

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

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

No. 14-md-02541 CW

THIS DOCUMENT RELATES TO:

ALL ACTIONS

ORDER RESOLVING
MOTIONS TO EXCLUDE
"NEW" EXPERT OPINIONS

(Dkt. Nos. 939, 946,
955)

Now pending are requests by Plaintiffs and Defendants, respectively, to exclude certain expert opinions contained in trial testimony declarations on the ground that such opinions were not disclosed as required by Rule 26(a). Each side responded to the other side's requests to exclude. Having considered the parties' submissions, the Court rules as set forth below.

DEFENDANTS' REQUESTS TO EXCLUDE

I. Admitted Opinions

The following opinions will be admitted because (1) Plaintiffs have shown that the sources upon which they are based were not available at the time expert reports were served, and that the opinions at issue fall within the scope of previously disclosed opinions; and (2) Defendants' experts have responded to some of these opinions and sources in their trial declarations. To the extent that Defendants' experts have not yet responded, and would like to, the Court will provide an additional opportunity to

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1 Defendants to respond during trial, via cross-examination or
2 otherwise.

3 1. Direct Testimony of Dr. Noll ¶ 71. The opinions at issue
4 regarding the Academic Enhancement Fund will be admitted.

5 2. Direct Testimony of Dr. Noll ¶ 112 & n.109. The opinions at
6 issue based on the Baker study will be admitted. Defendants'
7 experts, Dr. Elzinga and Dr. Heckman, have already responded
8 to the opinions at issue in their direct testimony
9 declarations.

10 3. Direct Testimony of Dr. Noll ¶¶ 119-22, Exhibit 168(d),
11 Exhibit 168(e). The opinions at issue based on NCAA data and
12 EADA data will be admitted.

13 4. Rebuttal Testimony of Dr. Noll ¶¶ 43-44. The opinions at
14 issue based on the graduation data in question will be
15 admitted.

16 5. Direct Testimony of Dr. Rascher ¶ 36 & n.3. The opinions at
17 issue based on the University of Chicago survey will be
18 admitted.

19 6. Direct Testimony of Dr. Rascher ¶¶ 48-49 & nn.4-6. The
20 opinions at issue based on the articles in question will be
21 admitted.

22 7. Direct Testimony of Dr. Rascher ¶¶ 84-87 & nn.9-13. The
23 opinions at issue based on articles quoting Condoleezza
24 Rice's statements and other industry leaders who "echo"
25 Rice's statements will not be excluded based on Defendants'
26 non-disclosure objection.

27 8. Direct Testimony of Dr. Rascher ¶ 141 & n.14. The opinions
28 at issue based on the Weaver study will be admitted.

1 9. Direct Testimony of Dr. Rascher ¶ 260 & n.25. The opinions
2 at issue based on the Leeds study will be admitted.

3 10. Rebuttal Testimony of Dr. Rascher ¶ 23. The opinions at
4 issue based on the Baker study will be admitted.

5 The following opinions will be admitted because Plaintiffs
6 have shown that they fall within the scope of previously disclosed
7 opinions. Defendants may explore any weaknesses in admitted
8 opinions during cross-examination at trial, and the Court will
9 weigh such opinions accordingly.

10 1. Direct Testimony of Dr. Poret ¶ 27. The opinions at issue
11 regarding support for the proposition that consumers'
12 expressed opposition may not actually result in changes in
13 behavior will be admitted.

14 2. Direct Testimony of Dr. Poret ¶ 61. The opinions at issue
15 regarding the impact on demand of scenarios that Dr. Poret
16 did not test in his survey will be admitted.

17 3. Rebuttal Testimony of Dr. Poret ¶¶ 13, 15. The opinions at
18 issue regarding responses to Dr. Isaacson's criticisms of Dr.
19 Poret's survey will be admitted.

20 4. Rebuttal Testimony of Dr. Poret ¶ 17. The opinions at issue
21 regarding whether Dr. Poret's control scenarios had no
22 negative impact on consumer demand will be admitted.

23 The following opinions will be admitted because they respond
24 to "new" opinions of another expert. Defendants may explore any
25 weaknesses in admitted opinions during cross-examination at trial,
26 and the Court will weigh such opinions accordingly.

27 1. Rebuttal Testimony of Dr. Noll ¶¶ 46-47. The opinions at
28 issue regarding walk-ons and scholarships will be admitted

1 because Plaintiffs have shown that such opinions respond to
2 opinions that Dr. Heckman disclosed for the first time in his
3 rebuttal report, to which Dr. Noll previously did not have an
4 opportunity to respond.

5 II. Excluded Opinions

6 The following opinions are excluded because the opinions are
7 based on sources not previously disclosed, and because Plaintiffs
8 have not shown that the newly-cited sources were not available at
9 the time expert reports were served. The exclusion of any opinion
10 does not bar any party from attempting to introduce material
11 supporting that opinion into the record in another manner, or to
12 argue the significance of the material from a common-sense
13 perspective.

14 1. Direct Testimony of Dr. Noll ¶¶ 50-51. Citations to the
15 deposition testimony of Mark Lewis, the deposition testimony
16 of Michael Aresco, and a Los Angeles Times news article
17 regarding a Stanford football player, as well as any opinions
18 based on the same, are excluded.

19 2. Direct Testimony of Dr. Noll ¶¶ 67-68. Citations to analysis
20 and surveys listed in footnotes 61 and 62, as well as any
21 opinions predicated on the same, are excluded.

22 3. Direct Testimony of Dr. Noll ¶ 72 & n.67. Citations to the
23 guidelines of particular schools in paragraph 72 and note 67,
24 as well as any opinions predicated on the same, are excluded.

25 4. Direct Testimony of Dr. Noll ¶ 132 & n.123. Citations to the
26 website identified in footnote 123 and the data contained
27 therein, as well as any opinions predicated on the same, are
28 excluded.

1 Unless otherwise noted, the following opinions are excluded
2 because Plaintiffs have not shown that such opinions fall within
3 the scope of previously disclosed opinions. The exclusion of any
4 opinion does not bar any party from attempting to introduce
5 material supporting that opinion into the record in another
6 manner, or to argue the significance of the material from a
7 common-sense perspective.

8 1. Direct Testimony of Dr. Noll ¶¶ 78-85. Plaintiffs have not
9 shown that Dr. Noll's analyses pertaining to the following
10 topics were previously disclosed: the NCAA's evolving rules
11 regarding Pell Grants, and the number and amounts of Pell
12 Grants offered at various institutions for the purpose of
13 showing that the proportion of athletes at Division I schools
14 who receive a COA scholarship and a Pell Grant is
15 "substantial."¹ Accordingly, paragraphs 80 to 84 of Dr.
16 Noll's direct testimony, as well as the sources cited
17 therein, which also were not previously disclosed, are
18 excluded. The remaining challenged paragraphs, 78, 79, and
19 85, contain previously disclosed opinions and will be
20 admitted.

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23 ¹ In his report of May 16, 2017, Dr. Noll briefly mentioned
24 Pell Grant awards to University of Texas men's basketball players
25 in 2015 to 2016 for the purpose of undermining Dr. Elzinga's
26 reliance on the assertions of Gregory Fenves, President of the
27 University of Texas, regarding a relationship between above-COA
28 compensation and demand for the sport. Noll Report of May 26,
2017 at 41-42. By contrast, the data for various Division I
schools cited for the first time in Dr. Noll's direct testimony
supports a different point, namely that the proportion of Division
I athletes who receive both a COA scholarship and a Pell Grant is
substantial. Noll Direct Testimony ¶¶ 82-84.

1 2. Direct Testimony of Dr. Noll ¶¶ 133-136. Plaintiffs have not
2 shown that the opinions in paragraphs 135 to 136 regarding a
3 paternalism theory in the context of discussing integration
4 were previously disclosed. Accordingly, the opinions in
5 these paragraphs are excluded. The remaining challenged
6 opinions in paragraphs 133 and 134 fall within the scope of
7 previously disclosed opinions and will be admitted.

8 3. Direct Testimony of Dr. Noll ¶¶ 140, 142. Plaintiffs have
9 not shown that the opinions at issue relating to the impact
10 of academic eligibility rules or multiyear scholarships on
11 athletes' incentives were previously disclosed. Accordingly,
12 the opinions at issue in paragraphs 140 and 142, and the
13 sources cited therein, are excluded.

14 4. Direct Testimony of Dr. Noll ¶ 147. Plaintiffs have not
15 shown that the criticisms of Dr. Heckman's regressions as
16 stated in paragraph 147 were previously disclosed.
17 Accordingly, the criticisms at issue in paragraph 147 are
18 excluded.

19 5. Direct Testimony of Dr. Noll ¶ 149-178. Plaintiffs have not
20 shown that the opinions in paragraphs 149 to 155, 163 to 166,
21 169 to 170, and 173 to 176 were previously disclosed or that
22 they respond to opinions that Dr. Heckman expressed for the
23 first time in his rebuttal report. Accordingly, the opinions
24 in these paragraphs are excluded. The remaining opinions in
25 the challenged paragraphs were either previously disclosed or
26 respond to new opinions by Dr. Heckman and will be admitted.

27 6. Direct Testimony of Dr. Noll ¶¶ 179-212. Plaintiffs have not
28 shown that the opinions in the challenged paragraphs

1 evaluating or proposing less restrictive alternatives outside
2 of the context of directly responding to or criticizing the
3 opinions of Defendants' experts on less restrictive
4 alternatives were previously disclosed. Accordingly, any
5 opinions in the challenged paragraphs that evaluate or
6 propose less restrictive alternatives outside of the context
7 of responding to or criticizing the opinions of Defendants'
8 experts regarding less restrictive alternatives are excluded.

9 7. Direct Testimony of Dr. Rascher ¶ 150. Plaintiffs have not
10 shown that the opinions at issue regarding a relationship
11 between academic success and increased athletic benefits
12 based on graduation rates were previously disclosed.
13 Accordingly, such opinions are excluded.

14 8. Direct Testimony of Dr. Rascher ¶ 204. Plaintiffs have not
15 shown that the opinions at issue regarding a proposed bonus
16 for living in dorms were previously disclosed. Accordingly,
17 such opinions are excluded.

18 PLAINTIFFS' REQUESTS TO EXCLUDE

19 I. Admitted Opinions

20 The following opinions will be admitted because Defendants
21 have shown that they fall within the scope of previously disclosed
22 opinions. Plaintiffs may explore any weaknesses in admitted
23 opinions during cross-examination at trial, and the Court will
24 weigh such opinions accordingly.

25 1. Direct Testimony of Dr. Heckman ¶¶ 4, 13, 7, 11, 12, 16, 26-
26 28, 34, 66, 73, 79, 81-82, 102, 4. The opinions at issue
27 regarding the purported existence of a causal link between
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1 benefits to athletes and participation in athletics under the
2 current NCAA rules will be admitted.

3 2. Direct Testimony of Dr. Heckman ¶¶ 93, 13, 16, 63, 67-68, 74,
4 89, 92-93, 94. The opinions at issue regarding incentives to
5 spend more time on athletics if athletes are provided with
6 more compensation will be admitted.

7 3. Direct Testimony of Dr. Elzinga ¶ 29. The opinions at issue
8 regarding the economic value of amateurism will be admitted
9 to the extent they are relevant to the issues remaining for
10 trial.

11 4. Direct Testimony of Dr. Elzinga ¶ 50. The opinions at issue
12 regarding the economic value of amateurism will be admitted
13 to the extent they are relevant to the issues remaining for
14 trial.

15 5. Direct Testimony of Dr. Elzinga ¶ 134. The opinions at issue
16 regarding unlimited compensation to athletes not being as
17 effective as the challenged rules will be admitted.

18 6. Direct Testimony of Dr. Elzinga ¶ 152. The opinions at issue
19 regarding the cost of conference-level rulemaking will be
20 admitted.

21 7. Direct Testimony of Dr. Isaacson ¶¶ 107, 2. The opinions at
22 issue regarding whether Dr. Isaacson's survey presents
23 substantial evidence on how consumers would behave if the
24 scenarios he tested were implemented will be admitted.

25 II. Excluded Opinions

26 Unless otherwise noted, the following opinions are excluded
27 because Defendants have not shown that such opinions fall within
28 the scope of previously disclosed opinions. The exclusion of any

1 opinion does not bar any party from attempting to introduce
2 material supporting that opinion into the record in another
3 manner, or to argue the significance of the material from a
4 common-sense perspective.

5 1. Direct Testimony of Dr. Elzinga ¶¶ 7-8. The opinions at
6 issue criticizing Dr. Rascher's and Dr. Noll's comparison of
7 revenues before and after the move to COA based on a failure
8 to control for factors that could have affected revenues
9 over time, such as media rights agreements, are excluded.

10 2. Direct Testimony of Dr. Elzinga ¶ 44. The opinions at issue
11 criticizing Dr. Rascher's and Dr. Noll's historical analysis
12 of NCAA rules on the basis that they failed to consider
13 differences in "relevant economic considerations" over time,
14 as well as the effects of any such differences, are
15 excluded.

16 3. Direct Testimony of Dr. Elzinga ¶¶ 52-55. The opinions at
17 issue regarding a comparison between demand for minor
18 leagues sports and Division I sports are excluded.

19 4. Direct Testimony of Dr. Elzinga ¶ 82. The opinions at issue
20 regarding Dr. Rascher's analysis of Major League Baseball
21 are excluded.

22 5. Direct Testimony of Dr. Elzinga ¶¶ 83-86. The opinions at
23 issue regarding pre-2000 Olympics data are excluded.

24 6. Direct Testimony of Dr. Elzinga ¶ 138. The opinions at
25 issue criticizing the HHI indices analyzed by Dr. Rascher
26 are excluded.

27 7. Direct Testimony of Dr. Elzinga ¶ 149. The opinions at
28 issue in footnote 208 to paragraph 149 criticizing Dr.

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Rascher's analysis of different categories of schools and their pay models are excluded.

8. Direct Testimony of Dr. Heckman ¶¶ 12, 72. The opinions at issue proffering specific and definitive ways in which the current equilibrium would change if the current athlete-compensation rules were changed are excluded (such as the challenged opinions by Dr. Heckman that changes in athlete compensation "would require additional funding" or that "other forms of revenue would have to be raised"). Dr. Heckman may testify at trial regarding his previously disclosed opinion that the equilibrium under the current rules would be affected by changes in athlete compensation, but he may not proffer specific and definitive ways in which the equilibrium would change given that Defendants have not shown that Dr. Heckman previously proffered any such specific and definitive changes.

9. Direct Testimony of Dr. Elzinga ¶ 137. The opinions at issue in paragraph 137 comparing conference-level rulemaking to splitting up the NFL are excluded. The remainder of paragraph 137 will be admitted.

IT IS SO ORDERED.

Dated: August 16, 2018



CLAUDIA WILKEN
United States District Judge