

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 REAFFIRMING  
EXCLUSION OF CERTAIN  
EXPERT TESTIMONY BY  
DR. ELZINGA

United States District Court  
For the Northern District of California

Following the Court's rulings on cross-motions for summary judgment and the admissibility of Dr. Elzinga's expert opinions regarding a multi-sided market definition, Defendants assert that the Court's summary adjudication of market definition, as well as the ruling on the admissibility of Dr. Elzinga's opinions on that issue, are erroneous because they are predicated on a misunderstanding of Defendants' position at the summary judgment stage, and because of the recent Supreme Court opinion regarding market definition in the context of two-sided transaction platforms, Ohio v. American Express Co., 138 S. Ct. 2274 (2018) (American Express). See Docket No. 862 at 7-10. The parties briefed these issues and argued them at the pretrial conference held on July 19, 2018.

The Court revisits its summary judgment adjudication of market definition and related Daubert ruling as to Dr. Elzinga's

1 proposed multi-sided market definition in light of American  
2 Express and reaffirms those decisions.

3 I. MARKET DEFINITION

4 In its Order Granting in Part and Denying in Part Cross-  
5 Motions for Summary Judgment, the Court granted Plaintiffs'  
6 summary judgment motion on the issue of market definition based on  
7 "the absence of any material factual dispute" with respect to that  
8 issue. Docket No. 804 at 18. The Court noted that Defendants  
9 contend that stare decisis controls the outcome of this case,  
10 including the market definition. Id. The Court also noted that,  
11 at the hearing on the cross-motions for summary judgment,  
12 Defendants agreed that all relevant rulings in O'Bannon control in  
13 this case, including market definition. Id.

14 Defendants now argue that their summary judgment briefs were  
15 clear that "the applicable market definition is a disputed issue  
16 of fact," and that they never agreed, either in their summary  
17 judgment briefs, or at the hearing on the cross-motions for  
18 summary judgment, "to application of the same relevant market as  
19 in O'Bannon." Docket No. 862 at 8-9. The record, however, does  
20 not support these new contentions.

21 Plaintiffs moved for summary judgment on the issue of market  
22 definition. They pointed to sufficient facts to satisfy their  
23 burden of production under Rule 56 to define the relevant market  
24 in this case as comprising national markets for Plaintiffs' labor  
25 in the form of athletic services in men's and women's Division I  
26 basketball and FBS football, wherein each class member

1 participates in his or her sport-specific market.<sup>1</sup> Docket No.  
2 655-4 at 6-7 (citing Daniel A. Rascher Report of March 21, 2017  
3 (Rascher Rep.) at 74, 13-63, 75-100). In these markets, the  
4 class-member recruits sell their athletic services to the members  
5 of Division I basketball and FBS football in exchange for grants-  
6 in-aid and other benefits and compensation permitted by NCAA  
7 rules. Id. This market definition is consistent with Plaintiffs'  
8 claims against Defendants in this litigation, which are based on  
9 the theory that Defendants have monopsony power over the labor  
10 markets for Division I basketball and FBS football and exercise  
11 that power to cap artificially the compensation to athletes  
12 participating in these markets.

13 In response to Plaintiffs' motion, Defendants did not ask the  
14 Court, either in their summary judgment briefs or at the hearing  
15 on the parties' cross-motions for summary judgment, to adopt a  
16 market definition different from the one that Plaintiffs proposed.

17  
18 <sup>1</sup> Dr. Rascher's definition of these markets is based on  
19 similar economic analyses to those performed in O'Bannon, which  
20 were not challenged by the NCAA on appeal in that case. Dr.  
21 Rascher's analyses here are predicated on up-to-date data and take  
22 into account women's Division I basketball, which was not at issue  
23 in O'Bannon. Rascher Rep. at 74-75. Dr. Rascher's economic  
24 analyses show that the most talented athletes are concentrated in  
25 the respective markets for Division I basketball and FBS football;  
26 purported alternatives to Division I basketball and FBS football,  
27 such as the National Association of Intercollegiate Athletics  
28 (NAIA) or National Christian College Athletic Association (NCCAA),  
have not proved to be viable substitutes; none of the major  
professional leagues in class members' sports provide competitive  
options for most college-aged talent; high barriers to entry  
preclude any viable alternatives emerging for class members'  
athletic services; and the geographic scope of the markets is  
nationwide. Id. at 75-100. Defendants did not move to exclude  
Dr. Rascher's opinions regarding market definition under Federal  
Rule of Evidence 702. Defendants did not appeal the Court's  
market definition in O'Bannon and the Ninth Circuit adopted it.

1 Nor did Defendants point to any facts in their summary judgment  
2 briefs to show that a genuine issue of material fact existed with  
3 respect to the issue of market definition.

4       Instead, Defendants' position during summary judgment  
5 proceedings was that O'Bannon controls all relevant issues in this  
6 litigation, including market definition. See Docket No. 789, Hr'g  
7 Tr. at 7-9 (responding in the affirmative when asked by the Court  
8 whether the rulings in O'Bannon "with respect to the agreement,  
9 the market, and the anti-competitive effect would apply equally"  
10 to the women's basketball class, which includes persons who were  
11 not involved in O'Bannon). At the hearing on the cross-motions  
12 for summary judgment, the Court asked the parties whether expert  
13 testimony, including Dr. Elzinga's on his multi-sided market  
14 theory, was relevant to the determination of the summary judgment  
15 motions. Defendants responded only that Dr. Elzinga's opinions  
16 "are relevant if, for example, you allow re-litigation on the  
17 issue of pro-competitive justifications." Id. at 74. Defendants  
18 added that "Dr. Elzinga does not redefine the market from the way  
19 it was defined in O'Bannon in the sense that O'Bannon defined it  
20 to include Division I colleges and universities." Id. at 75  
21 (emphasis added).

22       To the extent that Defendants mentioned Dr. Elzinga's  
23 testimony in their summary judgment briefs, they did so in  
24 connection with other issues, and did not cite it as a basis to  
25 preclude summary adjudication on market definition. Specifically,  
26 Defendants mentioned Dr. Elzinga's opinions (1) to support their  
27 argument that Defendants did not abandon certain of their  
28 procompetitive justifications, Docket No. 704, Opp'n to MSJ at 52;

1 and (2) to argue that the portions of Dr. Elzinga's opinions that  
2 were based on a multi-sided market theory should not be excluded,  
3 in part because they are "consistent with several holdings of  
4 O'Bannon regarding the college education market and the  
5 procompetitive effects of the challenged restraints within that  
6 market" and because they provide a "framework for explaining the  
7 features" of the market recognized in O'Bannon. Docket No. 748,  
8 Defs.' Reply at 37 (emphasis added).

9 The foregoing establishes that Defendants did not point to  
10 facts to show the existence of a disputed issue of fact as to  
11 market definition. See Keenan v. Allan, 91 F.3d 1275, 1279 (9th  
12 Cir. 1996) (holding that the non-moving party must "identify with  
13 reasonable particularity the evidence that precludes summary  
14 judgment" and that it is not the duty of the district court "to  
15 scour the record in search of a genuine issue of triable fact").  
16 Accordingly, the Court's summary adjudication on the issue of  
17 market definition in Plaintiffs' favor was appropriate.

## 18 II. DR. ELZINGA'S OPINIONS REGARDING A MULTI-SIDED MARKET

19 In a separate order following its rulings on summary  
20 judgment, the Court granted Plaintiffs' motion to exclude the  
21 expert opinions of Dr. Elzinga regarding the definition of the  
22 relevant antitrust market in this litigation as a multi-sided  
23 market. The Court excluded such opinions as irrelevant because  
24 they addressed market definition, an issue that was no longer a  
25 part of this case in light of the Court's summary adjudication of  
26 that issue. Docket No. 815 at 5.

1 After the Court excluded Dr. Elzinga's opinions regarding a  
2 multi-sided market definition, the Supreme Court issued its  
3 decision in American Express, which addresses market definition in  
4 the context of two-sided transaction platforms. Defendants argue  
5 that "the American Express decision validates key aspects of Dr.  
6 Elzinga's opinions that this Court excluded and squarely calls  
7 into question whether the Court erred in declining to even  
8 consider at trial Dr. Elzinga's arguments on the relevant market  
9 and anticompetitive effects." Docket No. 862 at 7-10. Defendants  
10 add that "even if the Court were correct in its view that  
11 Defendants previously waived reliance on a multi-sided market  
12 analysis, the Supreme Court's clarification of the law in American  
13 Express makes it appropriate for Defendants to advance that theory  
14 at trial." Id. at 9. At the pretrial conference held on July 19,  
15 2018, the Court invited both sides to argue the relevance, or lack  
16 thereof, of American Express to the Court's prior rulings.

17 After considering the parties' submissions and argument, the  
18 Court concludes that American Express has no effect on its rulings  
19 on market definition or the exclusion of Dr. Elzinga's opinions on  
20 the issue.

21 In American Express, the question before the Supreme Court  
22 was whether the plaintiffs in that case carried their initial  
23 burden to prove that American Express' anti-steering provisions in  
24 its contracts with merchants, which prevented merchants from  
25 encouraging cardholders to use non-American Express credit cards  
26 at the point of sale and which resulted in higher merchant fees,  
27 have anticompetitive effects under Section 1 of the Sherman Act.  
28 138 S. Ct. at 2283.

1 The Supreme Court explained that a credit-card company brings  
2 two types of market participants together in what is called a two-  
3 sided transaction platform, which offers different services to two  
4 different groups "who both depend on the platform to intermediate  
5 between them." Id. at 2280. Each credit-card company operates a  
6 network that "provides separate but interrelated services to both  
7 cardholders and merchants," consisting of credit on the cardholder  
8 side, and a means to receive a fast and guaranteed payment on the  
9 merchant side. Id. Two-sided transaction platforms "facilitate a  
10 single, simultaneous transaction between participants," such that  
11 when a credit-card network sells one transaction's worth of card-  
12 acceptance services to a merchant, it also "must" sell one  
13 transaction's worth of credit-payment services to a cardholder.  
14 Id. at 2286. Because of this directly proportional and  
15 simultaneous consumption on both sides, two-sided transaction  
16 platforms are "better understood as suppl[ying] only one product -  
17 transactions." Id. (internal quotation marks and citation  
18 omitted).

19 The Supreme Court held that, to determine whether the anti-  
20 steering provisions at issue have anticompetitive effects under  
21 Section 1, they should be assessed under the rule of reason  
22 because they are vertical restraints, namely restraints imposed by  
23 agreement between firms at different levels of distribution. Id.  
24 at 2284. The Supreme Court further held that defining the  
25 relevant market is necessary to determine the existence of any  
26 anticompetitive effects. Id. at 2284-85. The district court had  
27 defined the relevant market as including only the merchant side of  
28 the credit-card two-sided transaction platforms that compete in

1 the credit-card market, but the Second Circuit reversed, holding  
2 that the credit-card market is a single market that should include  
3 both the merchant side and the cardholder side of the credit-card  
4 two-sided transaction platforms. Id. at 2283.

5 The Supreme Court affirmed the Second Circuit and held that  
6 “[i]n two-sided transaction markets, only one market should be  
7 defined,” and it defined the relevant market there as “the two-  
8 sided market for credit-card transactions as a whole.” Id. at  
9 2287. The Supreme Court held that “courts must include both sides  
10 of the platform - merchants and cardholders - when defining the  
11 credit-card market” for two reasons. Id. at 2286.

12 First, credit-card two-sided transaction platforms exhibit  
13 “pronounced” indirect network effects<sup>2</sup> and interconnected pricing  
14 and demand. Id. As a result of the presence and degree of these  
15 economic relationships, credit-card two-sided transaction  
16 platforms cannot raise prices on one side without risking a  
17 feedback loop of declining demand; consequently, the credit-card  
18 network that intermediates must find the “balance of pricing” that  
19 encourages the greatest number of matches between cardholders and  
20 merchants based on “differences in the two sides’ demand  
21 elasticity[.]” Id. at 2286-87. Striking the “optimal balance” of  
22 the prices charged on each side “is essential” for two-sided  
23 transaction platforms to “maximize the value of their services and  
24 to compete with their rivals.” Id. at 2281; see also id. at 2286  
25

26  
27 <sup>2</sup> Indirect network effects “exist where the value of the  
28 platform to one group depends on how many members of another group  
participate.” 138 S. Ct. at 2280.



1 ("[C]redit cards determine their market share by measuring the  
2 volume of transactions they have sold.").

3 Second, "competition cannot be accurately assessed by looking  
4 at only one side of the platform in isolation," because only other  
5 credit-card two-sided transaction platforms that have "both  
6 cardholders and merchants willing to use [their] network" can  
7 compete with American Express in the credit-card transaction  
8 market. Id. at 2287.

9 Dr. Elzinga opines that the "relevant market in this case is  
10 a multi-sided market for college education in the United States"  
11 in which colleges operate as multi-sided platforms that balance  
12 their pricing to numerous constituencies.<sup>3</sup> Kenneth G. Elzinga  
13 Report of March 21, 2017 (Elzinga Rep.) at 26-28. Dr. Elzinga  
14 opines that this multi-sided market encompasses a relationship  
15 between the "pricing to any one constituency on the volume of  
16 participation" by the college's various constituencies. Id. at  
17 27-28. Dr. Elzinga, however, does not identify what product the  
18 universities offer to each of their constituencies, or how any  
19 product is "priced" to each constituency; he does not explain what  
20 he means by or how he determines "participation" and "volume"; he  
21 does not describe what "value" he is referring to or indicate how  
22 that can be measured. Dr. Elzinga also does not identify or  
23 describe the relevant economic interactions between the members of  
24

25 <sup>3</sup> Dr. Elzinga states in his report that the various  
26 constituencies in his multi-sided platform include "student-  
27 athletes in each of their respective sports, non-athlete students,  
28 alumni, coaches and athletic staff, faculty, other staff, the  
community in which the school is located, and, if they are public  
institutions, the state." Elzinga Rep. at 28. Dr. Elzinga notes  
that this list is "not necessarily exhaustive." Id.

1 the numerous constituencies and the platform, or identify the  
2 timing or relationship of any such interactions to other  
3 interactions within the claimed platform.

4 The multi-sided relevant market proposed by Dr. Elzinga is  
5 not analogous to the relevant market that the Supreme Court  
6 recognized as two-sided in American Express. In this litigation,  
7 the market participants and their interactions are nothing like  
8 what the Supreme Court observed in the context of credit-card  
9 transactions in American Express. There is no simultaneous  
10 interaction or proportional consumption through a platform by  
11 different market participants of what essentially constitutes  
12 "only one product." Additionally, the restraints at issue in this  
13 litigation are horizontal agreements among competitors to limit  
14 student-athlete compensation, which is alleged to constrain  
15 competition among the universities; by contrast, the restraint  
16 analyzed in American Express was a vertical agreement between a  
17 single credit card company, American Express, and the merchants  
18 who participate in that credit card company's network, which  
19 American Express claimed allowed it to better compete with other  
20 credit card companies. In light of these material and obvious  
21 differences, it is clear that American Express does not require  
22 altering the Court's rulings as to market definition or the  
23 admissibility of Dr. Elzinga's opinions on that issue.

24 But even assuming that American Express would permit the  
25 relevant market here to be defined as multi-sided although the  
26 relevant interactions are not transactional or simultaneous and  
27 the restraints at issue are not vertical, the Court's rulings on  
28 market definition and the admissibility of Dr. Elzinga's opinions

1 on that topic would remain unchanged, because any opinions by Dr.  
2 Elzinga as to a multi-sided market definition are unreliable and  
3 thus inadmissible under Daubert v. Merrell Dow Pharms., Inc., 509  
4 U.S. 579 (1993), and Federal Rule of Evidence 702. As such, Dr.  
5 Elzinga's opinions regarding a multi-sided market definition could  
6 not have precluded the entry of summary judgment as to market  
7 definition even if Defendants had pointed to such opinions for  
8 that purpose during the summary judgment proceedings, which they  
9 did not.

10 To support his conclusion that the relevant market in this  
11 litigation is multi-sided, Dr. Elzinga refers frequently in his  
12 report to economic variables such as pricing, demand, supply,  
13 participation, "value," "network externalities," "competitive  
14 discipline," and others. He states that relationships exist  
15 between the various sides of his multi-sided platform with respect  
16 to these variables. But Dr. Elzinga does not perform any economic  
17 analysis to support his assertions with respect to these variables  
18 and purported relationships.<sup>4</sup> Indeed, he does not examine any  
19 economic data at all to quantify, test, evaluate, or confirm any  
20 of the economic relationships upon which his proposed multi-sided  
21 relevant market is predicated. The lack of any such analysis is  
22 confounding given that Dr. Elzinga states in his report that this

23  
24 <sup>4</sup> The only "price" discussed by Dr. Elzinga is the cap on  
25 student-athlete compensation, which is set by the NCAA by  
26 agreement; it is not set individually by each university multi-  
27 sided platform through "balancing" in an effort to better compete  
28 with other university multi-sided platforms. As discussed above,  
this distinguishes Dr. Elzinga's proposed multi-sided market from  
the two-sided relevant market recognized in American Express in  
the context of two-sided transaction platforms.

1 analysis is necessary. Elzinga Rep. at 11 ("Market definition  
2 ought to take the products involved in a dispute as data and  
3 attempt to identify the substitutes that provide competitive  
4 discipline for those products.").

5 Dr. Elzinga states in his report that his opinions are based  
6 on his interviews with a handful of university administrators.  
7 Dr. Elzinga does not discuss in his report, and Defendants have  
8 not explained in their briefs, why it would be proper for Dr.  
9 Elzinga to rely solely on interviews or noneconomic data to  
10 support his opinions about market definition, particularly where  
11 economic data is available and has been employed by other experts  
12 in this litigation. Further, Dr. Elzinga admitted at his  
13 deposition that his interviewees were selected by attorneys and  
14 that he did not know the methods that these attorneys used in  
15 selecting the administrators that he interviewed; Plaintiffs  
16 represent that he is referring to Defendants' attorneys, which  
17 Defendants do not seem to dispute. Elzinga Dep. Tr. 97-98. Dr.  
18 Elzinga also testified that he would have no way to know whether  
19 the interviews are representative of what other university  
20 administrators would say. Id. He also admitted that he did not  
21 ask questions about revenue during these interviews, and that he  
22 did not review the financial statements of any Division I member.  
23 Id. at 29, 33.

24 The lack of economic analysis is particularly problematic in  
25 light of the undefined number of sides (i.e., constituencies) in  
26 Dr. Elzinga's proposed multi-sided market; the number of sides or  
27 constituencies apparently is so large that Dr. Elzinga does not  
28 even claim to provide an exhaustive list in his report.

1 Nothing in American Express supports the notion that a  
2 relevant market can be defined to include more than one side  
3 without performing any economic analysis. To the contrary, the  
4 law review articles cited in American Express indicate that the  
5 presence and degree of the economic relationships discussed in  
6 that case present "an empirical issue." See, e.g., David S. Evans  
7 & Michael Noel, Defining Antitrust Markets When Firms Operate Two-  
8 Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 671 (2005) (Evans &  
9 Noel).

10 For these reasons, the Court cannot admit Dr. Elzinga's  
11 opinion that the relevant market in this case is multi-sided.  
12 Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319  
13 (9th Cir. 1995) (noting that the trial court's gatekeeping  
14 function requires more than simply "taking the expert's word for  
15 it"); Fed. R. Evid. 702 advisory committee's note (2000) ("The  
16 trial judge in all cases of proffered expert testimony must find  
17 that it is properly grounded, well-reasoned, and not speculative  
18 before it can be admitted."). Dr. Elzinga's opinion assumes,  
19 without any economic analysis as support, that the type and degree  
20 of the economic relationships observed in the context of two-sided  
21 transaction platforms in American Express exist here, where he  
22 does not describe any platform analogous to a two-sided  
23 transaction platform. The gap between Dr. Elzinga's opinions on  
24 market definition and the legal or economic support for them is  
25 too large. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)  
26 ("[N]othing in either Daubert or the Federal Rules of Evidence  
27 requires a district court to admit opinion evidence that is  
28 connected to existing data only by the ipse dixit of the expert.

United States District Court  
For the Northern District of California

1 A court may conclude that there is simply too great an analytical  
2 gap between the data and the opinion proffered."); Vollrath Co. v.  
3 Sammi Corp., 9 F.3d 1455, 1462 (9th Cir. 1993) (rejecting market  
4 definition where "[t]here was no detailed examination of market  
5 data or analysis of cost, comparable usage, or comparative  
6 features of other competing products").

7 III. CONCLUSION

8 Dr. Elzinga's opinions regarding a multi-sided market  
9 definition are excluded as irrelevant in light of the Court's  
10 summary adjudication of market definition, and as unreliable,  
11 under Federal Rule of Evidence 702 and Daubert. The Court does  
12 not address in this Order the admissibility of any other opinions  
13 of Dr. Elzinga that arguably are dependent upon the excluded  
14 multi-sided market definition theory. The Court will address  
15 objections to any such opinions at trial on a case-by-case basis.

16 IT IS SO ORDERED.

17 Dated: September 3, 2018

  
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CLAUDIA WILKEN  
United States District Judge

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