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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

This Document Relates to:

ALL ACTIONS EXCEPT *Jenkins, et al. v. NCAA, et al.*, Case No. 14-cv-02758-CW

MDL Docket No. 14-md-02541-CW

DEFENDANTS' NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF TO EXCLUDE THE OPINIONS OF DR. DANIEL A. RASCHER

Date: October 25, 2016
Time: 2:30 p.m.
Courtroom: Courtroom 2, 4th Floor
Before: Hon. Claudia Wilken

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 25, 2016, at 2:30 p.m., or as soon thereafter as the matter may be heard by the Court, at the courtroom of the Honorable Claudia Wilken, Courtroom 2, 4th Floor, United States District Court, 1301 Clay Street, Oakland, California, Defendants National Collegiate Athletic Association, the Pac-12 Conference, The Big Ten Conference, The Big 12 Conference, the Southeastern Conference, the Atlantic Coast Conference, the American Athletic Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference and the Western Athletic Conference will and hereby do move the Court for an order to exclude the opinion testimony of Dr. Daniel A. Rascher offered in support of the pending motion for FRCP 23(b)(3) class certification.

This motion is made pursuant to Federal Rule of Evidence 702, as well as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Defendants base their motion on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Declaration of Karen Hoffman Lent and its exhibits, the [Proposed] Order, any oral argument heard by the Court and such other matters as the Court deems proper.

DATED: August 26, 2016

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Preliminary Statement

Defendants respectfully submit this memorandum of points and authorities in support of their motion, pursuant to Rule 702 of the Federal Rules of Evidence ("Rule 702"), to exclude the opinions of Dr. Daniel A. Rascher relating to class certification in this proceeding. Plaintiffs have proffered Dr. Rascher as an expert economist to offer opinions that the proof of antitrust impact, class membership, and damages at trial all will involve common, class-wide evidence that predominates over evidence affecting only individual student-athletes. Under Rule 702, as applied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, however, an expert's opinion is inadmissible, and should be excluded, if (i) it is not predicated on a valid, reliable methodology, but on subjective belief or unsupported speculation, or (ii) it is not sufficiently tied to the facts of the case to be relevant in aiding the fact-finder to resolve the dispute. *Id.* at 590-93.

As demonstrated below, Dr. Rascher's opinions are neither predicated on a valid, reliable methodology nor sufficiently tied to the facts of the case to be relevant in aiding the fact-finder to resolve the instant dispute. His approach is wholly unscientific and inherently subjective, rendering his conclusions unsupported either by sufficient facts and data or by well-accepted economic principles. He has not shown that a valid, reliable economic methodology exists that could be used to prove antitrust impact, class membership, and damages for all putative class members on a common, class-wide basis, or that could eliminate the thousands of individual mini-trials that would be necessary to try this case to the jury. Indeed, Dr. Rascher does not provide any specialized knowledge that would help the trier of fact understand the evidence or determine a fact at issue in this case. He has not applied any of the tools commonly used by economists in antitrust cases. His conclusions are not the product of reliable principles and methods, but the result of his own speculative assumptions and subjective interpretation of atomistic pieces of factual evidence that he continues to collect. As such, his approach cannot be replicated or tested. In addition, his opinions do not fit the facts because they fail to account for the wide differences in the way that the 350 Division I schools treat the hundreds of federal, state, local, and institutional academics-based and need-based scholarships and grants that, in addition to athletics-based grants, have been available

and awarded to student-athletes throughout the putative class period.

In short, Dr. Rascher's opinions—that a fact-finder in this case could employ common, class-wide evidence to determine (a) which student-athletes were actually injured by the pre-2015 NCAA rule limiting a full athletics-based grant-in-aid ("GIA") to tuition, room, board, books and fees, (b) which partial GIA recipients are members of the putative classes, and (c) the amount of any damages award—consists entirely of expert *ipse dixit* that *Daubert* and its progeny do not tolerate. They are thus inadmissible and should be excluded under Rule 702.

Argument

DR. RASCHER'S OPINIONS DO NOT DEMONSTRATE A VALID, RELIABLE METHODOLOGY FOR PROVING ANTITRUST IMPACT, CLASS MEMBERSHIP, AND DAMAGES ON A COMMON, CLASS-WIDE BASIS

Rule 702 provides that an expert witness may testify only if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. The proponent of the expert witness bears the burden of proving that his or her testimony satisfies Rule 702. *Cooper v. Brown*, 510 F.3d 870, 880 (9th Cir. 2007); *Brighton Collectibles, Inc. v. RK Tex. Leather Mfg.*, 923 F. Supp. 2d 1245, 1253 (S.D. Cal. 2013).

In *Daubert*, the Supreme Court held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597. Rule 702 "establishes a standard of evidentiary reliability" of proffered expert testimony that "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 590, 592. As the Court explained, unlike a percipient witness, an expert witness is permitted to offer testimony that is not based on first-hand knowledge or observation, and this relaxation of the usual requirement of first-hand knowledge "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592.

The gatekeeping requirement of *Daubert* ensures that an expert "employs in the courtroom

the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). It is thus well established that an economist must apply the methods and tools commonly used by others in his or her field of expertise in a manner that may be replicated and tested. In *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 418-20 (7th Cir. 2005), the court explained:

> An expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable. Someone else using the same data and methods must be able to replicate the result. [The expert's] method, "expert intuition," is neither normal among social scientists nor testable—and conclusions that are not falsifiable aren't worth much to either science or the judiciary.

Id. at 419. As the Supreme Court held in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* at 146.

It is equally well settled that expert testimony offered in support of class certification must satisfy the same standards for admissibility as testimony offered at trial. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (district court correctly applied *Daubert* evidentiary standard to plaintiffs' proposed expert testimony at class certification stage); *see also In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2014 WL 2758598, at *11 (N.D. Cal. June 17, 2014); *In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 545 (N.D. Cal. 2012); *Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-cv-00288 JF (HRL), 2012 WL 1595112, at *7 (N.D. Cal. May 4, 2012).

A. Dr. Rascher's Opinions Do Not Demonstrate a Valid, Reliable Methodology for Proving Antitrust Impact on a Common, Class-Wide Basis

In his report, Dr. Rascher purports to articulate two forms of antitrust impact allegedly resulting from the pre-2015 rule limiting athletics-based aid to tuition, room, board, books and fees:

(i) market-wide economic harm and (ii) pecuniary harm. (Rascher Rep.[1] ¶¶ 169-81.) But he fails to offer or apply any valid economic methodology or model for determining, on a common, class-wide basis, whether all putative class members were, in fact, injured by the challenged rule.

In his deposition, Dr. Rascher repeatedly conceded that he has not developed or applied a full-fledged, reliable economic model or methodology for showing class-wide antitrust impact on the basis of common evidence. Rather, he testified, he simply intended to suggest various ways in which, at the later merits stage of the case, a fact-finder or a different expert witness might determine impact:

> Q. . . . [W]ho would be looking at . . . all these different data points that . . . you've mentioned and making a decision as to whether they support an inference that a school would pay cost of attendance going forward?
>
> A. Presumably the expert witness at the merits stage.
>
> Q. And how—how would that expert witness perform that analysis?
>
> A. What do you mean by "how"?
>
> Q. Well, it sounds to me like you're saying someone would take a look at all these different things, and they'd . . . sort of get a holistic sense of whether this school looks like it's really supporting the program in a way that would indicate that it will support cost-of-attendance scholarships going forward.
>
> Is that what you're saying?
>
> A. Well, . . . [t]hey could do it in a way that essentially is—you know, maybe lexicographic instead of holistic, right, where they kind of go down and they say does it satisfy three of these factors. Oh, and by the way, we can look and see if currently that's happening just as an indicator. Does it satisfy these other factors or not. Right.
>
> And that person might even present to the court, under these assumptions about the metrics, here's what the evidence says about—about impact. And under these other assumptions, here's what the evidence says about the impact. And they would presumably support those assumptions with evidence. Right.
>
> And then I think that the court would ultimately have to decide, or the adjudicator if it's a jury, I guess, you know, which schools they think really would have

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[1] Expert Report of Daniel A. Rascher on Damages Class Certification, dated February 16, 2016 ("Rascher Rep.") (attached as Exhibit A to the accompanying Declaration of Karen Hoffman Lent).

paid cost of attendance.

(Rascher Dep.[2] at 41-43); *see also id.* at 69 ("I don't know how a court is going to decide how to treat a HOPE Grant or any other grant"); 77 ("any types of those adjustments can be made because the data is there, and someone just has to decide whether or not those are considered to be part of this process or not.").

That is not nearly good enough. For class certification, plaintiffs must establish a valid methodology that would show—now, rather than at the merits stage—which putative class members were impacted. Antitrust impact is an element of defendants' liability, not an element of plaintiffs' damages. Without establishing antitrust impact, a private party has no right to bring a federal antitrust action. *See, e.g., Gray v. Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972) ("The 'mere existence of a violation is not sufficient *ipso facto* to support the action' and a 'private person has no right to complain of a violation of § 1 or § 2 [of the Sherman Act] as such, nor does such a violation *per se* give a private cause of action." (citation omitted)); *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 WL 1207915, at *10 (W.D. Wash. May 3, 2006) ("Antitrust '[i]mpact is a distinct element of liability, independent of proof of a violation and independent of the matter of individual damages.' Thus, liability cannot be established until this second element is proven." (citation omitted)).

Accordingly, this Court may not certify the putative classes based on Dr. Rascher's unsupported assurances that a model *could be* constructed or a methodology *could be* further developed that will determine which putative class members suffered impact or fact of injury. *Gonzales v. Comcast Corp.*, No. 10-cv-01010-LJO-BAM, 2012 WL 10621, at *19 (E.D. Cal. Jan. 3, 2012) (the determination as to whether individualized questions relating to defendants' liability predominate over any common issues cannot be reserved for the post-certification merits inquiry); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013) ("If the damages model cannot withstand [defendants' critique that it is prone to false positives regarding injury in

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[2] Transcript of the Deposition of Daniel A. Rascher, Ph.D., taken on August 3, 2016 ("Rascher Dep.") (excerpts attached as Exhibit B to the accompanying Declaration of Karen Hoffman Lent).

fact], that is not just a merits issue. [The] models are essential to the plaintiffs' claim they can offer common evidence of classwide injury. No damages model, no predominance, no class certification." (citation omitted)). "A party's assurance to the court that it intends or plans to meet the requirements [of Rule 23(b)(3)] is insufficient." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2009); *see also In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 497 (N.D. Cal. 2008) (expert assertions that a more acceptable model will be developed as the case further progresses are not sufficient).

Under *Daubert*, Dr. Rascher's acknowledgement that he has not developed a reliable economic model for proving impact—and thus liability—on a common, class-wide basis disqualifies his opinion from consideration on plaintiffs' motion for class certification. There is nothing statistically or economically valid (much less anything helpful to the trier of fact) in Dr. Rascher's speculative musings about how *someone else*—but not him—might try to determine on some undefined basis which student-athletes were, in fact, injured by the challenged rule. Dr. Rascher's opinions should thus be excluded under Rule 702.

1. Dr. Rascher's Opinions Do Not Demonstrate a Valid, Reliable Methodology for Proving Alleged Market-Wide Harm on a Common, Class-Wide Basis

Dr. Rascher describes the alleged market-wide economic harm flowing from the challenged rule as "reduced competition . . ., reduced choice and reduced market variety." (Rascher Rep. ¶ 90.) Although Dr. Rascher baldly opines that "[e]very participant in these markets was directly impacted by the restraint on the maximum GIA . . . because violations of the antitrust laws, including price fixing as alleged here, harm the entire market, not just those who pay higher prices or receive lower compensation" (*id.* ¶ 89), an allegation that class members "have suffered cognizable antitrust injury in the form of lower quality, less choice, and reduced innovation," in the absence of pecuniary harm, is insufficient to prove antitrust impact on a class-wide basis. *Graphics Processing*, 253 F.R.D. at 507; *accord Rail Freight Fuel Surcharge*, 725 F.3d at 249 n.5 ("The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust violations, under both the *per se* rule and rule-of-reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury.'" (quoting

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

Dr. Rascher offers no valid, reliable economic model or theory to determine the monetary or pecuniary value of any alleged reduced competition, reduced choice, and/or reduced market variety. (Orszag Rep.[3] ¶¶ 24-38.) Moreover, he concedes that such alleged impact was *not* class-wide when he asserts that some student-athletes were not in sufficient demand to bargain for a full COA scholarship, and thus suffered no impact from any reduction in market competition, choice, or variety. (Rascher Rep. ¶¶ 274, 276; *see also* Orszag Rep. ¶¶ 33, 36.) Ultimately, Dr. Rascher acknowledged in his deposition that such impact is so "much more speculative to try to figure out how you would measure [it]," that "you don't ever see that . . . in, say, a damages case. You stick to the more measurable direct pecuniary harm." (Rascher Dep. at 139-40.) Thus, Dr. Rascher has made no effort to model or measure any market-wide harm or impact in this case (*id.* at 158), and his baseless opinions on this subject should be excluded.

2. Dr. Rascher's Opinions Do Not Demonstrate a Valid, Reliable Methodology for Proving Alleged Pecuniary Harm on a Common, Class-Wide Basis

Plaintiffs propose to prove the requisite pecuniary impact of the challenged rule by subtracting the amount of financial aid that each of the thousands of Division I student-athletes received in each year during the putative class period from the amount that each such student-athlete likely would have received during that period in the absence of the former GIA rule. As Dr. Rascher puts it, the proof in this case requires nothing more than "ministerial subtraction exercises" involving "little or no economic modeling." (Rascher Rep. ¶ 16.) And, as his deposition testimony makes clear, Dr. Rascher has undertaken no economic modeling whatsoever.

Defendants' economics expert, Professor Jonathan Orszag, explains that there is ample economic literature discussing the types of models that economists use to assess antitrust impact by predicting market outcomes that would have prevailed in the absence of the challenged rule or practice. (Orszag Rep. ¶¶ 29, 47-49.) But Dr. Rascher has not used any such model or employed

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[3] Expert Report of Jonathan Orszag, dated August 26, 2016 ("Orszag Rep.") (attached as Exhibit C to the accompanying Declaration of Karen Hoffman Lent).

any of these commonly used tools and methods. Instead, he has relied on his own personal, subjective construction and weighing of disparate pieces of often ambiguous and inconclusive, or even inconsistent, individualized pieces of evidence—such as financial aid records, press reports, anonymous survey results, and subjective recruiting scores—to reach factual conclusions that cannot be replicated or tested in any analytical way. And his conclusions ignore or contradict many critical, undisputed facts that have been developed in the record in this case.

a. Dr. Rascher Proposes No Common Economic Model for Proving What Each Student-Athlete Actually Received During the Putative Class Period

Dr. Rascher does not propose any valid, reliable economic method for proving to the jury, with common, class-wide evidence, what each student-athlete *actually received* during the period from March 2010 to the final disposition of this case. He seems to believe that the mass of squad lists and individual financial aid records collected by plaintiffs somehow constitute "common" evidence of all these disparate and individualized aid awards because those records (he thinks) are similar—but not identical—among the 350 colleges and universities within Division I. (Rascher Dep. at 125-26.) But this belief wholly ignores the thousands of variations among student-athletes' financial aid packages and the ambiguities in the records that would require additional explanation from the school or the student-athlete. And it grossly misconstrues the requirement that "common" questions be provable by common evidence applicable to all class members. "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

The factual record that Dr. Rascher and plaintiffs have amassed demonstrates that, in each academic year between March 2010 and the final disposition of the case, there were as many as 20,340 student-athletes in the three putative classes—up to eighty-five scholarship FBS football players at each of 124 Division I institutions and up to thirteen scholarship men's basketball play-

ers and fifteen scholarship women's basketball players at each of the 350 Division I schools.[4] The factual record also shows that there are hundreds of different federal, state, local and institutional academics-based and need-based scholarships and grants that, in addition to athletics-based grants, were available and awarded to student-athletes during the putative class period. The record shows that different Division I institutions treated these scholarships and grants differently from one school to another (and, within the same institution, sometimes from one student-athlete to another in any given year and from one year to another for any individual student-athlete).[5] Many student-athletes received total financial aid during the putative class period that equaled their full COA; many others received financial aid in addition to their GIA to cover some of the difference between their GIA and their COA. (*See* Def. Opp. Br.[6] at 4-8; *see also* Orszag Rep. ¶¶ 92-108.)[7]

Thus, even with respect to the threshold questions as to the amount and composition of each putative class member's annual financial aid package, the record is replete with individual questions that must be presented to the jury, and Dr. Rascher has presented no valid, reliable economic

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[4] Assuming that one quarter of the annual number of student-athletes graduate and are replaced by an equal number of incoming freshman, the total number of individual class members may be greater than 45,000.

[5] Dr. Rascher acknowledges that the financial aid records are sometimes ambiguous, requiring the fact-finder to seek explanation from the individual schools. (Rascher Dep. at 113-15.) For example, with respect to the financial data for women's basketball at [redacted], Dr. Rascher's report reflects: "Hard to tell, but it looks like all got full COA." (Rascher Dep. Ex. 15.)

[6] Defendants' Memorandum of Points and Authorities in Opposition to Consolidated Plaintiffs' Motion for Certification of Damages Classes, dated August 26, 2016 (Def. Opp. Br.").

[7] Dr. Rascher's suggestion that "one could look at 2014-15 and 2015-16 and start to figure out how [the schools] are treating [each non-athletics-based scholarship and grant]" (Rascher Dep. at 212) provides no insight into the methodology that should be used to do so. His further suggestion that, once the fact-finder determines how a particular school has treated a specific non-athletics-based form of financial aid, such as the HOPE scholarship, the fact-finder could consistently and formulaically treat that scholarship in the same way for all putative class members for all schools for all years (*id.* at 213, 230-31), is flatly wrong. As Dr. Rascher is well aware—and as the record clearly reflects—because different schools have treated the same scholarship differently from one school to another, and from one student-athlete to another at the same school, and from one year to another for the same student-athlete, there simply is no formulaic way to treat the hundreds of different federal, state, local, and institutional academic-based and need-based scholarships and grants that are available and have been awarded to putative class members since March 2010.

model for dealing with them on a common, class-wide basis. He simply ignores them.[8]

b. Dr. Rascher Proposes No Reliable or Relevant Economic Model for Proving What Each Student-Athlete Would Have Received Absent the Challenged Rule

Dr. Rascher also has not proposed any valid, reliable economic methodology for proving to the jury—with common, class-wide evidence—what each student-athlete *likely would have received* in the absence of the challenged GIA rule. He asserts that a "benchmark" or "before-and-after" methodology could be used to determine the amount of athletics-based financial aid that each school likely would have awarded to each putative class member in the absence of the challenged NCAA rule. (Rascher Dep. at 165-83.) To be economically valid, such an analysis would need to control for the effects of economic conditions and other variables between the two periods—the benchmark period and the damages period, or the before period and the after period—having nothing to do with the challenged conduct, and thereby to isolate the effects of the challenged conduct. (Orszag Rep. ¶¶ 24-29, 46-49; Rascher Dep. at 116.) Economists typically control for these differences in economic conditions and other variables between the two periods through the use of a multivariate regression analysis. (Orszag Rep. ¶¶ 24-29, 46-49.) And the failure to employ such an analysis can and should result in the exclusion of the expert's opinion. As the Seventh Circuit held in *Zenith Electronics Corp.*:

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[8] To the extent that Dr. Rascher ignores the hundreds of different grants and scholarships available to putative class members and views athletics-based aid in isolation, his analysis would not comport with substantive antitrust law, and therefore should be rejected on that ground. It is well established that antitrust courts must look to the economic realities of a transaction, and cannot ignore its integral parts. *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 209 (1968); *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 965-66 (5th Cir. 1979) ("There usually is no substitute for a careful analysis of the economic realities presented by the facts of a given case in light of the underlying purpose of the relevant antitrust statute."). Courts have thus rejected efforts to ignore discounts and other economic aspects of price. *See, e.g.*, *Felder's Collision Parts, Inc. v. All Star Advertising,* 777 F.3d 756, 763 (5th Cir. 2015) (rejecting argument that price should be considered before the application of any discounts and holding that the "approach of comparing price and cost as they exist only on the day of the sale ignores the economic realities that govern antitrust analysis"); *American Academic Suppliers v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1322 (7th Cir. 1991) (determination of price includes "the promotional value of the discounts . . . added to the discounted price"); *A.A. Poultry Farms. Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989) ("Whether price discrimination has occurred depends, therefore, on the price *after* all discounts, specials, and so on." (citation omitted)). The value of each student-athlete's financial aid, therefore, includes *all* forms of academic-based and need-based aid, in addition to the athletics-based grants that schools award, and Dr. Rascher may not ignore that economic reality.

> The supposed "uniqueness" of a market does not justify substituting a guess for careful analysis. . . . [S]ocial science has tools to isolate the effects of multiple variables and determine how they influence one dependent variable . . . . Perhaps the leading tool is the multivariate regression, which is used extensively by all social sciences. Regression analysis is common enough in litigation to earn extended treatment in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (2d ed. 2000). . . . [The expert] neither employed any of the methods covered in the *Reference Manual* nor explained why he hadn't.

395 F.3d at 418-19.

Dr. Rascher did not conduct any type of regression analysis in this case. (*See* Orszag Rep. 30, 50-59.) He concedes that a "benchmark" or "before-and-after" analysis here would need to control for, among other things, "the expenditures on the sports in suit, the growth in the revenue in those sports, are they already showing strong demand for the athletes. Are they in a competitive set or a competitive—you know, where they sit in the competitive order in the recruiting market. What's happening with their peers." (*Id.* at 168.) But he acknowledges that he has not "done that for this analysis on a school-by-school basis yet." (*Id.* at 184.) He has simply "describ[ed] a method that one would do at merits to be able to sort these schools into, yes, they would have paid or, no, they wouldn't have paid." (*Id.* at 175.)[9]

Dr. Rascher's explanation for why he did not develop a regression analysis—that the dependent variable (*i.e.*, the scholarships ultimately awarded by each school) "is continuing to change" during the post-2015 benchmark period (Rascher Dep. at 170-72)—illustrates why this *Daubert* motion should be granted. Regardless of whether Dr. Rascher is relying on a "before-and-after" methodology or a regression analysis, both require data sufficient to determine the value of scholarships awarded to student-athletes during the benchmark. To the extent that Dr. Rascher argues that there is insufficient or unreliable class-wide data on scholarships for the benchmark period, he cannot reliably predict the scholarships that would have been awarded during the impact pe-

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[9] As Professor Orszag makes clear, there are still more variables beyond those identified in Dr. Rascher's deposition that are absent from his analysis. For example, Dr. Rascher has not controlled for the impact of one of the largest recessions in American history, changes in schools' funding, the movement of schools between conferences, differences in schools' recruiting success, differences in the schools' athletics budgets, and differences in the number of scholarship student-athletes at individual schools. (Orszag Rep. ¶¶ 50-59.)

riod but-for the challenged rules. (Orszag Rep. ¶ 50 n.79.) Dr. Rascher's failure to develop and apply common economic tools in his report, and his meritless explanation for that failure, render his opinion unreliable and inadmissible. *See Zenith Elec. Corp.*, 395 F.3d at 418-19.

In lieu of the tools and analysis commonly employed by economists in antitrust cases to determine impact, Dr. Rascher has suggested an approach that does not involve any economic analysis whatsoever. Instead, he has merely classified each of the 350 Division I institutions into four categories, depending on his perception of their response during the 2015-16 academic year to the NCAA's 2015 change in its GIA rule to permit schools to award athletics-based financial aid up to each recipient's full COA. (Rascher Rep. App. D.) But there is no economic methodology or analysis to Dr. Rascher's school classification; he simply applies his subjective interpretation of various pieces of sometimes ambiguous or inconclusive evidence, weighing conflicting or inconsistent evidence, to reach highly debatable conclusions about how each individual school has responded—or is likely in the future to respond—to the changed GIA rule. (Orszag Rep. ¶¶ 60-72.)

In particular, Dr. Rascher relies on (i) 2015-16 squad lists and other financial aid documents, (ii) public statements by school officials, press reports and the results of an anonymous survey of coaches suggesting each school's future scholarship plans, and (iii) student-athletes' individual "star" ratings as published by a third-party recruitment service. (Rascher Rep. ¶¶ 202-04; App. D; *see also* Orszag Rep. ¶ 42.) Proceeding on a school-by-school basis, and using different combinations of these various pieces of evidence affecting only individual Division I institutions, Dr. Rascher classifies as "Instant" adopters those institutions that immediately began to award full COA athletic scholarships to most, though not necessarily all, of their football and basketball players. (Dr. Rascher classifies a school as an Instant adopter even if as many as ten of its football players and three of its men's or women's basketball players did not receive a full COA athletics-based scholarship.) (*See* Rascher Rep. App. D.) Of the remaining institutions, Dr. Rascher then classifies some as "Partial" adopters if they either (a) immediately began to award some amount of athletics-based financial aid above tuition, room, board, books and fees (though not necessarily a full COA scholarship) to at least ten football players or at least three men's or women's basketball players, or (b) made a public statement that suggested to Dr. Rascher that the school intended to do

so at some future date. (*Id.*) Dr. Rascher classifies as "Wait" any remaining institution that neither (a) immediately awarded some amount of financial aid above tuition, room, board, books and fees to at least ten football players or at least three men's or women's basketball players, nor (b) publicly suggested an intention to do so in the future. (*Id.*) Finally, Dr. Rascher classifies as "Unknown" any institution for which he has insufficient information to otherwise classify it "solely due to the timing of [his] report versus the completion of discovery." (Rascher Rep. ¶ 166 n.223.)[10]

The unreliability of this non-economic classification scheme is manifest. Dr. Rascher acknowledges that the squad lists and other financial documents are often ambiguous and require further explanation from school officials, something he has not sought. (Rascher Dep. at 230-33; *see also* Orszag Rep. ¶ 63.) The public statements, press reports and results of the anonymous survey of coaches suggesting individual schools' future scholarship plans are even more ambiguous and inconclusive, and Dr. Rascher does not explain how he has reached the conclusions he has with respect to many of them. (Orszag Rep. ¶¶ 64-69.) In many cases, the public statements on which Dr. Rascher relies to classify a school as an "Instant" or "Partial" adopter of COA scholarships is contradicted by available financial aid records. (*Id.* ¶ 68.) Dr. Rascher testified at his deposition that he looked for such statements about future scholarship plans from "economic actors," by which he meant coaches and athletic directors. (Rascher Dep. at 34-35.) But he conceded that coaches and athletic directors do not generally have the authority to determine the level of athletics-based scholarships that the school will provide to its student-athletes. (*Id.* at 37-38.) That authority, he concedes, would reside with "different people at different universities." (*Id.* at 38.)

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[10] Dr. Rascher testified that these classifications are somewhat fluid, and could change if schools alter their athletics-based scholarship policies and practices to reach what Dr. Rascher calls a "competitive equilibrium." (Rascher Dep. at 194.) But because he has done no economic analysis whatsoever to support it, Dr. Rascher concedes that he does not know what the "competitive equilibrium" with respect to athletics-based scholarships is, or how long it will take to reach such a competitive equilibrium. The "competitive equilibrium is an equilibrium that's not in transition, whatever that equilibrium may be," he testified, acknowledging that "it could be that all of the schools are offering full COA. It could be that some—you know, certain schools, certain conferences are offering COA and others aren't. And that may be where it settled down." (*Id.*) "Certainly one or two years is not enough [to get to a competitive equilibrium], maybe three isn't. But, you know, you would—I think you would start to see it play out in four, five and beyond, you know, like that that would be in some ways sufficient." (*Id.* at 277.)

And Dr. Rascher's reliance on third-party recruitment data to predict individual institution's future scholarship plans is so unreliable that, when applied to schools with other allegedly corroborating evidence of future intent, it predicted the wrong classification in roughly two-thirds of the cases. (Orszag Rep. ¶¶ 70-72.) It is significant that in cases in which the financial data and public statements or other evidence appear inconsistent, Dr. Rascher has opted to "override" the existing data to predict how the school will behave in the future. (Rascher Dep. Ex. 15; *see also* Orszag Rep. ¶ 67.)[11]

Having classified the 350 Division I schools into the four categories, Dr. Rascher then assumes that, in the absence of the challenged NCAA rule, the Wait and Unknown schools would not have awarded athletics-based scholarships above the former GIA level to *any* of their scholarship student-athletes, while the Instant and Partial adopter schools would have provided full COA athletics-based scholarships to *all* of the scholarship student-athletes. Dr. Rascher has provided no economic theory or factual basis for his "all-or-nothing" assumption. (*See* Orszag Rep. ¶¶ 73-86.) Rather, he concedes that one cannot know which putative class members would have received more financial aid than they actually received "because it's five years earlier, four years earlier, three years earlier," and, for that reason, he concluded that it would be "reasonable" to put each school "into an all-giving or not-all-giving category." (Rascher Dep. at 271.)

Dr. Rascher's entire approach to forecasting what Division I schools would have awarded in athletics-based grants to their student-athletes is not predicated on any valid, testable economic model, but on Dr. Rascher's personal assumptions and speculation. (Orszag Rep. ¶¶ 60-73.) On that basis, it is both unreliable and inadmissible. In addition, Dr. Rascher's "all-or-nothing" conclusion that all Instant or Partial adopter schools would have awarded full COA scholarships to *all* of their scholarship student-athletes in the putative damages period because, in the 2015-16 academic year, they awarded either full or partial COA scholarships to at least ten football players or three men's or women's basketball players is inconsistent with undisputed facts and sound eco-

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[11] When asked at his deposition about this practice, Dr. Rascher professed not to know what he meant by the term "overrides" in his report. (Rascher Dep. at 246.)

nomic analysis. (*Id.* ¶¶ 74-86.) It is therefore irrelevant to the fact-finder's efforts to understand the evidence or to determine a fact in issue. *See Daubert*, 509 U.S. at 591-93 (where expert's opinion cannot reasonably be applied to the facts of the case, it is inadmissible as irrelevant). Dr. Rascher's facile speculation that, over time, Instant and Partial adopter schools would award full COA athletics-based grants to *all* of their scholarship football and basketball players to eliminate the alleged lingering effects of the challenged GIA rule is completely unsupported by any economic analysis or modeling whatsoever (Orszag Rep. ¶¶ 39-86), and ignores the fact that many such schools often did not provide athletics-based financial aid equal to full GIA to all their scholarship football and basketball players during the putative class period.

In short, Dr. Rascher's opinion that antitrust impact can be proven to the jury in this case on a class-wide basis using evidence common to all putative class members that will predominate over evidence affecting only individual class members is not based on sound economic theory, modeling, analysis, or thinking. Rather, it is the product solely of Dr. Rascher's subjective assumptions and unsupported speculation that do not comport with the undisputed factual record that Dr. Rascher and plaintiffs have developed. Dr. Rascher's opinion is both unreliable and irrelevant, and should therefore be excluded under Rule 702.

B. Dr. Rascher's Opinions Do Not Reliably Demonstrate a Valid Methodology for Proving Class Membership on a Common, Class-Wide Basis

At his deposition, Dr. Rascher explained his non-economic—and inconclusive—approach to ascertaining which student-athletes are members of the putative classes. First, relying on each school's football and basketball squad lists, Dr. Rascher opined that, "if a person got a full GIA, then they're in the class. Right. If they didn't, then they're—then they're not in the class." (*Id.* at 49.) [redacted] (Orszag Rep. ¶ 100.)[12]

[12] [redacted]

For those student-athletes who are not reflected on the squad lists as having received a full GIA, Dr. Rascher further explained that "[y]ou want to look and see if there's other information that helps you determine whether they were getting a full scholarship." (Rascher Dep. at 58.) Rather than describe an economic model or even an economic basis for ascertaining class membership, however, Dr. Rascher testified that someone at trial could just "pick a number" representing the percentage of a full GIA that a fact-finder could assume reflected the school's intention to award a full GIA, even if that number resulted in student-athletes being wrongly excluded from class membership:

> And so one could create a threshold of something, of some percentage below [100%], and say, Okay, that's—looks like that's a full scholarship. Maybe there's a slight variation, again, depending on what [each school] put in the denominator, because they put the average of the dorm prices or maybe the highest dorm price or something like that.
>
> * * *
>
> I'm just showing that you could do that. And then when you look on the financial aid form details, you can see how those—those numbers, that .92 or whatever, .88, sometimes appear, and they end up being a full GIA. So I'm just showing that you can do all of that by looking at—excuse me—the other data.
>
> At the same time, if you didn't have the FAFD data, you could just create a metric, a percentage, like the 90 percent that I mentioned three of the NCAA economists have used, as a reasonable estimate of who would be in the class. And so you might leave somebody out, unfortunately, who ought to be in the class kind of situation.
>
> * * *
>
> I think I looked at a percentage, and I can't think of what the percentage is, but as I—I'm saying one could—once all the information is in, someone at merits could pick a number that—that they feel is safe, is conservative. Right. So you might leave a few people out, but you're not going to accidentally include a lot of people who shouldn't be there. Right.

(*Id.* at 58-61.)

Dr. Rascher's proposal for determining who is a putative class member is not predicated on any valid, reliable methodology. (*See* Orszag Rep. ¶¶ 92-100.) Rather, it requires the fact-finder subjectively "to look and see if there's other information that helps you determine whether they were getting a full scholarship" (Rascher Dep. at 58)—perhaps by asking each school what it intended with respect to each partial GIA recipient—and then arbitrarily to choose a percentage

threshold, below which student-athletes would be excluded from the classes. Dr. Rascher has done no work—economic or otherwise—to determine what that threshold should be, and offers no economic model or valid methodology for determining it on a common, class-wide basis. His arbitrary "pick a number" approach to determining the threshold for "full" GIA recipients who are legitimate members of putative classes is unreliable on its face and should be excluded.

C. Dr. Rascher's Opinions Do Not Reliably Demonstrate a Valid Methodology for Proving Damages on a Common, Class-Wide Basis

Lastly, Dr. Rascher conceded at his deposition that discovery has not progressed sufficiently even to develop a damages model (*id.* at 47), and he has not developed one. His opinion that damages can be proven on a common, class-wide basis is therefore nothing more than baseless speculation (*see* Orszag Rep. ¶¶ 109-19), and should be excluded. With no valid damages model, there can be no class certification. *See*, *e.g.*, *Rail Freight Fuel Surcharge*, 725 F.3d at 253 ("[T]he damages model [is] essential to the plaintiffs' claim they can offer common evidence of classwide injury. No damages model, no predominance, no class certification." (citation omitted)).

* * *

Ultimately, Dr. Rascher's approach to developing a valid method for proving antitrust impact and damages, as well as class membership, on a common, class-wide basis is wholly devoid of economic analysis or rigor, and completely dependent on Dr. Rascher's unsupported assumptions and *ipse dixit* speculation. To the extent that Dr. Rascher has reached conclusions about the nature of the proof necessary to demonstrate antitrust impact and class membership, those conclusions are contradicted by the factual record. And he has done nothing to develop a valid methodology for establishing the amount of damages on a common, class-wide basis.

"When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993). As the *Daubert* Court made clear, an expert opinion must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591 (citation omitted); *see also Perez v. State Farm Mut. Auto. Ins. Co.*, No. C 06-01962

JW, 2012 WL 3116355, at *5-6 (N.D. Cal. July 31, 2012) (rejecting expert opinion where the expert's analysis was "far too subjective to constitute a workable methodology"); *American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal. 2001) (where the expert's model "contains entirely too many assumptions and simplifications that are not supported by real-world evidence," the expert's conclusions "are entirely too speculative to support a jury verdict" and should be excluded).

As the district court explained in *Graphics Processing*, "[i]n recent years, many courts have exhibited greater willingness to test the viability of methodologies that experts propose to show class wide impact and injury using common proof, and are increasingly skeptical of plaintiffs' experts who offer only generalized and theoretical opinions that a particular methodology may serve this purpose without also submitting a functioning model that is tailored to market facts in the case at hand." 253 F.R.D. at 492 (citation omitted)). "It is not enough to submit a questionable model whose unsubstantiated claims cannot be refuted through *a priori* analysis. Otherwise, 'at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be.'" *Rail Freight Fuel Surcharge*, 725 F.3d at 254 (quoting *Comcast Corp v. Behrend*, 133 S. Ct. 1426, 1433 (2013)).

Conclusion

For the foregoing reasons, defendants' motion to exclude the opinions of Dr. Daniel A. Rascher should be granted.

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FILER'S ATTESTATION

I, Jeffrey A. Mishkin, am the ECF user whose identification and password are being used to file DEFENDANTS' MOTION AND MEMORANDUM AND AUTHORITIES IN SUPPORT THEREOF TO EXCLUDE THE REPORT AND TESTIMONY OF DANIEL A. RASCHER. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Jeffrey A. Mishkin

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ Jeffrey A. Mishkin