	$0
Summit League	9	0	3	3	3	$692,716	$782,378
Sun Belt	11	2	6	1	2	$2,051,136	$2,364,468
West Coast	10	3	2	3	2	$1,163,234	$1,230,496
WAC	8	1	1	1	5	$447,812	$582,991
Total	340	155	51	63	71	$41,102,456	$45,469,780

WBB

		Impact				*Damages*	
Conference 2015-16	**Total**	**Instant**	**Partial**	**Wait**	**Unknown**	**Total LB**	**Total UB**
America East	9	1	1	5	2	$126,078	$197,732
AAC	11	8	3	0	0	$2,941,988	$3,119,372
Atlantic 10	14	11	3	0	0	$1,885,100	$2,087,125
ACC	15	15	0	0	0	$3,073,790	$3,225,311
Atlantic Sun	8	3	1	0	4	$802,038	$816,444
Big 12	10	10	0	0	0	$2,524,754	$2,611,952
Big East	10	10	0	0	0	$1,232,744	$1,457,960
Big Sky	12	0	1	7	4	$474,840	$474,840
Big South	11	8	3	0	0	$1,774,421	$2,207,264
Big Ten	14	14	0	0	0	$2,819,574	$2,976,978
Big West	9	1	2	2	4	$598,975	$609,981
CAA	10	2	1	5	2	$696,009	$720,742
CUSA	14	3	9	2	0	$2,746,285	$3,295,863
Horizon League	10	4	1	0	5	$936,458	$1,081,621
MAAC	23	10	5	3	5	$2,155,546	$2,417,774
MEAC	13	0	1	11	1	$188,447	$205,144
Missouri Valley	10	5	0	4	1	$983,315	$1,026,440
Mountain West	10	8	2	0	0	$2,546,037	$2,926,837
Northeast	22	6	2	5	9	$1,728,483	$2,164,373
Pac-12	12	12	0	0	0	$2,893,603	$3,282,248
Patriot League	8	1	1	3	3	$175,465	$181,435
SEC	14	14	0	0	0	$3,437,635	$3,539,072
Southern	10	1	3	5	1	$1,084,164	$1,096,420
Southland	13	2	0	3	8	$403,231	$440,137
SWAC	10	0	0	0	10	$0	$0
Summit League	9	0	3	3	3	$517,722	$578,933
Sun Belt	11	3	5	1	2	$2,295,917	$2,640,715
West Coast	10	3	2	3	2	$1,208,577	$1,269,384
WAC	8	1	1	1	5	$490,857	$634,039
Total	340	156	50	63	71	$42,742,055	$47,286,135

Notes

[1] Squad List reported "Team_Full_Grant_Amt" within a thousand dollar range of the reported COA limits are considered COA Limits.

[2] Ivy League Schools and Service Academies are excluded from this analysis.

[3] Schools missing from the Squad List assigned average number of class member athletes for a given sport.

Sources

Third-Party Subpoena documents

Squad List from Ordover Report Back Up

Updated Squad List (NCAAGIA02263617)

Individual School Financial Aid Websites (See back-up)

Public Statements from School Officials or Media Sources

Rivals.com

Integrated Postseconday Education Data System (IPEDS) database from https //nces.ed.gov/ipeds/datacenter/

Exhibit 13. Sum of Damages Estimates (by Instant/Partial)

	Instant	Partial	Total
Total FBS	$118,574,956	$35,978,439	$154,553,395
Total MBB	$32,110,624	$11,175,494	$43,286,118
Total WBB	$33,663,951	$11,350,143	$45,014,095
Total	$184,349,532	$58,504,076	$242,853,608

Notes

[1] Based on median of on-campus and off-campus COA GAP values.

[2] Squad List reported "Team_Full_Grant_Amt" within a thousand dollar range of the reported COA limits are considered COA Limits.

[3] Ivy League Schools and Service Academies are excluded from this analysis.

[4] This estimate excludes athletes from 71 non-FBS schools for whom insufficient data currently exist even for an extrapolation.

Sources

Third-Party Subpoena documents

Squad List from Ordover Report Back Up

Updated Squad List (NCAAGIA02263617)

Individual School Financial Aid Websites (See back-up)

Public Statements from School Officials or Media Sources

Integrated Postseconday Education Data System (IPEDS) database from https //nces.ed.gov/ipeds/datacenter/

Rivals.com

233. The full classes' damages figures presented in this section are not offered as a precise estimate of damages for the merits phase of this case, but as a detailed demonstration of the ease of applying the class-wide, formulaic means for calculating a reasonable and non-speculative estimate of the classes' damages, and for rolling it out to the three classes. At the merits stage of this case, when discovery is complete, the same method can be used for all schools and athletes in suit using each school's data, and a more precise estimate of these damages will be feasible (and easy) based on common formulas.

234. Finally, to give these numbers some perspective, consider that from 2010 to 2014 (a period approximately coincident with the damages period), total payments in FBS made to terminated coaches as exit payments (i.e., money paid to them to not coach) was about

$250 million.[283] This money alone would have been sufficient to cover the single-damages estimate above, prior to any trebling.

7.3 DAMAGES DO NOT HINGE ON AN ATHLETE'S "COA GAP" IN THE BUT-FOR WORLD

235. As discussed above in Section 7, calculating damages in this case does not require knowledge of the athlete's specific but-for COA school, once he/she is determined to have attended a COA-adopting school. Whether athletes would have attended the same school in the but-for world as they did in the actual (which is the likely outcome for the vast majority of these athletes), or accepted a competitive offer from a competitive school, an athlete's damages remain grounded in his/her real-world shortfall. Although there might be some level of switching across teams of similar levels of competitiveness (e.g., between two Power 5 schools or between two lower-level FBS schools), such switching would have no bearing on the calculation of damages in this case. This is because, as discussed above in Section 7, damages are based on the actual collusive shortfall experienced in the actual past, as compared to the predicted shortfall of zero that would have occurred but for the alleged misconduct. That latter value will be zero for every class member at every school that would have competed up to Full COA in the but-for world.

236. So if an athlete who attended San Diego State and has been shown to have been of sufficiently high quality that he would have had his entire shortfall eliminated at that school, had instead ended up at a different, but similarly competitive school (which is the sort of "re-shuffling" that could theoretically occur under the Invariance Principle), he would still be sufficiently in demand to have his shortfall eliminated at his new (but-for) school. As a result, Defendants' claimed "Substitution Effect" is irrelevant to this calculation of damages.

[283] Wolverton, Brad, "10 revealing tidbits we found in football coaches' contracts," December 16, 2015, Chronicle of Higher Education (chronicle.com), (http://bit.ly/1Tknayb).

7.4 THE SO-CALLED "SUBSTITUTION EFFECT" IS NOT AN IMPEDIMENT TO CERTIFYING A DAMAGES CLASS

237. In previous phases of this[284] and other litigation, the NCAA has appealed to the so-called "Substitution Effect," so I anticipate that Defendants will argue that a "'cascade' effect"[285] of "re-shuffling"[286] will lead to the displacement of a non *de minimis* number of class members, creating what they claim is class conflict and arguing that this would make formulaic damages impossible.

238. In the injunctive phase of this case, this court summarized this argument as follows:

> "Defendants' 'substitution effects' theory predicts the following chain of events: removing the GIA cap would lead to some student-athletes receiving greater compensation; greater compensation is an incentive for players to opt in to, or remain in, NCAA athletics who otherwise would have pursued more lucrative opportunities; that incentive would lead to more players competing for finite school resources; and that competition would result in less valued student-athlete class members losing their full GIAs."[287]

239. As seen in this summary of Defendants' theory, the essence of this argument is first to acknowledge the clear anticompetitive harms of the restraint in suit have greatly harmed the market as a whole and caused pecuniary damage to some participants, but then to argue that the resulting pro-competitive adjustment back to the less constrained, more competitive equilibrium may result in differential impact to different class members. The concept boils down to three elements:

(a) Delayed Exit/New Entry: Ending the anticompetitive effect of the price restraint may cause fewer college stars to exit FBS/D1 early, and the ongoing anticompetitive restrictions on quantity (challenged separately in *Rock*) will cause each returning athlete to displace the least valuable player on his team, who will find a spot on a lesser quality team,

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[284] *Ordover Injunctive Report*, ¶22.

[285] *Expert Report of Daniel L. Rubinfeld Regarding Class Certification (O'Bannon)*, March 14, 2013 available as redacted at 681-1 (3/14/13), p. 58. In *Expert Report of Professor Janusz A. Ordover on Class Certification Issues* (*White*), September 6, 2007, ¶52, Dr. Ordover uses the term "cascade effect" without internal quotations.

[286] *Declaration of Professor Janusz A. Ordover in Support of the NCAA's Opposition to Plaintiffs' Second Motion for Class Certification*, (*Walk-on*) February 10, 2006, p. 35.

[287] *Order Granting Motion For Rule 23(b)(2) Class Certification*, December 4, 2015, p. 13.

displacing another athlete in turn. Similarly, athletes who currently forgo playing the college sports in suit altogether will purportedly enter the college ranks in meaningfully large groups, most notably from overseas or lower divisions.

(b) Increased Competition: Ending the anticompetitive effect of reduced competition among college teams will lead to more aggressive bidding for talent that will purportedly change the identity of who attends where in an economically meaningful way.

(c) Abandonment of Division I Sports: Ending the anticompetitive wealth transfer from athletes to schools will purportedly cause a mass exodus of college teams from D1/FBS.

240. Each of these effects is entirely hypothetical; there is no evidence of any of these purported effects,[288] even as the market is adjusting now to the new COA limit.

241. Most relevant to the allegations in suit, during *O'Bannon*, the NCAA put forward economic evidence that the "reshuffling" they predicted during the class certification phase in *O'Bannon* did not apply to the facts of an adjustment from the pre-2015 Cap to Full COA GIAs, stating through their expert, Professor Daniel Rubinfeld that:

> "The Economics of Re-Matching in the Current Case [*O'Bannon*] Are Vastly Different from *White*."[289]

242. In fact, once *O'Bannon* had moved to the merits phase, the NCAA concern for reshuffling switched to a different argument, which is that paying players would have no effect whatsoever on team composition:

> "In the but-for world, in contrast, NCAA teams would consist of virtually the same set of players as in the actual world; players would not be switched out for professionals."[290]

243. Dr. Rubinfeld also testified at trial that the move to Full COA would raise few of the same concerns he had expressed vis-à-vis an unlimited level of payments.[291]

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[288] For example, Dr. Ordover testified that he has not identified even one player in basketball or football who has decided to stay in school next year rather than going in the NFL or NBA draft because of the fact that the Power 5 Conferences have adopted their new rules permitting additional compensation to players in different forms. See *Ordover Deposition*, p. 105.

[289] *Expert Sur-Reply Report of Daniel L. Rubinfeld Regarding Class Certification, May 30, 2013,* (*O'Bannon*), pp. 41, available as redacted at 790-1 (05/30/2013).

[290] *Expert Rebuttal Report of Daniel L. Rubinfeld Regarding Merits (O'Bannon)*, November 5, 2013, ¶217. Available as redacted at 925-15 (12/12/13).

[291] *O'Bannon* Trial Transcript, Volume 15, pp. 3116-17

244. Turning to the real world, when the validity of the hypothesized "cascade of shuffling" is tested with empirical evidence, none of Dr. Ordover's hypothesized effects can be shown to cause more than a *de minimis* concern. I take each in turn.

7.4.1 Delayed exit and/or new entry does not create class conflict

245. In 2014, a record-number of athletes across Division I football—98 in total, with 92 from FBS and 6 from FCS—chose to forgo a least one year of college eligibility.[292] A slightly lower level of football athletes declared for the 2016 draft, a number which was described as "way more than the [NFL] system can absorb."[293] Earlier in the class period, this number was even lower.

Exhibit 14. Players with Eligibility Left Who Entered NFL Draft

The players granted special eligibility for the NFL Draft the past 10 years:

Year	Players Granted Special Eligibility		Year	Players Granted Special Eligibility
2016	96		2011	56
2015	74		2010	53
2014	98		2009	46
2013	73		2008	53
2012	65		2007	40

Source: NFL Press Release, January 22, 2016, "96 PLAYERS GRANTED SPECIAL ELIGIBILITY FOR 2016 NFL DRAFT"

246. This high-water mark of 98 represented less than 1% of the 10,000-plus[294] FBS football players with remaining eligibility. Only 37 of these 98 athletes actually became NFL draftees.[295] And even these 37 athletes deemed ready for the NFL before their senior year were not being recruited by NFL teams directly out of high school.[296] The empirical

[292] "List of underclassmen granted eligibility for 2014 NFL draft," January 19, 2014, NFL (nfl.com), (bit.ly/1ulMQO5).

[293] Dodd, Dennis, "Near-disastrous number of early entries declaring for 2016 NFL Draft," January 18, 2016, CBS Sports (cbssports.com), (http://cbsprt.co/1Qm8LzG).

[294] 126 FBS teams in 2013-14 multiplied by 85 players = 10,710 total FBS players. See "NCAA FBS (Division I-A) Football Standings – 2013," ESPN (espn.com), (http://es.pn/1oCE3HQ).

[295] "List of underclassmen granted eligibility for 2014 NFL draft," January 19, 2014, NFL (nfl.com), (bit.ly/1ulMQO5).

[296] The NFL and NFLPA have agreed to an effective age limit of 21, requiring players to wait three years after the year they graduate (or would have graduated) high school. See "NFL and NFL Players Association Collective Bargaining Agreement," August 4, 2011, p. 17.

evidence is clear that the NFL is no more than a fringe, albeit high-end, competitor with respect to the FBS labor market and the NBA and WNBA are similarly non-viable for the vast majority of the participants in the Division I men's and women's basketball labor markets.[297]

247. In *O'Bannon* however, the possibility of impact from some or all of these athletes remaining in college was purely theoretical, as Plaintiffs (and the Court) did not have access to the detailed Squad Lists[298] needed to test whether longer college careers for stars would be sufficient in number to actually displace any athletes from FBS or Division I. In this matter, those Squad Lists now have been produced, and they provide strong evidence that no such displacement need occur. For example even though there were 98 athletes who declared for the NFL draft in 2014, there were 110 unused counter slots (across 121 FBS football teams) and similarly, for men's basketball there were 137 slots (across 344 Division I basketball teams), more than sufficient to re-absorb the 45 and 19 returning stars in those sports as well as any "cascade" of athletes displaced by their return.[299]

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[297] This was also the conclusion in the *O'Bannon* case. "Dr. Noll noted that elite football and basketball recruits rarely forego opportunities to play FBS football or Division I basketball in order to play professionally. Neither the National Football League (NFL) nor the National Basketball Association (NBA) permits players to enter the league immediately after high school. Id. 68:17-69:6 (*O'Bannon*). Although other professional leagues – such as the NBA Development League (D-League), the Arena Football League (AFL), and certain foreign football and basketball leagues – permit players to join immediately after high school, recruits do not typically pursue opportunities in those leagues. Id. 482:11-:13 (Noll). … What's more, none of these leagues offers the same opportunity to earn a higher education that FBS football and Division I basketball schools provide. For all of these reasons, the Court finds that there are no professional football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide. These schools comprise a relevant college education market, as described above…." (*Findings of Fact and Conclusions of Law*, (*O'Bannon*), August 8, 2014, pp.11-12).

[298] A Squad List is defined by the NCAA in section 12.10.2 (also in 15.5.11): "Squad-List Form. The institution's athletics director shall compile on a form maintained by the Awards, Benefits, Expenses and Financial Aid Cabinet and approved by the Legislative Council a list of the squad members in each sport on the first day of competition and shall indicate thereon the status of each member in the designated categories."

[299] Schools rely on a small cushion of unused counters, so GIA limits are effectively binding at levels slightly below 85/13/15. Sufficient room thus exists to adjust to frictional events. The NCAA explained this frictional cushion in a white paper it presented to the DOJ in 2010. See Carlton, Dennis W., David A. Fenichel, Elisabeth M. Landes, and Jonathan M. Orszag, "Economic Analysis of the Competitive Effects of the NCAA One-Year Rule on Financial Aid to Student Athletes," June 28, 2010, Compass Lexecon, Inc. (NCAAGIA01177233 -249).

248. With these new data on the relative small number of would-be "substitutors" vis-à-vis the larger number of available Squad List slots, it is now clear that the theoretical concerns expressed in *O'Bannon* have no empirical basis. As this Court found at the injunctive phase of this matter:

> The Court finds that Dr. Ordover's reports fail to show intra-class conflicts of interest because, even if Plaintiffs sought the relief he assumes, his reports fail to demonstrate that enjoining the GIA cap would induce additional players to participate in NCAA athletics, and would induce schools, to attract those additional players, to reduce or deny GIAs to members of the proposed classes who receive full GIAs. Nor do they demonstrate that schools would change how they have valued members of the proposed classes because of an injunction against a GIA cap or that schools, despite their past actions and sources of revenue, would be forced by economic circumstances to harm certain members of the proposed classes."[300]

249. This is consistent with the contentions of the NCAA's expert witness in the *White* case, Professor Jerry Hausman of MIT, who provided expert opinion that, *inter alia*,

> "There is no proof, and I find it highly unlikely, that any SA [college athlete] decided to play professionally or decided against college as a result of the [pre-2015] GIA Rule."[301]

250. Moreover, as I explained in my previous report in this matter, even if there were some displacement from schools at the bottom end of the talent pool within FBS football or Division I basketball, the likely candidates for any such displacement are those receiving partial GIAs (who are not part of the class) rather than class members receiving Full GIAs. Per the Squad Lists [redacted].

[300] *Order Granting Motion For Rule 23(b)(2) Class Certification*, December 4, 2015, pp. 18-19.

[301] NCAAGIA02216105 - NCAAGIA02216171 (Expert Report of Professor Jerry A. Hausman (White), September 6, 2007, p. 5.)

251. As the NCAA explained to the DOJ in 2010: "it is the lower-tier recruits who in the actual world are probably least likely to have their scholarships renewed today due to poor athletic performance."[302] The five least compensated GIA recipients from each of the 24 teams in those two FBS conferences received an average of 30% of a GIA.[303]

7.4.1.1 Lessons from the *White* case: The Sky Has Not Fallen

252. The same "cascade" of displacement argument was not persuasive in *White v. NCAA*. In *White*, Professor Ordover made similar arguments that he and the other NCAA experts have made regarding the likely displacement of lower-skilled athletes by better athletes who had been harmed by the restraint in suit and, who but-for that restraint, would have received Full COA GIAs.[304] In *White*, however the Court was persuaded that the size of the damages alleged were sufficiently small that any reshuffling "cascade" would be minimal, an argument advanced by *White* Plaintiffs' Class Certification expert, Dr. Robert McCormick. This conclusion was also driven, in part, by the fact that the class of athletes in *White*, as here, had already established they were worthy of receiving a GIA in competition over those who had not.

253. Traditionally, Defendants have benefited from the fact that any plaintiff alleging anticompetitive harm from NCAA conduct did so in the absence of data for testing these claims. But here, this Court is blessed by the fact that we have a year's worth of actual market data to test the claims of both parties. In *White*, the NCAA witnesses could appeal to their industry expertise, without worry that that court could look at real-world market conduct to test whether their predictions were anything more than self-serving *ipse dixits*.

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[302] See Carlton, Dennis W., David A. Fenichel, Elisabeth M. Landes, and Jonathan M. Orszag, "Economic Analysis of the Competitive Effects of the NCAA One-Year Rule on Financial Aid to Student Athletes," June 28, 2010, Compass Lexecon, Inc. (NCAAGIA01177233 -249).

[303] To the extent these non-class member athletes move from a partial GIA athlete in FBS to a full GIA athlete in FCS, they might experience a pecuniary benefit from this "displacement." Given that several FCS schools (including Liberty, North Dakota State, North Dakota, and South Dakota, see FN 205) have announced plans to pay full COA scholarships for FCS football players, there is the real possibility this "displacement" could prove financially lucrative.

[304] See, as just one example, *Expert Report of Professor Janusz A. Ordover on Class Certification Issues* (*White*), September 6, 2007, ¶¶51-57.

Now that we are one year into the natural experiment of providing COA, the evidence is clear that the soothsaying abilities of the NCAA's industry witnesses in *White* was unreliable.

254. Specifically, the predictions made by Dr. Ordover, Professor Hausman, Lynn Holzman, and David Berst,[305] as to how providing COA would prove impossible, antithetical to amateurism, or simply too costly to enact have all been proven false. To my knowledge, no athlete has lost a GIA due to displacement from any "cascade of reshuffling" nor has any school left Division I.

255. Similarly, in *White* many industry participants (including representatives from Iowa State[306] and UCLA[307]) put in declarations claiming that if the Pre-2015 cap were relaxed and schools were given the option to pay Full COA GIA, many schools could leave Division I because they would be "unable to meet [the] challenge" of providing Full COA GIAs. Bob Toledo (of New Mexico and UCLA) declared that:

> "if the challenged NCAA rule [prohibiting Full COA GIAs] did not exist many Division I schools, including UCLA, would not have been in a financial position to award all of its football players athletics based aid up to the level of the cost of attendance, or would have chosen not to do so. … Any such decision would also have had to take into account Title IX requirements – which could nearly double the cost. As a result, based on my understanding of the plaintiffs' theory, the football players would have received varying amounts of aid, and some would have received less than the amount they actually received."[308]

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[305] Mr. Berst specifically declared that "allowing student-athletes to receive financial aid in a value up to, or even more than, $4,000 over cost-of-attendance" by allowing an athlete to receive Full COA and Full Pell would raise concerns regarding amateurism, the 'collegiate model' and pay-for-play." NCAAGIA02200316-34 (Declaration of S. David Berst (*White*), October 18, 2007), ¶37. Apparently, Mr. Berst's concerns were not shared by the NCAA membership when the Pre-2015 cap was relaxed and Full COA plus Full Pell was explicitly allowed.

[306] *Declaration of Roberta Johnson* (*White*) October 12, 2007, ¶7: "Based on my experience, I believe that most colleges and universities, including Iowa State University, operate their athletics programs under strict budgetary constraints. If the challenged rule did not exist, Iowa State University would have to struggle to find funds to provide its men's football and basketball student-athletes with financial aid up to the cost of attendance. Many colleges and universities would not be able to meet this challenge, which is further complicated by the differing ways in which cost of attendance can vary from school to school."

[307] *Declaration of Bob Toledo*, September 8, 2006.

[308] *Declaration of Bob Toledo, September 8, 2006*, ¶4.

256. As I testified in *O'Bannon*, this is an irrational claim, as the likely cost of adopting a Full COA GIA is far less than the likely loss of revenue from exiting Division I (and also ignores the possibility of simply remaining in Division I and making GIA offers below Full COA). Nevertheless, the NCAA put forth declarations claiming an exodus from FBS would loom if the current Defendants abandoned the pre-2015 cap in favor of the current COA cap:

> "For example, the former Assistant Head Football Coach at the University of New Mexico (and current Head Football Coach at Tulane University) noted in his declaration that 'if smaller or less well-funded schools were forced to choose between increasing athletics-based aid up to the cost of attendance and dropping out of Division I-A, I believe that some schools would seriously consider the latter option because of increased expense.' The Athletic Director of the University of Idaho has noted in an interview that the financial burdens associated with providing cost of attendance to football and men's basketball players, coupled with the additional expenses necessary to maintain Title IX compliance and meet equity obligations, would lead to consideration of switching out of Division I-A."[309]

257. Instead, as shown in the analysis of 2015 above, the predictions of *White* plaintiffs' class certification expert, Dr. Robert McCormick, have been borne out. The size of the COA impact, while meaningful to the individual athletes who were denied the payment by Defendants actions, has nonetheless not caused any of the predicted catastrophes asserted in past litigation. From the perspective of the scientific method, this poor track record of self-interested but incorrect prognostication should provide healthy skepticism when evaluating any analogous predictions of future woe. In my earlier work, I've shown the history of other sports, such as MLB and the NFL, predicting doom if economic competition for athletes were allowed, all of which were shown to be false with the passage of time. A similar false prophecy was the NCAA's claim to Congress (NCAAGIA02214880: *Letter from Tom Hansen, Assistant Executive Director of NCAA to Peter Chumbris*), in June 1975, that Title IX would destroy college football, writing that

[309] Quoted from NCAAGIA02217097 – 220 (Expert Report of Robert D. Willig, September 6, 2006), ¶76. (Internal citations omitted).

"… it would be impossible for a major institution with a football program comparable to the University of Nebraska ever to comply with the regulations [of Title IX] unless the football program were dismantled."

7.4.2 Increased competition does not create class conflict

258. In past litigation, including *White* and *O'Bannon*, Defendant NCAA has argued that one of the effects of its restraints (and a resulting anticompetitive harm therefrom) has been to misallocate talent across schools relative to the competitive outcome. Of course, they do not state it this starkly, but it should be clear that if one is going to argue that eliminating a collusive restraint will result in a market-driven correction and re-allocation of talent, then the collusive allocation is inherently sub-optimal in terms of matching supply and demand. Therefore, such an effect cannot matter economically without the pre-requisite conclusion that the restraint harms competition substantially.

259. The rest of the argument, however, fails because of what is acknowledged as the first finding in Sports Economics (over 50 years ago), known as the Invariance Principle,[310] which says that regardless of rules designed to prevent it, players will tend to end up where they are most valued. Thus, while the but-for world might see movement of athletes between Ohio State and Alabama, we would not see substantial movement of athletes from Ohio State to Ohio University or from Alabama to Alabama State.

260. This topic was much discussed in *O'Bannon* where I showed that:

> "When actual facts of the industry are taken into account, it is clear that athletic talent is already generally distributed proportionally to team revenue, and thus moving to a system where the amount of shared licensing that players receive is proportional to licensing revenue would

[310] Simon Rottenberg, "The Baseball Players' Labor Market," *The Journal of Political Economy* 64(3), 1956, pp. 242-258, here p. 255. This theoretical result was generalized in the literature by Nobel Prize Winner Ronald Coase. Rottenberg notes (p. 258) that "Markets in which the freedom to buy and sell is constrained by the reserve rule or by the suggested alternatives to it do not promise better results than do markets constructed on the postulate of freedom**. It appears that free markets would give as good aggregate results as any other kind of market for industries, like the baseball industry, in which all firms must be nearly equal if each is to prosper. On welfare criteria, of course, the free market is superior to the others, for in such a market each worker receives the full value of his services, and exploitation does not occur**." (Emphasis added.)

> thus be unlikely to result in any substantial reshuffling. Just as importantly, Defendants' hypotheses are out of sync with the established economic literature on this exact question, which strongly supports the empirical finding that even in the face of restraints on price, talent quality is distributed substantially the same as in a competitive market."[311]

261. Specifically, in *O'Bannon* I concluded that the sports economics literature has found the Invariance Principle applies to college sports as much as in major league sports,[312],[313] and that:

> "The facts of college sports are also wholly consistent with the findings in the literature. In the system that has developed over the many years of the restraint, schools and conferences have found many other ways to compete for players. Those mechanisms (e.g., skilled head and recruiting coaches, fancy physical facilities) have been quite effective in creating a market structure wherein talent and revenue have already sorted themselves out; a system that allowed schools with more revenue to offer players a higher royalty for their NIL rights would not likely generate any significant change in that relationship. As economist Dave Berri notes, if players were paid, coaches would end up with less money, top teams would still be great, lesser teams would still be lesser and NCAA wouldn't look that different."[314]

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[311] *Declaration of Daniel A. Rascher in Support of Motion by Antitrust Plaintiffs for Class Certification*, (*O'Bannon*) April 24, 2013, p. 43.

[312] Fort, Rodney D., Sports Economics, Third Edition, Pearson, pp. 477-483. Specifically, Fort states "the invariance principle suggests that competitive balance is invariant as to who gets to keep the MRP of players. Under the amateur requirement, the players simply earn less but go to the same athletic department they would otherwise choose." (p. 478)

[313] At trial in *O'Bannon*, the NCAA put forward testimony arguing that work by Professor David Berri (Berri, David J., "Is There a Short Supply of Tall People in the College Game?", in Fizel, John, Economics of College Sports, Greenwood Publishing Group, 2004, pp. 211-223) somehow disproved that the invariance principle applied to college sports. This is the exact opposite of what Dr. Berri found; instead he found that even though all of the pre-conditions of the original Invariance Principle did not apply to college sports ("…institutions such as free agency or players sales to not exist. Hence one does not expect the Rottenberg Invariance principle to apply" p. 214), nevertheless the results still held ("Competitive Balance… is not primarily controlled by the institutions and policies adopted by the league." p. 221), extending the reach of Rottenberg's theory.

[314] "Teams like Kentucky, North Carolina, Michigan State, and Syracuse – the number one seeds this year — would still be great. Teams with less money would probably not be as great. And the NCAA – even with paid players – would probably look about the same." See Berri, Dave, "Would Paying College Players Really Destroy Competitive Balance?" March 15, 2012, Freakonomics (freakonomics.com), (http://bit.ly/1QgsAUB).

262. As I also testified at trial in *O'Bannon*,[315] the NCAA's own analysis (testified to by Dr. Rubinfeld) showed that across 11,066 football athletes, more than 10,000 had offers either only among power conference schools or only among non-power conferences. That is, to the extent any "re-shuffling" were to occur, it would be highly concentrated across similar schools with similar programs.[316]

263. That the market has already sorted itself out despite the restraints in suit is well known within the industry. This awareness was explained by David Blackburn, the athletic director at UT-Chattanooga:

> "'Let's be honest,' Blackburn said. 'Part of the reason for the SEC's success is the money. It allows you to have unbelievable facilities. It allows pay for unbelievable coaches and pay to quickly get rid of the bad ones. And it allows you to recruit the best athletes from all over the country. When you can fly private jets wherever you want to recruit, it will create some separation.'"[317]

264. Defendant Pac-12's CEO, Larry Scott made a similar argument:

> "I don't think there is an even playing field," Scott said. "There's not an even playing field in TV exposure. There's not an even playing field in coaches and coaches salaries. There's not an even playing field in stadiums."[318]

265. The result is that concern of a "cascade of reshuffling" that might ensue among schools making Full COA payments is entirely unfounded – the market has already shuffled itself into the economically appropriate order. As quoted in *Sports Illustrated*, former University of Nebraska-Lincoln Chancellor Harvey Perlman discussed this:

> "If schools don't want to pay the extra scholarship money, they shouldn't. But he would ask that they not bother trying to stop other

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[315] I also showed these figures in Rascher Trial Demonstrative 38, which was admitted in evidence. See *O'Bannon* Trial Transcript, Volume 5, pp. 947-951.

[316] Fewer than 9% of the athletes even had the possibility of switching across tiers. Dr. Rubinfeld presented no evidence as to whether any (or how many) would have done so. See *O'Bannon* Trial Transcript, Volume 5, pp. 947-951.

[317] Wiedmer, Mark, "Wiedmer: SEC's riches tough to beat," June 14th, 2015, Times Free Press (timesfreepress.com), (http://bit.ly/1J8z0UO).

[318] Henderson, John, "Commissioner Larry Scott wants Pac-12 athletes to get more of the conference pie," June 15, 2011, The Denver Post (denverpost.com), (http://dpo.st/1oCFzK8).

> schools from paying it. Because no matter how much the NCAA regulates spending, the wealthy schools will find ways to use their wealth to their advantage. 'You can tell me that I can't give them bagels with cream cheese and I can't give them more scholarships and I can't do this and I can't do that, and I follow those rules,' Perlman said. 'But then what I do to recruit competitively is I spend the money on other stuff. So I build facilities where there is no limit on what I can do, and I make those facilities far beyond what normal students live in because there's no limit on that. There's a standard understanding about regulatory environments that if you regulate something, people will move to the part of their activity that isn't regulated.'"[319].

7.4.3 Increased competition will not lead Defendants or their Division I co-conspirators to abandon Division I Sports

266. In past litigation and in the injunctive phase of this matter, the NCAA has argued that marginal schools (which rely heavily on marginal athletes) will exit the market.[320] As with the other elements of the substitution effect, this argument only makes sense if one first concludes that the restraint in suit is having a substantial anticompetitive effect on the market. In this case the harm inherent in the NCAA's argument is that the restraint in suit is designed to protect weak competitors at the expense of competition.

267. However, the argument that we should expect schools to drop out of Division I if competition based on athlete compensation intensifies is false. The loss of revenue from Division I is far higher than the likely increase in expenses from a move to Full COA GIAs. The charts below depict the scale of athletic aid and damages compared to athletic department revenue, at both the FBS and non-FBS levels. Note that during the six years preceding 2015-2016, the average FBS school's athletic department revenue grew just over $3,000,000 annually, nearly ten times that of the $380,000 one-time growth in athletic aid (notwithstanding COA inflation). Average Non-FBS athletic department revenue grew $760,000 a year, also far outstripping the $230,000 one-time growth in athletic aid.

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[319] Staples, Andy, "Full-cost-of-attendance scholarship debate could break up the FBS," March 8, 2012, Sports Illustrated (si.com), (http://on.si.com/1ohJTPg).

[320] Notably, this contradicts another of Dr. Ordover's unsupported opinions that the extensive supply of (purportedly) nearly-as-good walk-ons will drive the market price of marginal GIA athletes down to zero, which would lower, not raise, the costs of marginal teams.

Exhibit 15a. Athletic Dept. Revenues, GIA Expenses, and Damages (FBS)

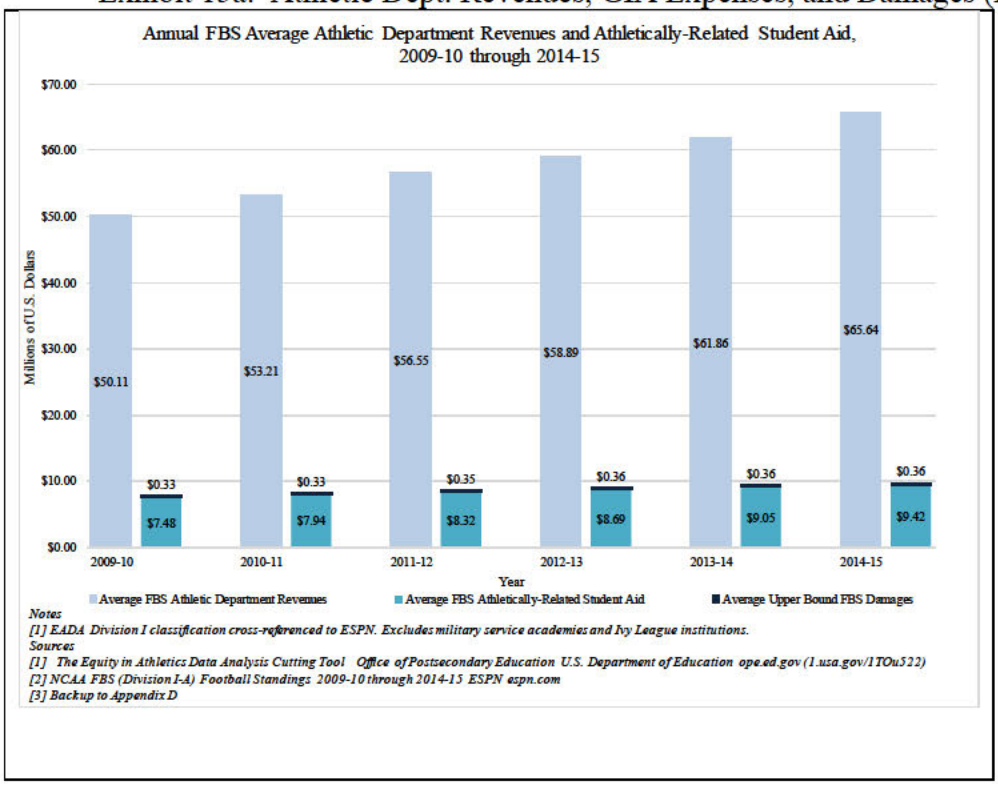
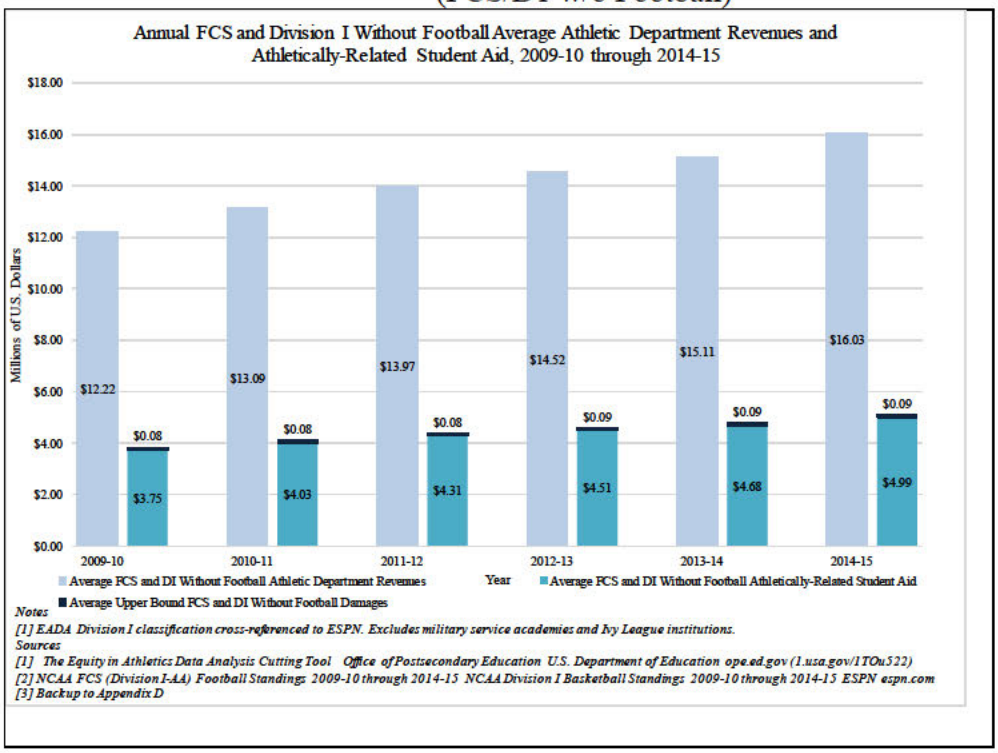


Exhibit 15b. Athletic Dept. Revenues, GIA Expenses, and Damages
(FCS/D1 w/o Football)



268. In deposition during the injunctive phase of this case, Dr. Ordover abandoned this argument that marginal schools would exit the market, testifying he offered no opinion that schools would cancel their football or basketball programs.[321] The latter version of Dr. Ordover's opinion is consistent with the opinion I put forward in *O'Bannon*:

> "It will not be economically rational for schools to leave DI if an injunction prohibiting agreement regarding the rules at issue in this case were entered. On an economic basis, there is more than the profit & loss sheet of the athletic department at issue. Many economic benefits accrue to the school as a whole."[322]

269. This Court in *O'Bannon* recognized this same fact[323] and did so again in its recent order certifying the injunctive classes.[324] Dropping the sports in suit completely is a far less logical response than simply choosing to accept bottom-tier status (within Division I),

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[321] "Where did I say that the schools will -- should or should not shut down their basketball or football team? I didn't say that." *Ordover Deposition*, pp. 220-221.

[322] Rascher Trial Demonstrative 1 (*O'Bannon*).

[323] *O'Bannon* Findings of Fact and Conclusions of Law, pp. 42-43.

[324] *Order Granting Motion For Rule 23(b)(2) Class Certification*, December 4, 2015, pp. 26-27.

even for a university with a philosophy that opposes market-based outcomes or a cash-strapped college on the margin. Making bottom-tier compensation offers and continuing to receive bottom-tier talent, while staying in Division I is far more rational choice than quitting. Because the new Full COA cap is not mandatory in the actual world (nor would be in the but-for world) a school that feels it cannot afford such an increase or is philosophically opposed to such a change, can simply remain in FBS/Division I and make less competitive offers and solider on with less competitive talent.

270. The most likely candidates to make the decision to stay in Division I but to remain at the old definition of a Full GIA, are those schools for whom the competitive landscape for talent was already bleak – that is that they already stood little chance to outcompete a "major" program for talent.

271. Matt Larsen, the athletic director at (FCS) North Dakota State explained:

> "… out here in the west, we have three people that play football – Mountain West, Pac-12 and us. We don't recruit the same people. They'll be getting the same kids, it will just cost them more."[325]

272. Ironically, despite this claim, within a few months, North Dakota State (NDSU) did announce it plans to begin paying Full COA GIAs,[326] as the forces of competition worked their way down the economic pecking order of Division I football to the schools NDSU competes with. Other peer schools (North Dakota and South Dakota) then followed suit.

273. Another such school, Montana State, explained that for it, the trigger to adopt Full COA GIAs would be the moment its rival, the University of Montana, moved to COA.[327]

274. In the meantime, Montana State has chosen a rational option: remaining in Division I without increasing its FCS football offers to the new Full COA level, and accepting that

[325] Kolpack, Jeff, "Colleges look at providing athletes more money," June 14, 2015, The Dickinson Press (thedickinsonpress.com), (http://bit.ly/1d2cf9u).

[326] "NDSU to offer full cost of attendance in 2016-17," August 27, 2015, North Dakota State Athletics (gobison.com), (http://bit.ly/1LoZtNE).

[327] Mazzolini, AJ, "UM, MSU saying no to full-cost-of-attendance scholarships for now," September 13, 2015, The Montana Standard (mtstandard.com), (http://bit.ly/1VfEO40).

it will generally not compete for 5-star talent, rather than drop to Division II or III. This is obvious economics – the benefits of FBS or D1 membership far outweigh the savings from lower GIA costs in FCS or Division II. Exit is not among the rational choices.

275. For other schools claiming to be cash strapped, but which do wish to continue to compete, the far more likely reaction is that of Troy University, which argued that for the 2015-16 academic year, it simply did not have enough money allocated to compete using Full COA GIAs. Rather than choosing to exit FBS or Division I, the school immediately undertook steps to remedy its cash deficiency by reallocating, and now will pay all full GIA athletes $3,000 in COA payments in 2016-17, simply by shifting its financial priorities:

> "We did this within the athletic budget …. Our coaches sacrificed in some areas. We reallocated some dollars in some places because we felt it was that important. Then we used some of our external revenue streams to supplement, as well."[328]

276. The real world shows that schools are acting as economics predicts (and as I testified and as the Court concluded in *O'Bannon*). That is they are acting rationally; they are not exiting the market even in the face of new athlete-related costs. Rather, those that choose to compete have upped their payments (or announced plans to do so as soon as possible) and those few schools that feel the increased costs are not worth incurring have continued to compete, albeit with less valuable offers. That these few non-COA schools are already outside the upper echelon of teams is no surprise. For the same reason, Defendants' claim that athletes attending these schools would be worse off in the but-for world (rather than simply indifferent at worst) is incorrect.

7.5 ADDRESSING QUESTIONS OF OFFSETS/MITIGATION

277. Finally, there is the question of damages offsets or reductions in damages because of mitigation. Counsel has indicated to me that whether one characterizes these damages

[328] Wise, Jeremy, "Troy athletes to receive cost of attendance stipends," January 21, 2016, Dothan Eagle (dothaneagle.com), (http://bit.ly/1PtvJ2Q).

reductions as offsets or mitigation, it is Defendants' burden to prove their existence and amount.

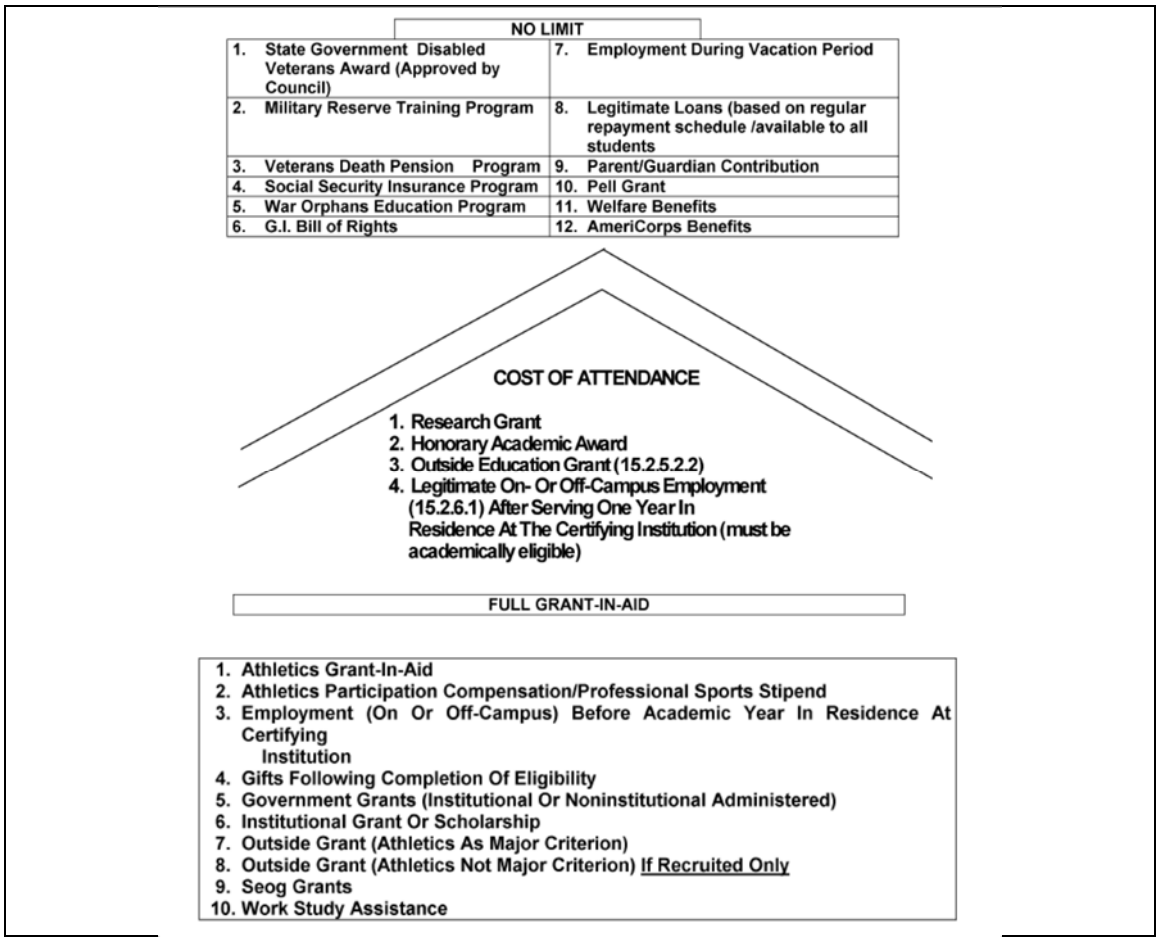
278. Nevertheless, to the extent such offsets are proven to be valid, it is my opinion that calculating damages net of any valid offsets is as simple a process as the calculation of damages, though similar level of data entry may be needed if the needed data are produced as inefficiently as they have been for Plaintiffs' needed data. In what follows, I first discuss my understanding of each of the Defendants' primary claims with respect to forms of mitigation (or other offsets to damages) and explain why these are either economically invalid, highly unlikely, or to the extent they have some economic validity and the Court agrees with them, easily addressed via mechanical tasks such as data entry and subtraction.

7.5.1 "The House of Financial Aid" provides a road map for evaluating potential offsets

279. In discovery, the NCAA produced a document entitled "THE HOUSE OF FINANCIAL AID -- DIVISION I" that explains the NCAA's treatment of various forms of student funds, relative to the GIA and COA cap during the damages period.[329] At the top of the picture, above the "roof," is a list of funds over which NCAA rules have no effect. This includes Pell Grants, which have "no limit" no matter how much athletic aid the athlete received.

[329] Although the document is undated, from the contents, it is clear it was created based on the system ushered in with the passage of Proposal 2002-87-A, and thus it covers the entire damages period prior to 2015-16.

Exhibit 16. The House of Financial Aid – Division I



280. In contrast, there are many funds, at the bottom of the "house" that are entirely offset by the receipt of the pre-2015 GIA. That is, if an athlete received a Full (pre-2015) GIA, none of the funds below the "FULL GRANT-IN-AID" line would have been available throughout the damages period or in the present. Thus, as an example, in my initial review of the preliminary data produced by schools, I have seen few, if any, athletes who received full GIAs who also received SEOG[330] money, during the period of the restraint or afterwards.

281. For all of these funds, above the roof or at the bottom of the house, the actual world from 2009-10 through 2014-15 treatment of these funds is identical to the set of rules that have existed since January 2015, and thus I see no reason why the but-for world would

[330] My understanding of the SEOG is that it is a supplemental grant program run by the federal government based on need, similar, but not identical, to the Pell Grant program.

differ in its treatment of any of these funds. If the actual and the but-for world treat the fund the same, then these funds, roof and floor alike, are irrelevant to damages and also cannot be economic offsets.

282. In the middle of the house, above the GIA line, but below the COA roof is the limited set of funds where the treatment of the funds could, potentially, differ between the actual and the but-for world.

283. When Proposal 2002-83-A went into effect in August 2004, the NCAA began allowing athletes to receive non-athletic aid above GIA up to the Full COA. If that treatment remained in force in the but-for world, but athletic aid rose from the pre-2015 capped GIA to the Full COA, these funds had at least the potential to vary between the actual and the but-for world, and therefore makes these funds, such as Georgia's Hope Grant, candidates to analyze as potential economic offsets to damages.

284. This diagram simplifies the question dramatically and, as is shown below, limits the scope of potential offsets to a very narrow subset of the various possibilities (the ones under the roof but above the GIA line). In what follows, I address some of the key offset candidates: Pell Grants, the Student Assistance Fund, Hope Grants and other non-athletic merit awards, and SEOG payments.

7.5.2 Pell Grants

285. One of the elements of financial aid that the NCAA has previously contended should serve as an offset to COA-related damages is the Federal Pell Grant. There is substantial, class-wide evidence, from the Federal Government and from the NCAA that this is false. In this section, I first lay out the NCAA's contention that Pell should serve as an offset, then provide the evidence that neither has the Federal Government made the size of a Pell Grant contingent on receipt (or not) of a Full COA GIA, nor has the NCAA made the size of a GIA (even up to Full COA) contingent on receipt (or not) of a Pell Grant. As

a result, as a matter of economics, Pell Grants cannot be related to damages or serve as an offset to them.

7.5.2.1 The Pell Grant Argument from *White*

286. In past litigation related to Cost of Attendance (the *White* case), the NCAA contended that Pell Grants should serve as offsets to damages. Plaintiffs in *White* argued that this ran contrary to then-current NCAA rules. In response, Defendants argued that there was no evidence that schools would allow athletes who received a Full COA grant to keep their Pell money too, and that in fact doing so would be contrary to NCAA principles:

> "I am aware of no basis for Dr. Netz's assumption that in the but-for world, NCAA rules would allow student-athletes to receive Pell Grants in addition to full COA scholarships. In fact, Professor Hausman argues that such a scenario would be inconsistent with the NCAA's brand of college athletics. This view is confirmed by David Berst and Lynn Holzman of the NCAA, who have both been involved in NCAA rulemaking regarding financial aid for many years."[331]

287. What Lynn Holzman stated in her parallel declaration was:

> "Based on my experience at the NCAA, I do not believe that the membership would adopt a rule change to allow a student-athlete to receive a Pell Grant and a full COA scholarship on top of it. The Pell Grant exception has always been adjusted to permit aid to hover at or just above COA for Pell eligible student-athletes. Allowing student-athletes to receive financial aid in a value up to, or even more than, $4,000 over COA would raise concerns regarding amateurism and pay-for-play."[332]

288. David Berst made similar claims.[333]

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[331] *Declaration of Janusz A. Ordover in Support of Motion to Decertify Class* (*White*), September 6, 2007. (internal citations omitted)

[332] Holzman, p. 13.

[333] In Berst's Declaration in *White* (Dec. 10, 2007), he states "Current rules do not allow that, and based on my experience in over 30 years at the NCAA, I do not believe that the membership would adopt a rule change to allow that." (¶ 36).

7.5.2.2 NCAA Treatment of Pell Grants since 2015-16 (and during the brief MEA interlude) completely contradicts the NCAA's contentions in *White*

289. Dr. Ordover, Ms. Holzman, and Mr. Berst all proved to be poor predictors of NCAA future conduct. As it happens, since these declarations in 2007, the NCAA has twice allowed athletes to receive athletic aid related to cost of attendance, once briefly in 2011 (with the so-called MEA payments) and then more permanently since January/August 2015. In both cases, when the NCAA rules regarding COA were changed, so too were the rules related to Pell Grants, such that Pell money remained entirely outside the reach of NCAA Bylaws and had zero effect on athletic aid (and thus zero reason for being an offset).

290. With respect to the MEA, the NCAA explained:

> "A Pell Grant will not be included in the NCAA financial aid calculation and will be considered an exempted government grant for purposes of applying NCAA regulations."[334]

291. Since the January 2015 relaxation of the rule against provision of Full COA grants, the NCAA has similarly altered its bylaws to allow an athlete receiving Full COA to continue to receive any and all Pell money, up to the maximum allowed Pell Grant, on top of his (full COA) athletic aid. This can be seen first by reviewing bylaw 15.02.5, which changed the definition of a Full Grant-in-Aid to include Full COA:

> 15.02.5 Full Grant-in-Aid. [A] A full grant-in-aid is financial aid that consists of tuition and fees, room and board, books, **and other expenses related to attendance at the institution up to the cost of attendance** established pursuant to Bylaws 15.02.2 and 15.02.2.1. (Revised: 8/7/14, 1/17/15 effective 8/1/15)

And then reviewing Bylaw 15.1.1, entitled "Exception for Pell Grant," which makes it clear the NCAA allows that newly defined Full GIA (which includes Full COA) in addition to a Full Pell Grant:

> "A student-athlete who receives a Pell Grant may receive financial aid equivalent to the limitation set forth in Bylaw 15.1 or the value o or the value of a full grant-in-aid plus the Pell Grant, whichever is greater."

[334] NCAAGIA01218460-70, here NCAAGIA01218463

292. To the extent this wasn't clear, an NCAA response to Frequently Asked Questions made doubly clear that Full Pell and Full COA are fully compatible:

> Question No. 1: How will equivalencies be calculated for an institution who is a member of one of the five autonomy conferences?
> Answer: The grant-in-aid will be redefined as equal to student-athlete's cost of attendance. …
>
> Question No. 3: May a student-athlete receive a Pell Grant in addition to a full grant-in-aid, which includes other expenses related to attendance at the institution up to the cost of attendance?
>
> Answer: The proposal does not change Bylaw 15.1.1, which states that a student-athlete who receives a Pell Grant may receive financial aid equivalent to the limitation set forth in Bylaw 15.1 (cost of attendance) or the value of a full grant-in-aid plus the Pell Grant, whichever is greater. Each institution must ensure that it also follows applicable federal, state and institutional requirements.[335]

293. Similarly, since the adoption of Full COA GIAs, the NCAA has re-programmed its "Compliance Assistant" software to harmonize the treatment of Pell with the new less restrictive definition of a maximum GIA. This software is explicitly programmed to allow an athlete who is receiving Full COA to also receive the maximum allowed Pell award.

[335] "2014-15 autonomy legislation question and answer document," May 22, 2015, NCAA (ncaa.org), (http://on.ncaa.com/1PW5Hdl).

Exhibit 17. Compliance Assistant Manual Excerpt re COA and Pell Grants

How the CA Program Determines Individual Limits for Division I Institutions

1. The CA program takes into consideration Division I legislation which includes, but is not limited to, the following information:

   a. A student-athlete may receive up to the value of a full grant-in-aid (or cost of attendance for autonomy institutions) from the following: (1) Institutional financial aid based on athletics ability, (2) Outside financial aid from an established and continuing program; and (3) Educational expenses awarded by the United States Olympic Committee or a United States National Governing Body.

   b. For non-autonomy institutions, a student-athlete may receive up to the value of the cost of attendance from institutional financial aid unrelated to athletics ability.

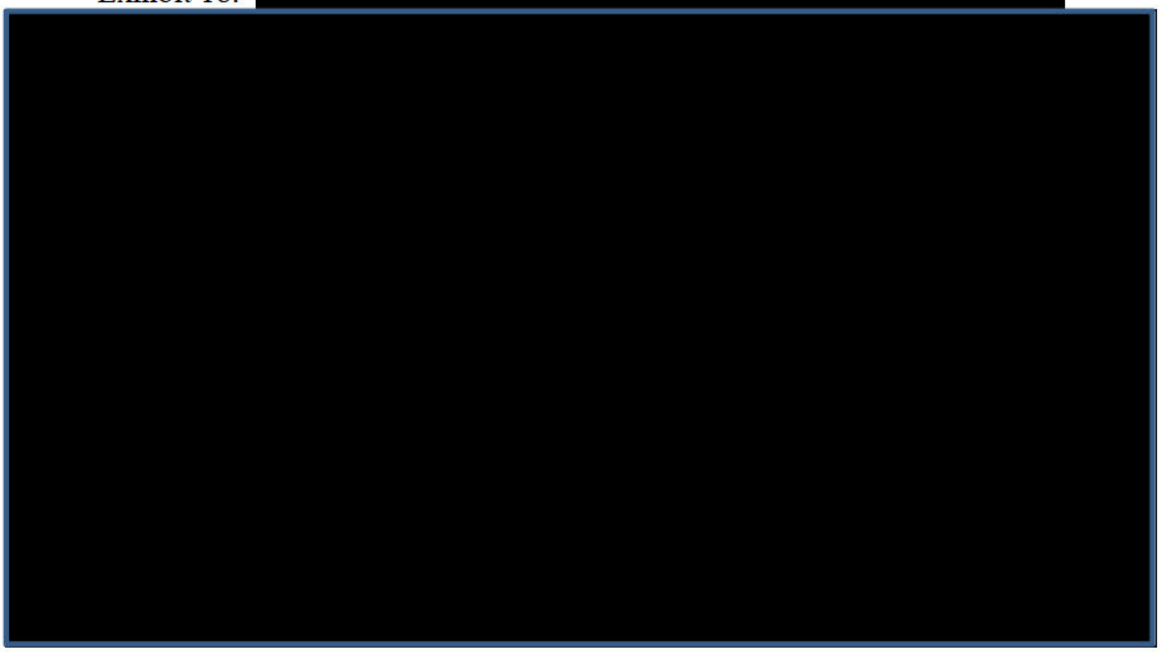
   c. If a student-athlete receives a Pell Grant, the student-athlete may receive financial aid unrelated to athletics ability up to the value of either: (1) A full grant-in-aid (or cost of attendance for autonomy institutions) plus a Federal Pell Grant; or (2) The institutional cost of attendance (whichever is greater).

2. The CA program determines the appropriate limit for each student-athlete based on the aid types received.

Source: NCAA Compliance Assistant manual, p. 6-10.

294. In my review of the FAFD forms provided through the third-party subpoena process, I have determined that all or virtually all of the schools with data are not considering Pell money to be an offset to receipt of a Full COA. In some cases, this is immediately obvious, such as with Wisconsin where [redacted], as with his peers, can [redacted].

Exhibit 18. [redacted]



295. Other schools that follow this practice (but have not provided the standard FAFD form) include Florida, where it can be seen that athletes (such as [redacted].

Exhibit 19. [redacted]

[336] See 2015-16 COA data.pdf for in-state COA. $42,988 represents the in-state COA adjusted upward for out-of-state supplement and "7 Day-Access PLUS" meal plan, per Florida Email.pdf.

296. Finally, within the last week, the NCAA appears to have ruled that using Pell Grant money to lower athletes GIA funding is actually against NCAA rules. According to a statement by South Carolina State University, the NCAA has required the university to pay full scholarships to athletes, rather than the school's policy which:

> "…called for applying Pell loans and grants to the athletes' accounts and then using as much university-supported scholarship as needed to pay the remainder of the students' bills. However, the NCAA ruling required the university to give students their full scholarships."[337]

7.5.2.3 The Federal Government does not consider Full COA GIAs to be an offset to Pell Grants

297. Separate from this empirical evidence, there are many other factual reasons why Pell Grants are not an economic offset to damages. Most importantly, the federal government, which makes the Pell Grant awards, is quite explicit that it considers Pell Grant levels prior to any other form of aid, and does not reduce them even if other aid is received.[338] The Federal Government even explains how this works in the context of an NCAA Grant-in-Aid:

> "For instance, the National Collegiate Athletic Association's rules for athletic aid sometimes permit a school to award athletic aid that exceeds the student's need. You must still pay the full Pell Grant to the student…"[339]

298. Based on this, I see zero reason even to calculate an alternative version of damages in which Pell money is netted out. While I reserve the right to critique any work done by Defendants that shows the contrary, I simply failed to find any validity to this argument that would justify modeling the use of class-wide data to calculate an offset for money received by class members from the Federal Government through the Pell Grant program.

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[337] Linder-Altman, Dale, "SCSU finances improving; athletics department seeks to remedy deficit," February 9, 2016, The T and D (thetandd.com), (http://bit.ly/1REqyD0).

[338] "Packaging Principles ➔ Pell Grants packaged first; not reduced for other aid." See "Packaging Aid," Information for Financial Aid Professionals (ifap.ed.gov), (http://1.usa.gov/20ya286).

[339] The remainder of the quote focuses on non-Pell forms of aid. See "Packaging Aid," Information for Financial Aid Professionals (ifap.ed.gov), (http://1.usa.gov/20ya286).

But with that said, the data are clearly there and one could do so if the economic facts merited it, and in my damages examples, I provide tallies of Pell money received by class members to show the data's availability.

299. In the current case, the NCAA's claims of a Pell offset are already proven false, as can be shown with the actual payment data produced by Defendants and their member schools. For team after team, the empirical economic evidence proves beyond any doubt that the introduction of Full COA grants has not led to reduction in Pell money received by athletes receiving a Full COA GIA. Instead the empirical data in this case is full of thousands of examples with athletes receiving both at the same time. Pell Grants are not economic offsets to damages.

7.5.3 The Student Assistance Fund

300. The Student Assistance Fund is an NCAA sponsored program that provides schools and conferences with some of the proceeds from the March Madness television contracts in a fashion that is supposedly ear-marked for athletes' needs. In the past, these needs have been interpreted extremely loosely, resulting in the use of this money for the shredding of documents, chair rental, and lightning-detection software under the guise of being a benefit to athletes.[340] As I understand it, the Student Assistance Fund is a catch-all term covering two previously adopted funds, the "Student-Athlete Opportunity Fund" (SAOF) and the Special Assistance Fund. As I understand it, one of the terms of the *White* settlement was that any distinction in the usage of the funds was eliminated, so from 2008 onward, the funds were equally available.[341] In my discussion of these funds, I will use the term Student Assistance Fund (or SAF for short), but it should be read to include all of these NCAA-provided funds, including the SAOF.

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[340] Wolverton, Brad, "NCAA money for student assistance lands in many pockets, Big Ten document shows," January 31, 2013, Chronicle of Higher Education (chronicle.com), (http://bit.ly/213HqFE).

[341] See *2015-16 Division I Revenue Distribution Plan*, p. 18.

301. My understanding is that Defendants claim that had the Pre-2015 Capped Grant-in-Aid Level not been in place during the damages period, some elements of the Student Assistance Fund might not have been available to athletes at the new Full COA cap. In essence, this amounts to the claim that but-for the restraint in suit, some SAF recipients would not have been eligible for some or all of the SAF money they received in the actual historical past. That is, Defendants may be claiming that SAF money provided was subject to the cap on Athletic Aid in suit.

302. As a first matter, this flies in the face of the claims that the NCAA made during *White*, in which they were adamant that SAF money is not subject to the cap on athletic aid. For example, according to the Declaration of then-NCAA employee (and now Commissioner of the West Coast Conference), Lynn Holzman (with my emphasis in bold):

> "… the NCAA, via it's [sic] member conference and schools, disburses money to student-athletes through its Special Assistance Fund and its Student-Athlete Opportunity Fund. These monies are disbursed only to student-athletes. Monies received from these funds **are not included when determining whether a student-athlete has received the maximum amount of aid allowed under Division I rules. … A student-athlete who receives money from these funds may therefore receive total athletics-related aid in an amount that exceeds the value of a GIA.**"[342]

303. Industry participants have made the same point as to how the SAF is currently treated. At the *IMG SBJ Intercollegiate Forum*, Dan Guerrero and Nancy Yow both claimed that receipt of Full COA has no impact on SAF payments under NCAA rules. My review of the third-party data produced in discovery supports this view. For example, [redacted]

[342] NCAAGIA02200121-137 (Declaration of Lynn Holzman, *Jason White, et al. v. National Collegiate Athletic Association*, October 20, 2007), ¶25). It is worth noting that even though Ms. Holzman explained how SAF/SAOF money was considered immune from any GIA cap calculation, she also predicted elsewhere in her declaration that this would stop being the case if the Pre-2015 cap were replaced with a COA cap. See ¶26). David Berst make the same claim, word for word, in his parallel Declaration. (NCAAGIA02200316-34 (Declaration of S. David Berst (*White*), October 18, 2007), ¶38). However, based on the statements of Defendant employees and the evidence in the data, Ms. Holzman and Mr. Berst are again shown to have been unreliable predictors of future NCAA conduct.

[redacted][344].

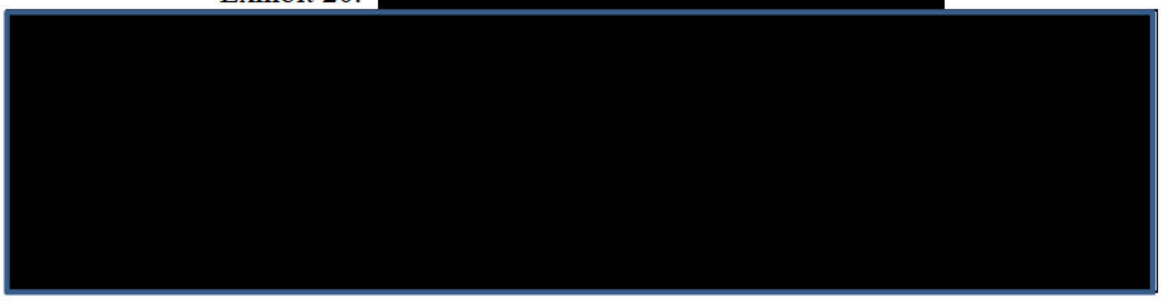
304. The NCAA standard FAFD report defines SAF money under the category "Aid Exempt from Individual and Team Limit" even in the most recent year, and my understanding is that this means SAF money remains exactly as Ms. Holzman defined it in 2007, uncapped by the restraints in suit.

305. As with Pell money, some schools' data gives off the initial impression that the athletes' athletic aid has been reduced by an amount equal to his SAF money, but upon more careful study this is shown not to be the case. [redacted].

[343] "Payment schedule for determining full-time scheduled awards for the 2015-2016 award year," Federal Pell Grant Program, Information for Financial Aid Professionals (ifap.ed.gov), (http://1.usa.gov/1TXyMGY).

[344] See p. 506 of "NC State Full Set of Financial Aid Form Detail.pdf"

Exhibit 20. [redacted]



306. [redacted]

307. However, based on my general knowledge of the industry and my preliminary review of the data, I have come to understand that although it appears there is no NCAA requirement to offset SAF money, and that based on preliminary discovery, schools like [redacted]

345 [redacted]

346 [redacted]

(on their own) to reduce COA payments by amounts equal to SAF amounts. To the extent that full discovery shows this phenomenon to have occurred at levels worthy of measurement, then this might be economic evidence of a potential damages offset, but nonetheless, the calculation of that offset would simply be a matter of identifying the schools in question and tabulating the SAF payments made to class members.

308. In any event, to the extent schools have lowered SAF payments to athletes receiving full COA, it is my understanding that alleged offsets/mitigation like this fall under the Defendants' burden to prove and do not constitute impediments to certification. Nevertheless, in my calculations above, I have used actual-world data produced in discovery to tally the SAF money received by class members, as a demonstration of how, to the extent one wanted to undertake a formal, class-wide calculation of such offsets, one could easily do so.

7.5.4 Other Payments (Hope Grants, etc.)

309. Separate from these two categories: Pell Grants and SAF payments, college athletes playing FBS football or Division I basketball also occasionally receive other forms of funding. Under the rules that existed during the damages period, certain types of aid could be granted above the Pre-2015 Capped GIA Level, up to the Full Cost of Attendance if that money was not specifically related to athletic merit. This money might take the form of a state-funded academic merit grant available to all qualified students (not just athletes), such as a Georgia Hope Grant. In the "House of Financial Aid" depicted above, these funds appear in the "attic."

310. Unlike the current treatment of Pell or SAF money where the post-2014 rules specifically allow for a Full COA on top of those two sources of aid, under current rules it appears the NCAA requires schools to disallow receipt of these other sources of funds (or equivalently, to reduce COA funding on a dollar-for-dollar basis). The NCAA appears to insist this money be taken away from GIA recipients, despite published studies showing

that receipt of money through programs like the Hope Grant is directly linked to improved graduation success.[347]

311. To the extent my understanding of the NCAA's insistence that this money be confiscated is correct, and to the extent that Defendants are able to show that in the but-for world that confiscation above COA would also have been mandatory, then economically, any payment of such funds in the actual world functions as an offset to damages or a form of mitigation.[348] This is for the same reason Pell Grants are not proper offsets. In the case of the latter, the funds remain available in the actual and the but-for world. In the case of the former, these funds may have become unavailable to Full COA recipients. Thus, to the extent the Defendants seek to prove up such offsets/mitigation on reply, one possible question is whether such an analysis is amenable to formulaic calculation and common proof.

312. It is clear these offsets can be calculated in a formulaic fashion. [redacted][349]

313. In the discovery I have received to date, this also appears to be the case for other schools in other states – aid other than Pell and SAOF/SAF that was given to athletes in

[347] See Section 1.3 in Appendix C.

[348] Economically, these appear to be the same to me, though as a legal matter the two forms of damages reduction may have different meanings or context.

[349] [redacted]

earlier years to cover the difference between the Pre-2015 Capped GIA Level and COA is now being confiscated by these schools.[350]

314. To the extent the Defendants succeed in proving that such funds should be treated as mitigation or offsets to damages, then the data produced so far shows that such calculations are entirely formulaic. One merely deducts the value of the Hope Grant (or any other similar source of funding) from calculated collusive shortfall for athletes who received these potential offsets in years prior to 2015-16. These sorts of offsets are small relative to the GOA Gaps they potentially served to partially offset.

7.5.5 SEOG payments

315. As explained above by the "house of financial aid," some kinds of non-athletic aid given to Full GIA athletes are essentially confiscated by the NCAA, because they are either taken by the school or in an economically equivalent way, their GIA is reduced on a dollar-for-dollar basis. The result is it is rare to see a Full GIA athlete receive any SEOG money during the damages period. However, unlike funds between the pre-2015 Full GIA level and the Full COA level, the SEOG and similar funds are not differently affected under the restraint in suit versus the but-for world. Put differently, if an athlete was getting a Full GIA as defined prior to January 2015, the SEOG had already been confiscated/denied and there is no additional impact from allowing the athlete to receive additional athletic compensation in the but-for world. The same is true for those schools, such as the University of Georgia, that treated other grants in this fashion.[351]

316. The result is that the treatment of SEOG payments (or any other form of aid treated in similar fashion during the damages period) is identical (and generally zero) in both the

[350] However, I also note some schools, such as the [redacted]

[351] Other state grants like the Florida Resident Access Grant appear to have been treated similarly in the past.

actual and the but-for world, and when the level of a given payment is unaffected by the restraint in suit, it can neither cause damages nor serve as an offset to damages.

7.5.6 Offsets are all based in the Actual World

317. Most importantly, all of these questions related to offsets speak to a need to download, scan, or retype already-existing business records to calculate any applicable offset, or in the event the Defendants (or their member schools) failed to keep accurate records, whether Defendants and their experts will be able to develop a valid method for estimating an appropriate offset (again, with the understanding that proving up these offsets is Defendants' burden). Importantly, this is not an exercise in economic modeling of a hypothetical but-for world. Rather this is the equivalent of the mechanical tallying of expense receipts, based on actual world spending for which most businesses should have a reasonable paper trail, given that it involved the payment of money (presumably by check) to athletes. To my knowledge, the need to use an adding machine does not constitute what the law considers to be individualized inquiry.

8. NUMEROSITY AND ASCERTAINABILITY

318. In the full version of the damages tally above, I calculated damages for 81,683 athlete-years across the three sports. An athlete can have more than one athlete-year if he/she played for more than one year, but this indicates there are thousands of putative class members in each class. And, since the identity of all FBS football and Division I basketball athletes receiving full GIAs is easily found via each school's squad list, the set of class members is also easily ascertained.

9. SIGNATURE

319. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of February, 2016, at Emeryville, California.

_____
Daniel A. Rascher