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UNITED STATES DISTRICT COURT
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

Case No. 4:14-md-02541-CW
Case No. 4:14-cv-02758-CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: January 16, 2018
Time: 2:30 p.m.
Judge: Hon. Claudia Wilken
Courtroom 2, 4th Floor

REDACTED VERSION OF DOCUMENT SOUGHT TO BE FILED UNDER SEAL

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 16, 2018 in Courtroom 2 of the Honorable Claudia Wilken of the United States District Court for the Northern District of California, Oakland Division, located at 1301 Clay Street, Oakland, CA 94612, the Consolidated Class Plaintiffs and *Jenkins* Plaintiffs ("Plaintiffs") will and hereby do move the Court, under Federal Rule of Civil Procedure 56, for summary judgment.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, declarations, and pleadings and papers on file in this action.

STATEMENT OF ISSUE TO BE DECIDED

Whether Plaintiffs are entitled to summary judgment that the challenged restraints, limiting compensation to Division I basketball and FBS football players for their athletic services, violate Section 1 of the Sherman Act given new and undisputed economic and other evidence following *O'Bannon* that renders it factually impossible for Defendants to meet their burden to prove that "amateurism" or any other purported procompetitive objective can serve as a justification for these anticompetitive agreements.

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INTRODUCTION

The Supreme Court decided long ago that a defendant's justification for a restraint on competition must be firmly rooted in economics and enhancing competition—such as proving that the restraint is necessary to increase demand (output) for the product or service. Non-economic notions of "moral philosophy" or "societal ideals" are not procompetitive under the antitrust laws and do not legally justify horizontal competitors agreeing to fix market prices no matter how ostensibly laudable their intentions. "Amateurism," therefore, is not a talisman to substitute for economic evidence. There are good reasons for this stringent requirement of economic proof: for one, labels and philosophies can be pretextual or morph over time, depending on what serves a cartel's interest at a given moment. Such expedience is what the undisputed evidence reveals here. Defendants' price-fixing justification based on their ever-elusive concept of "amateurism" is simply their version of a three-card Monte game in which the line defining amateurism never stays in the same place. Indeed, the undisputed record evidence here is very different from that presented in *O'Bannon*. In this case, the record demonstrates that Defendants can offer nothing more than pure *ipse dixit*—rather than economic proof—in a futile effort to try to carry their burden to prove that the challenged compensation rules actually promote consumer demand.

Defendants posit that the Ninth Circuit's decision in *O'Bannon* compels judgment in their favor because *O'Bannon* purportedly means that providing *any* benefit to college athletes—even a penny—that is above the cost of attendance ("COA") and untethered to education would destroy Defendants' assertedly procompetitive goal of maintaining the NCAA's "amateur" product. But new and undisputed evidence submitted here—and *not* part of the record in *O'Bannon*—requires the opposite result. Defendants will not be able to carry their burden to prove that the challenged restraints are necessary to maintain consumer demand or have any other procompetitive benefit in the markets for Division I basketball and FBS football. Defendants' repeated assertions about the supposed importance of amateurism to consumer demand are economically unsupported and not sustainable as a matter of fact. Coupled with *O'Bannon*'s precedential findings about the substantial anticompetitive harm inflicted by Defendants' compensation rules, Defendants' failure to produce any record evidence capable of showing that their restraints promote competition—as opposed to protecting competitors

from having to share their wealth with Class Members—leads to the inexorable conclusion that summary judgment in favor of the three Classes is warranted.

The significance of the new evidence presented herein cannot be overstated. Each of the following undisputed facts supports entry of summary judgment and a permanent injunction against Defendants' continued application of the challenged compensation rules to Class Members:

First, the NCAA has now admitted there is no "bright line" between being an amateur and a non-amateur with maximum compensation set at COA. In binding 30(b)(6) testimony, the NCAA acknowledged it *already* permits schools to provide various benefits in excess of COA to athletes in exchange for their participation in sports. It is undisputed that these "incidental to participation" benefits are vastly more than a mere penny above COA, are "***not related to the principle of amateurism***," and are ***not*** tethered to education. Ex. 1, NCAA (Lennon) Tr. 58:20-59:1, 72:22-73:2, 287:6-13. In other words, Defendants already allow the very kind of participation benefits—*quid pro quo*s for athletics services, above COA, and untethered to education—that they previously argued to the Ninth Circuit in *O'Bannon* would destroy consumer demand for their "amateur" product. [redacted] Bound by these admissions, Defendants cannot sustain their burden of proof that the challenged compensation rules are justified by promoting purported consumer demand for amateurism.

Second, even within the existing COA rules framework, the undisputed evidence demonstrates that Defendants *permit* certain benefits that are exclusive to athletes and *untethered* to education while *prohibiting* other benefits to athletes that *are* tethered to education. As such, the challenged rules cannot be factually justified on the ground that Defendants must adhere to the distinction between educational and non-educational benefits that the NCAA persuaded the *O'Bannon* court to accept on the basis of a very different factual record. Here, the undisputed evidence demonstrates that Defendants do not abide by any such distinction purportedly to preserve consumer demand; instead, as the NCAA's 30(b)(6) witness testified, the contours of their compensation restraints rest on nothing more than the arbitrary legislative whim of the NCAA membership at a given point in time.

Third, Defendants have not even tried to satisfy *their* burden to come forward with credible

evidence capable of proving that their compensation restraints are necessary to maintain consumer demand. Unlike in *O'Bannon*, Defendants offer no consumer survey to try to show what, if any, impact permitting additional benefits for Class Members would have on consumer demand. Only Plaintiffs have submitted such a survey, and it shows that there would be no adverse impact at all. And dozens of NCAA and Conference officials have now testified that, even before this litigation, Defendants never actually studied consumer behavior to determine whether the NCAA's compensation restraints have any relationship with consumer demand. Further, the NCAA's President and many other witnesses have testified that the compensation rules are unnecessary because most schools would not offer benefits above COA even without the NCAA restraints. Such testimony is irreconcilable with Defendants' litigation effort to justify the challenged restraints as essential to preserving consumer demand. Indeed, the undisputed facts demonstrate that whereas the NCAA previously argued that permitting even COA scholarships would destroy consumer demand, the natural experiment that has transpired post-*O'Bannon* indisputably confirms that demand for Division I basketball and FBS football—manifest in revenue, attendance, ratings, and sponsorships—continues to thrive despite schools now paying thousands of dollars in cash "COA stipends" to athletes.

Fourth, the undisputed evidence further demonstrates that Defendants do not enforce their purported definition of amateurism as mandating that Class Members are students first, athletes second. Rather, Defendants sign lucrative TV contracts that require Class Members to play mid-week games (often late, often far from campus); they persistently realign their Conferences to generate more revenue while at the same time increasing athletes' already excessive travel schedules; and despite Class Members' substantiated complaints about the lack of time for school and a meaningful college academic and social experience, Defendants do virtually nothing to reduce the demands Class Members face as "athletes first." Defendants instead continue to cultivate the environment where Class Members are required to devote themselves to generating billions of dollars in revenues for their respective sports at the expense of their academic and collegiate experience.

Because Defendants' consumer demand/amateurism justification for the challenged restraints cannot survive summary judgment as a matter of fact, and because Defendants have developed no evidentiary support for their other claimed procompetitive justifications, they are left with no

cognizable justification for the anticompetitive harm they inflict on the Classes. And Defendants' non-economic assertions about amateurism as some kind of moral imperative are legally irrelevant under the antitrust laws. Based on these undisputed facts, summary judgment must be granted in favor of the Classes. This conclusion flows from the *O'Bannon* precedent confirming the sufficiency of the economic evidence Plaintiffs submit here demonstrating that the challenged compensation restraints are agreements among competitors that impose significant anticompetitive harm in the relevant markets for the athletic services of the Classes.

Plaintiffs do not seek an injunction to force Defendants to do anything other than to stop enforcing their illegal restraints against Class Members—a classic antitrust remedy. Thereafter, individual Conferences and/or schools would be free to make their own independent determinations about how to fairly compensate men and women athletes in Division I basketball and FBS football. If some Conferences or schools wish to enact new rules limiting benefits on a justifiable basis, they could do so, but the requested injunction would ensure that Class Members enjoy the benefits of competition among the individual Conferences and schools that the antitrust laws require.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. THE UNDISPUTED "CONTRACT, COMBINATION, OR CONSPIRACY" TO CAP AND FIX BENEFITS FOR CLASS MEMBERS

Defendants' conspiracy to cap and fix maximum benefits available to Class Members is a horizontal agreement among competitors for Class Members' services as Division I basketball and FBS football players. Their agreements operate in plain sight—Defendants and their member institutions are nationwide horizontal competitors for the athletic services of Class Members;[1] NCAA members vote upon and enforce rules that restrain the benefits that schools may offer to Plaintiffs;[2] and the Conferences agree to impose these rules on their member schools in lockstep.[3] None of these facts are disputed. *See* ECF 204 (NCAA Answer) ¶¶ 20, 39-49.[4] Indeed, the evidence of Defendants'

[1] *See e.g.*, Ex. 3, Smith Tr. 30:1-31:1; Ex. 4, Rascher Rep. 75-87, 95-100.

[2] *See* Appendix A, listing the specific rules that Plaintiffs seek to enjoin, insofar as they restrict schools or conferences from providing greater benefits to Class Members.

[3] NCAA (Lennon) Tr. 174:12-15 (individual Conference may not allow benefits greater than those permitted by other Conferences); *e.g.*, Ex. 5, Big 12 Conference Bylaws 1.3.3.1, 6.1, 6.5.3, 6.6(a); [redacted] Ex. 7, MAC Bylaws 3.03; 5.01; 5.05.

[4] *See also* ECF 201 (SEC Am. Answer) ¶¶ 20, 39-49; ECF 202 (Big Ten Am. Answer) ¶¶ 20, 39-49;

agreements—memorialized in Bylaws—is the same evidence of a "contract, combination, or conspiracy" held sufficient in *O'Bannon*. 802 F.3d 1049, 1070-72 (9th Cir. 2015).

II. THE UNDISPUTED EVIDENCE THAT THE CHALLENGED RESTRAINTS CAUSE ANTICOMPETITIVE EFFECTS

A. Anticompetitive Harm from the Agreements at Issue

Plaintiffs have come forward with indisputable and direct economic evidence that "NCAA rules . . . cause significant anticompetitive harm and inefficiency in the labor markets for FBS football players and Division I basketball players." Ex. 8, Lazear Rep. 23; *see also e.g.*, [redacted] This evidence shows, among other things, that:

- Defendants have used their agreements to artificially restrain and lower athlete compensation, so that there is less competition for athletes' services and a diversion of competition into inefficient substitutes, such as the race among Defendants' members to spend more on athletic facilities and salaries for coaches and administrators (Lazear Rep. 3-4, 6-17);
- [redacted] and
- [redacted][5]

Defendants' economists agree that the benefits that would be available to Class Members absent the challenged restraints would be greater than those currently provided—both in kind and degree. Their class certification expert, Dr. Janusz Ordover, testified, "If the injunctive relief were granted, some putative class members would be displaced . . . by players drawn to these institutions *by increased payments*." ECF 216-2 at 8 (emphasis added). Defendants' merits expert, [redacted]

ECF 203 (Pac-12 Am. Answer) ¶¶ 20, 39-49; ECF 205 (Big 12 Am. Answer) ¶¶ 20, 39-49; ECF 206 (ACC Am. Answer) ¶¶ 20, 39-49; ECF 145 (WAC Answer) ¶¶ 1-2, 140, 219, 221, 284, 287, 290, 294, 298-302; ECF 146 (Sun Belt Answer) ¶¶ 9, 12, 18, 139-40, 219, 294, 300-02, 304; ECF 147 (AAC Answer) ¶¶ 139-40, 219, 284, 287, 290, 294, 297-99, 300-02; ECF 148 (MWC Answer) ¶¶ 139-40, 219, 284, 287, 290-91, 294, 297-99, 300-02; ECF 159 (C-USA Answer) ¶¶ 8, 139, 284-292, 294; ECF 160 (MAC Answer) ¶¶ 139-140, 284, 285, 287-294.

[5] [redacted]

[redacted] In other words, although Defendants argue that they can justify their compensation restraints as necessary to maintain consumer demand for amateurism, Defendants do not deny that their agreed-upon rules directly restrain competition for the services of Class Members by preventing schools from offering them greater benefits. This is the very paradigm of a significant anticompetitive restraint on competition. *See O'Bannon*, 802 F.3d at 1070-72.[6]

B. Defendants' Market Power Over Class Members' Athletic Services

To the extent Plaintiffs must prove relevant markets (discussed *infra*), Plaintiffs have carried their burden of proof through the testimony of [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted] and
- [redacted]

As the Court knows, in *O'Bannon*, the NCAA did "not take issue with" similar economic evidence of relevant markets for the services of men's basketball and football players where "colleges

[6] *See also* [redacted] Lazear Rep. 3-4, 6-17.

[7] The DOJ has long advocated using SSNIP—"small but significant and non-transitory increase in price"—as a measure of monopoly power. *See* https://www.justice.gov/archives/atr/1982-merger-guidelines-and-ascent-hypothetical-monopolist-paradigm.

compete for the services of athletic recruits by offering them scholarships and various amenities," or with the fact that NCAA "rules restrain . . . schools from competing with each other in [those markets]." 802 F.3d at 1070. Nevertheless, in this action, Defendants present [redacted][8] that is contrary to the unanimous consensus of economists who have applied traditional market definition analysis to the NCAA and have concluded that it functions as a cartel in labor markets for athletic services. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 972 (N.D. Cal. 2014) (NCAA economist Dan Rubinfeld's "economics textbook specifically refers to the NCAA as a 'cartel,'"); [redacted][9] Indeed, as demonstrated in Plaintiffs' simultaneously filed motion to exclude Dr. Elzinga's market definition and market power testimony, Dr. Elzinga has not even tried to assess any information on the substitutability of products or services, cross-elasticity of demand, pricing data, or other factors that economists use to define markets. Mot. to Exclude Elzinga at 8-16, 18-19. Because of these deficiencies, Dr. Elzinga's opinions on relevant market are unreliable and inadmissible, and cannot create any genuine issue of material fact to oppose summary judgment. *Id.*

III. THE UNDISPUTED EVIDENCE THAT DEFENDANTS CANNOT MEET THEIR BURDEN TO PROVE THE RESTRAINTS HAVE PROCOMPETITIVE BENEFITS

As in *O'Bannon*, Defendants have asserted that their amateurism rules are necessary to differentiate Division I basketball and FBS football from professional sports and thereby maintain consumer demand. In this regard, Defendants contend that there is an unwavering bright line between "amateurs" and "professionals" at the cost of attendance (what the Ninth Circuit described in *O'Bannon* as compensation tethered to education), and that crossing the COA line by so much as one penny would destroy consumer demand for these sports:

- [redacted]
- It is important that a college athlete is not paid a dime more in cash compensation because schools "decided long ago that" that college sports "need to be of students, by students and for no other purpose than competitions among those students; not as a profession." Ex. 12, Emmert Tr. 61:11-62:3;

[8] [redacted]

[9] [redacted]

- [redacted]
- "Q. So it's your testimony that any dollar amount above calculated cost of attendance would harm amateurism; correct? A. Oh, absolutely." Ex. 13, Aresco Tr. 247:7-12.

But as detailed below, the post-*O'Bannon* evidence indisputably demonstrates that Defendants' compensation restraints are not tied to any fixed, COA-based notion of amateurism. And critically, no evidence in the record creates a disputed issue of material fact in support of Defendants' assertion that allowing Conferences and schools to choose whether or not to offer benefits to Class Members in excess of COA would damage consumer demand.

A. The NCAA Admits That It Permits Schools to Provide Athletic "Participation" Benefits That Exceed COA and Are "*Not Related to the Principle of Amateurism*"

In stark contrast to the record in *O'Bannon*, here, the NCAA's corporate designee has provided binding Rule 30(b)(6) testimony that the NCAA currently permits its member schools to choose whether to provide a category of substantial benefits in excess of COA that are "incidental to [athletic] participation." NCAA (Lennon) Tr. 58:20-59:1. These participation benefits are "***not related to the principle of amateurism***" (*id.* 72:22-73:2) and are ***not*** tethered to educational expenses (*id.* 287:6-19)—the benefits simply are whatever the NCAA's membership agrees to at a given point in time. The NCAA's Rule 30(b)(6) designee admitted this repeatedly:

- The NCAA permits certain benefits that are "incidental to participation, and our membership, at any point in time, can agree to change" rules to permit certain benefits "without violating the principle of amateurism . . . ***[I]t's related to incidental benefits to participation, and in that category, yes, it's subject to what the membership agrees to provide. This is not related to the principle of amateurism***."[10]

[10] NCAA (Lennon) Tr. 72:6-73:2; *see also e.g., id.* 59:12-16 ("There are items that schools can provide outside of educational expenses, which, again, are tethered to cost of attendance, that I would kind of capture as incidental to participation."); *id.* 74:22-75:8 ("Q. But you agree with me, there are other reasonable expenses which the school could apply under this category that would be incidental to participation that could be allowed? A. Yes. Q. That's why the category was created? A. Yes."); *id.* 93:4-10 ("If the—the benefit provided is permitted within the legislation as either related to educational expenses or . . . incidental to participation, then it would not be considered pay, and it would be permitted . . ."); *id.* 287:6-19 ("Q. Actually, as you testified a lot today, the membership is also comfortable in allowing expenses made that are incidental to competition—A. Yes. Q. –that are not tethered to educational expenses? A. That is correct. There is a category of things that is incidental to participation that they have carved out and said, yes, there are benefits there that -- Q. So there are two areas that the membership is comfortable with? A. That's correct, those two buckets, yes.").

Specific athletic participation benefits that currently are permitted—***in addition*** to a full COA grant-in-aid—include: "gift suite" participation awards, such as televisions, iPods, and designer watches and sunglasses (NCAA (Lennon) Tr. 119:20-122:22; Ex. 14, SPORTS BUSINESS JOURNAL, *All About that Bass*); loss-of-value insurance in the event that a college injury harms an athlete's earning prospects as a ***professional*** (NCAA (Lennon) Tr. 127:4-129:3); apparel, equipment, and supplies (*id.* 60:3-64:1); the costs of transportation and lodging for certain *family* members to attend championship contests (*id.* 71:7-72:25); the costs of transportation and lodging for *spouses and children* to attend athletics contests (*id.* 186:1-16); contest entry fees and costs of facility usage (*id.* 73:4-7); expenses for the athletes associated with national championships, Olympic trials, and national team tryouts (*id.* 86:17-87:13); and a *per diem* paid to athletes for away games that the membership could decide to increase without "violating the principle of amateurism, because that is not related to the principle of amateurism, but an incidental expense." *Id.* 85:5-23. The gift suites, for example, can collectively total thousands of dollars of compensation to athletes in excess of COA.[11] And Big 12 Commissioner Bob Bowlsby testified, "I'm not sure how [gifts provided in gifts suites] could be tethered to education." Ex. 16, Big 12 (Bowlsby Tr. 162:10-14). Former SEC Commissioner Mike Slive concurred that something like a $450 Best Buy gift card is "not really" connected to the educational experience. Ex. 17, Slive Tr. 218:4-10; *see also* Ex. 18, MAC (Steinbrecher) Tr. 214:7-13, 217:9-15. Schools may also, as described above, subsidize the premiums for insurance policies to cover lost future wages as a professional athlete in the event of athletic injury, a benefit that is "not related to . . . education expenses," but rather to certain Class Members' desire to become *professional* athletes. NCAA (Lennon) Tr. 128:4-7.

Critically, Defendants concede that providing these participation benefits exceeding COA has hurt neither the "collegiate model" nor consumer demand. *See e.g.*, NCAA (Lennon) Tr. 63:21-64:1, NCAA (Lewis) 79:11-21. Rather, Defendants' survey expert testified that providing, *e.g.*, gift suites and transportation benefits may actually "***foster***" demand because consumers may feel positively about colleges doing more for students. Ex. 19, Isaacson Tr. 244:8-245:6 (emphasis added). Defendants' provision of ever-increasing participation benefits in excess of COA that are "***not related***

[11] *See also* Ex. 15, NCAA Bylaws 16.1.4.1; 16.1.4.2; 16.1.4.3; Noll Rep. 24-25.

to the principle of amateurism"—without any harm to consumer demand—factually eviscerates their amateurism justification. *E.g.*, NCAA (Lennon) Tr. 72:6-73:2 (emphasis added).

B. Defendants' Post-*O'Bannon* "Cost of Attendance" Rules Demonstrate That There Is No Bright-Line Educational Nexus for Their Restraints

1. Defendants Already Permit "COA" Payments Untethered to Education

Defendants' new COA rules, implemented following *O'Bannon*, indisputably permit payments to Class Members for certain expenses that have nothing to do with education. To cover the gap between the prior iteration of a grant-in-aid scholarship and the "full" COA, NCAA members are permitted to make lump-sum cash payments to Class Members, which (thus far) range from approximately $1,600 to $6,000.[12] It is undisputed that Defendants do not regulate or restrict how Class Members use their COA cash payments, and that Class Members often use these cash payments for costs untethered to their education:

> Q. It is correct that the students can use the money in any way they desire to, correct?
> A. Yes, that's correct.
> Q. So, for example, [if a student used] part of the stipend to cover the $100 fee his younger brother needed to play football at high school. That's a perfectly permissible thing for a student to do, correct? . . .
> A. The NCAA does not dictate how a student uses any money it may receive within its cost of attendance.

NCAA (Lennon) Tr. 37:2-38:24; *see also id.* 35:7-16; Ex. 21, NEW YORK TIMES, *Pets, Car Repairs and Mom* (athletes spend COA money on car repairs, family members, pets, charitable donations, and other items untethered to education); NCAA (Lennon) Tr. 35:18-38:24. These COA cash payments vary so materially from school to school that they have become a recruiting tool, with players indicating, *e.g.*, [redacted] *see also, e.g.*, [redacted] Ex. 23, MAC_002447-48; [redacted]

Additionally, athletes may receive disbursements from the NCAA's Student Assistance Fund ("SAF") that are in ***addition*** to their COA scholarships (NCAA Bylaw 15.01.6.1; NCAA (Lennon) Tr. 152:19-153:19), and are ***not*** limited to expenses tethered to education. *See* Ex. 24, NCAAGIA03316030 at 052 (permitted uses of SAF money include paying for insurance, clothing,

[12] *See e.g.*, Ex. 20, Cost of Attendance Database" ; NCAA (Lennon) 31:22-32:17.

and family expenses). These SAF payments can total many hundreds or even thousands of dollars above COA, whether or not used for educational expenses. *See e.g.*, [redacted]

And after *O'Bannon*, Defendants began permitting Class Members to accept uncapped payments from international sports federations for participating in the Olympics and other international competitions without jeopardizing their "amateur" status, just as they do for U.S. federations.[13] For example, [redacted][14] Conference officials have been unable in depositions to articulate any principled explanation for how such payments are consistent with their professed amateur model linked to consumer demand, resorting to empty platitudes such as, "It's the Olympics." Slive Tr. 231:14-16; *see also* Ex. 25, Sankey Tr. 223:8-17; [redacted] As discussed at *supra* § III.A, it is undisputed that consumer demand has steadily increased despite the loosening of NCAA rules to permit these additional above-COA benefits.

2. Defendants Arbitrarily Prohibit the Payment of Certain Expenses That *Are* Tethered to Education

On the flip side, the undisputed evidence shows that Defendants' COA rules ban myriad forms of benefits to Class Members that *are* tethered to education. For example, NCAA rules do not allow schools to offer guaranteed post-eligibility scholarships to complete an undergraduate or graduate degree at a school of an athlete's choice, or to subsidize vocational training, or to offer financial incentives for academic progress or a degree.[15] Illustrating the arbitrariness of the restraint, NCAA President Mark Emmert testified that payments tethered to education (such as paying for post-graduate expenses) were no different than giving athletes cash or Ferraris if "it costs the university the same amount."[16] Such incoherent "justifications," and Defendants' undisputed choice *not* to tether their

[13] NCAA Bylaw 12.1.2.1.4.1.3. *See also id.* 12.1.2.1.4.1.2 (funds from U.S. Olympic Committee).
[14] [redacted]
[15] See Appendix B for list of benefits that Defendants have testified are not allowed.
[16] Emmert Tr. 155: 21-163:5.

"COA rules" to education, further demonstrate that Defendants' compensation rules are not based on amateurism being an economic principle to promote consumer demand.

C. Defendants Have Come Forward with *No* Evidence That Their Arbitrary and Changing Compensation Rules Promote Consumer Demand

In *O'Bannon*, to try to support its position that the then-existing rules banning name, image, and likeness compensation were necessary to maintain consumer demand, the NCAA offered a survey that endeavored to predict consumer behavior in the event those rules were changed to permit greater benefits. Ex. 27, BIGTEN-GIA202614, 631-33. Here, by contrast, Defendants' consumer survey expert disavows "attempt[ing] to measure future behaviors" in the event schools were able to provide new benefits for Class Members (Ex. 28, Isaacson Rep. 4), because he purportedly does not think surveys are reliable to predict future consumer actions. Isaacson Tr. 50:9-16, 51:3-53:1. This is the opposite position from that taken by the NCAA's consumer survey expert in *O'Bannon*. In any event, the *only* consumer survey evidence in the record measuring future demand was conducted by Plaintiffs' expert, Hal Poret. Mr. Poret demonstrates that permitting a wide variety of additional benefits to the Classes would not adversely impact Division I basketball and FBS football viewership and attendance. Ex. 29, Poret Rep. 19-20.

In fact, the undisputed evidence demonstrates that Defendants never have conducted any empirical studies of consumer demand in devising their current compensation restraints. Despite Class counsel asking NCAA and Conference Defendant executives time and time again at depositions, no Defendant witness has identified any kind of study—consumer demand, market testing, or otherwise—that Defendants have conducted into whether their compensation rules have any positive relationship to consumer demand for college sports.[17] Remarkably, the NCAA's President testified it

[17] *See e.g.* [redacted] MAC (Steinbrecher) Tr. 14:1-13 ("Q. Does the MAC have any tangible evidence that consumers place a premium on the amateur nature of MAC sports? A. I have no knowledge of that."); *id.* Tr. 45:8-11; [redacted] Ex. 31, Steinbrecher Tr. 44:21-46:2; [redacted] Emmert Tr.

was not even his "primary objection" that "impact . . . on audiences either watching the TV" or attending could be harmed by college athletes being paid beyond COA. Rather, the dominant rationale Emmert has discussed with NCAA members is "philosophical." Emmert Tr. 114:5-115:21; 117:17-24.

Given the foregoing admissions, it is unsurprising that the record evidence provides no support for a correlation between consumer demand and the NCAA's compensation restraints. In addition to the Poret survey described above, there is the "natural experiment" that has taken place as a result of Defendants increasing athletics scholarships to COA following *O'Bannon*. Historically, the NCAA had argued that offering COA scholarships would constitute "pay-for-play,"[18] that the previous GIA cap was [redacted] Smith Tr. 124:13-132:24 (Ohio State University has set records in ticket sales and fan interest since COA change); Ex. 50, AAC (DeMarco) Tr. 185:1-9 (no sponsors or potential sponsors expressed concern over COA

111:9-18; 113:9-15 ("Q.. . . [C]ould you explain to me the basis for your belief that, if the school or schools were permitted to pay student athletes beyond cost of attendance and did, that would adversely affect significantly viewership, attendance, what I mean by "demand"? A. Yeah. Well, just my personal experiences and anecdotal evidence … Q. And in all of that experience, I appreciate you're saying you didn't have empirical – A. That's right. Q. – support for your opinion, correct? Is that right? A. That's correct."); Ex. 33, Scott Tr. 21:24-22:8 ("Q. And are you aware of any studies of the reaction of fans to the provision of full cost of attendance scholarships to student athletes? … A. I can't recall any specific studies that I'm aware of that have measured fan reaction to going to full cost of attendance."); Ex. 34, CUSA (MacLeod) Tr. 126:21-127:7 ("Q. Does the conference specifically promote the concept of amateurism? . . . A. I don't believe so, no."); *id.* Tr. 129:19-130:2. None of Defendants' experts could identify any such study, either. *E.g.*, [redacted] *See also* Exs. 35-48 (defendant interrogatory resp demand studies supporting their position).

[18] NCAA Mem. of Ps. and Auth. ISO Summ. J., ECF 221, *White v. NCAA*, 06-cv-999 (C.D. Cal). *See also* Emmert Tr. 134:23-35:4.

[19] [redacted]

[20] [redacted]

[21] [redacted]

[22] [redacted]

change). On the contrary, Defendants' survey expert has opined that upon learning that schools may now offer COA scholarships, "a fan . . . may view this new information as making them ***more likely*** to watch or attend." Isaacson Rep. 20 (emphasis added); *see also* Isaacson Tr. 240:2-241:18.

In sum, the undisputed evidence establishes that Defendants' revenues and ratings for Division I basketball and FBS football have continued to grow substantially and are projected to continue to do so well into the future[23] despite: paying COA stipends often worth several thousand dollars to Class Members to use in any way they like;[24] providing substantial athletic participation benefits in excess of the full cost of attendance that are "not related to the principle of amateurism" (*supra* § III.A); permitting the payment of SAF funds to athletes for expenses not tethered to education (*supra* § III.B); and [redacted]

D. The Undisputed Facts Establish That Defendants Do Not Enforce Their Asserted Objective for Capping Compensation to Class Members So That They Can Purportedly Be "Students First, Athletes Second"

The NCAA contends that "[m]aintaining amateurism is crucial to preserving an academic environment in which acquiring ***a quality education is the first priority***"—that is, Class Members are "***students first, athletes second***."[25] But the record is replete with undisputed evidence that Defendants care far more about maximizing revenues than enforcing this purported principle.

For instance, [redacted]

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[23] In their fiscal year 2015 financial disclosures, the five power Conferences ranged from $267M to [redacted] in revenues. *See* Exs. 51-55, SEC00310136; BIGTEN-GIA159684; PAC12GIA_00186911; ACC-GIA130310; Big 12 Form 990 FY 2014. The "poorest" power Conference, the Big 12, will earn [redacted] and projects [redacted] Even a smaller Conference, like the Mid-American, will earn more than [redacted] and projects annual revenue [redacted]

[24] [redacted]

[25] "Amateurism," NCAA.ORG, Apr. 27, 2017, http://www.ncaa.org/amateurism (emphasis added).

[26] [redacted]

[redacted][redacted][7] Despite the consensus that academics are subordinate to athletics, Defendants do little to address this imbalance. The so-called 20-hour rule[28] is not worth the paper it's printed on because, according to NCAA Executive Vice President Oliver Luck, "a lot of the time spent [on athletics] falls outside of those . . . limits"; Big 12 Commissioner Bowlsby testified that "there are so many exceptions to [the 20-hour rule], that, as a practical matter, the number of contact hours is more than that."[29] An NLRB regional director made the undisturbed factual ruling that Defendants' time-demand rules are a sham.[30]

Defendants created this environment for their own financial benefit. To collectively generate billions of dollars in revenues, they surrender control over scheduling games to broadcasters and, in the process, sacrifice Class Members' academic lives and time.[31] Defendants admit that their "stated beliefs and [their] actions are too often inconsistent with one another" due to television- and revenue-driven conditions like "[late] 9:48 tip-off[s]" on school nights, "three days of competition in a row,"[32] [redacted][33] and a host of other concessions that place TV broadcasters' needs ahead of athletes'.[34]

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[27] [redacted] In addition, "[T]ime demands keep [athletes] from . . . getting adequate sleep," and "[i]t is not uncommon for student-athletes to . . . change their majors . . . either because they cannot schedule the classes and other requirements they need, or they cannot keep up with their academic demands due to their sport's time demands." Ex. 66, Pac-12 Report on Student-Athlete Time Demands 6, 16.

[28] NCAA Bylaw 17.1.7.1, the "20-Hour Rule," mandates that a college athlete spend no more than 20 countable athletically related activity ("CARA") hours on a sport per week.

[29] Ex. 67, Luck Tr. 83:4-20; Ex. 68, Bowlsby Tr. 37:23-38:4.

[30] NLRB Decision and Direction of Election, Northwestern and CAPA, Case 13-RC-121359 (Mar. 26, 2014) (football players were not "primarily students" because they spent "many more hours" on athletics than their studies (*id.* 18); devoted 50-60 hours per week to football during training camp, 40-50 hours per week during the regular season, and 40-50 hours per week during the postseason (*id.* 6-8); worked around CARA rules by regularly holding drills at night in the presence of a student trainer instead of coaches (*id.* 7); and had non-standard academic schedules (*id.* 18-19)).

[31] *See* Appendix C.

[32] Bowlsby Tr. 36:3-18.

[33] Big 12 (Bowlsby) 89:13-21.

[34] *See* Appendix C.

In Conference realignment—the process through which schools change Conference affiliation—schools have also imposed more onerous scheduling obligations on the players, leaving them with even less time to study, because no consideration is "more important than revenue." CUSA (MacLeod) Tr. 225:16-19. Class Members now travel farther and more often than ever to attend games, as the Conferences have sought maximum presence in television markets.[35] Commissioner Bowlsby conceded that "Conference realignment has not been our finest hour,"[36] and it has exposed that "[a]side from the financial windfall that an institution" can receive from joining a different conference, there aren't "any other reasons why institutions" might explore such a move.[37]

Worse still, the NCAA does not take responsibility for the quality of education that its member schools provide to Class Members despite asserting that "a quality education is the first priority." The NCAA disclaims any "duty to ensure the quality of the education" athletes receive."[38]

On this record, there can be no genuine dispute that the compensation rules imposed by the Defendants do not further any purported education-related objective. Most significantly, Defendants have not produced a shred of evidence that there is any relationship between denying a Class Member greater benefits and enabling him or her to devote more time to studies. On the contrary, [redacted]

[35] *See e.g.*, CUSA (MacLeod) Tr. 213:25-214:24 (schools' locations in specific television markets is an important consideration related to adding new member schools); Luck Tr. 54:20-56:14 (West Virginia University's move to the Big 12 increased travel time for athletes); AAC (DeMarco) Tr. 218:1-15 (increase in athlete time demands after realignment because new Conference geography requires more travel); *see also* [redacted]

[36] Big 12 (Bowlsby) Tr. 148:16-19.

[37] AAC (DeMarco) Tr. 220:5-11.

[38] Mem. ISO Def.'s Mot. to Dismiss at 15, ECF 21, *McCants v. Univ. of North Carolina at Chapel Hill*, No. 1:15-CV-176 (M.D.N.C. Mar. 30 2015). *See also id.* at 5 ("The NCAA has never regulated the content of college courses."); *id.* at 27.

LEGAL ARGUMENT

I. THE SUMMARY JUDGMENT BURDEN-SHIFTING STANDARDS AS APPLIED TO THE RULE OF REASON

To prevail on a Section 1 claim under the Sherman Act, a plaintiff must show "'(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade . . . ; and (3) that the restraint affected interstate commerce.'" *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001). In the first step of the rule of reason framework,[39] the plaintiff bears the burden to demonstrate that a challenged restraint produces significant anticompetitive effects within a relevant market. *Tanaka*, 252 F.3d at 1063. But where there is direct evidence of anticompetitive effects, detailed market analysis becomes unnecessary. *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988). If the plaintiff carries its initial burden, the defendant must then furnish evidence of any procompetitive benefits of the restraint. *Tanaka*, 252 F.3d at 1063. If there are procompetitive benefits, then the burden shifts back to the plaintiff to show that they could be achieved in a substantially less restrictive manner. *Id.* "Finally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Cnty of Toulumne v. Sonora Comty Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

This Court must grant summary judgment if Plaintiffs show "that there is no genuine dispute as to any material fact and [they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact issue is "material" only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* For issues on which the non-moving party bears the burden of proof at trial (here, Defendants' procompetitive justifications), if that party, after adequate time for discovery, fails to make a showing sufficient to establish the existence of essential elements of its case, the "plain language of Rule 56(c) mandates the entry of summary judgment[.]" *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *see also Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000) ("[T]he moving party may show

[39] For purposes of this motion, Plaintiffs assume without conceding that the restraints at issue are subject to a rule of reason analysis. *See O'Bannon*, 7 F. Supp. 3d at 985.

that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.").

In this motion, Plaintiffs first present undisputed evidence of Defendants' agreements imposing significant anticompetitive harm in the relevant markets. Second, Plaintiffs demonstrate that the undisputed record, developed since the decision in *O'Bannon*, preclude Defendants from meeting their burden to prove that these agreements are procompetitive. Because Defendants bear the burden of proof on the latter issue, Plaintiffs need only call to the Court's attention the absence of a genuine factual dispute in the record. *See Celotex*, 477 U.S. at 324-25. If the Court finds in the Classes' favor on the above points, summary judgment should be entered against Defendants with no need to consider less restrictive alternatives or to balance competitive effects of the restraints. *See F.T.C. v. Ind. Fed. of Dents.*, 476 U.S. 447, 464-67 (1986); *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998).

II. PLAINTIFFS HAVE SHOWN, WITH UNDISPUTED EVIDENCE, AN AGREEMENT CAUSING ANTICOMPETITIVE HARM

A. Plaintiffs Have Presented Undisputed Evidence of Defendants' "Contract, Combination, or Conspiracy"

Like *O'Bannon* and *Board of Regents*, this is the unusual antitrust case where Defendants conspire in the open, and the terms of their horizontal agreements are beyond dispute. *See supra* Statement of Undisputed Material Facts ("SUF") § I; *O'Bannon*, 7 F. Supp. 3d at 985; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 99 (1984). The challenged NCAA agreements and rules, insofar as they restrict schools or conferences from providing greater benefits to Class Members, are specified in Appendix A and formally memorialized in the annually published NCAA Division I Manual. There is also no dispute that Defendants employ a formal staff to enforce these agreements and impose substantial penalties for non-compliance. *See e.g.*, [redacted] Plaintiffs are thus entitled to summary judgment on the existence of a "contract, combination, or conspiracy." *Hairston v. Pac-10*, 101 F.3d 1315, 1319 (9th Cir. 1996).

B. Plaintiffs Have Presented Undisputed Evidence That Defendants' Restraints Impose Significant Anticompetitive Effects

Plaintiffs have produced undisputed and direct evidence of the anticompetitive effects of Defendants' compensation restraints. *See supra* SUF § II; [redacted] Lazear Rep. 3-4, 6-

17, 23; [redacted] And, in *O'Bannon*, the NCAA did not "dispute the district court's conclusion that the compensation rules restrain the NCAA's member schools from competing with each other within" the relevant markets. *O'Bannon*, 802 F.3d at 1070, 1072, 1075; *O'Bannon*, 7 F. Supp. 3d at 973 ("the NCAA has the power—and exercises that power—to fix prices and restrain competition in [these markets]"); *Law*, 134 F.3d 134 at 1020 ("the undisputed evidence supports a finding of anticompetitive effect" where the NCAA's restraints reduced coaches' salaries). Such "[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *Bd. of Regents*, 468 U.S. at 107-08.

The Ninth Circuit has explained that "[b]ecause market definition and market power are merely tools designed to uncover competitive harm, proof of actual detrimental effects such as reduction of output, can obviate the need . . . [for] elaborate market analysis." *Oltz*, 861 F.2d at 1448. "The Supreme Court also has suggested that elaborate market analysis may not be necessary in a rule of reason case where there is a 'naked' agreement not to compete in terms of price or output." *Bhan*, 929 F.2d at 1414 n.13. Because, here, "there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Bd. of Regents*, 468 U.S. at 109 (internal quotation marks omitted). Instead, Plaintiffs' direct evidence of anticompetitive impact is legally sufficient. *See supra* SUF § II.

Even if the Court were to find that Plaintiffs must define the relevant markets in this case, they have carried this burden as well. The undisputed facts of substitutability and other relevant economic criteria establish that the relevant markets here are the markets for Plaintiffs' labor (athletic services) in men's and women's Division I basketball and FBS football. *Supra* § SUF II. Each Class Member participates in his or her sport-specific relevant market, and Defendants and their co-conspirators have monopsony power in all three markets (that is, the power to collectively depress input prices), as they comprise all of the competitors in those markets. *Id.* These are the same relevant markets—plus Division I women's basketball—upheld in *O'Bannon* and in prior NCAA antitrust cases. *See O'Bannon*, 802 F.3d at 1070; *White v. NCAA*, 2006 WL 8066802, at *3 (C.D. Cal. Sept. 20, 2006); *Rock v. NCAA*, 2013 WL 4479815, at *13 (S.D. Ind. Aug. 16, 2013).

In fact, in *O'Bannon*, the NCAA *conceded* almost identical market definitions. 7 F. Supp. 3d

at 993 (finding that a cognizable college education market exists wherein colleges compete for the services of athletic recruits through, among other thing, offers of GIA); 802 F.3d at 1070 (the NCAA "[did] not take issue with the way that the district court defined the college education market").[40] And for good reason—courts have repeatedly recognized relevant labor markets for the services of collegiate athletes, NCAA assistant coaches, and others who provide services. *See e.g., Law*, 134 F.3d at 1015, 1022 (finding that an NCAA rule capping compensation for entry-level coaches restrained trade in a "labor market for coaching services" and noting that "[l]ower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises"); *McNeil v. NFL*, 790 F. Supp. 871, 892 (D. Minn. 1992) (precluding NFL defendants "from relitigating the determination that the services of major league professional football players in the United States constitutes a relevant market for purposes of plaintiffs' claims").[41]

Defendants' only rejoinder is the wildly speculative and inadmissible opinion of Dr. Elzinga—who relies on a novel and non-peer-reviewed "multi-platform" theory for college sports with ***no*** evidence on substitutability of products or services, cross-elasticity of demand, competitive alternatives for Class Members, or any other economic analysis that Ninth Circuit courts examine to define relevant markets in antitrust cases. *See O'Bannon*, 7 F. Supp. 3d at 986-87 (citing *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008); *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003); *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989); *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984)). Dr. Elzinga's testimony on platform markets and market power is so unreliable and contrary to peer-reviewed economic standards that it must be

[40] [redacted]

[41] *Cf. Agnew v. NCAA*, 683 F.3d 328, 346 (7th Cir. 2012) (recognizing that NCAA scholarship rules may restrain trade in a "labor market for student athletes"); *White*, ECF 72, slip op. at 3 (C.D. Cal. Sept. 20, 2006) (market allegations where "colleges and universities compete to attract prospective student-athletes" were sufficient to state an antitrust claim); *Rock*, 2013 WL 4479815, at *11 (finding a cognizable market in which "buyers of labor (the schools) are all members of NCAA Division I football and are competing for the labor of the sellers (the prospective student-athletes who seek to play Division I football)."); *In re NCAA I–A Walk–On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (similar).

declared inadmissible. Mot. to Exclude Elzinga 8-16, 18-19.

III. DEFENDANTS CANNOT MEET THEIR BURDEN TO PROVE ANY OF THEIR PROFFERED PROCOMPETITIVE JUSTIFICATIONS

A. Defendants Bear the Burden of Proof to Demonstrate with Economic Evidence that Amateurism Is Procompetitive

Defendants bear the burden of proof on their claim that their restraints "actually promote [] competition in a relevant market." *In re NCAA Student-Athlete Name & Likeness Litig.*, 37 F. Supp. 3d 1126, 1150 (N.D. Cal. 2014). As this Court has previously ruled, Defendants must produce evidence that: (1) the anticompetitive restraint promotes the proffered justification; and (2) that the proffered justification enhances competition, or face judgment as a matter of law. *See id.* at 1151; *Tanaka*, 252 F.3d at 1063; *Ind. Fed. of Dents*, 476 U.S. at 459 (demonstrating anticompetitive effects "are sufficient as a matter of law to establish a [Sherman Act § 1] violation" where defendants failed to prove "some countervailing procompetitive virtue" for the restraint).

To carry their burden of proof, Defendants must come forward with economic evidence, not self-serving *ipse dixits* from their executives that their compensation rules enhance competition by preserving consumer demand. *See e.g.*, *McWane, Inc. v. F.T.C.*, 783 F.3d 814, 841 (11th Cir. 2015) ("Having established that the defendant's conduct harmed competition, the burden shifts to the defendant to offer procompetitive justifications for its conduct . . . [s]uch justifications, however, cannot be merely pretextual."); *N.Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 659 (2d Cir. 2015) ("Because we have determined that Defendants' procompetitive justifications are pretextual, we need not weigh them against anticompetitive harms."). A genuine issue of material fact can only be raised by probative economic evidence. *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (defendant "must produce significant probative evidence that demonstrates that there is a genuine issue of material fact").

And whatever Defendants tout about social or educational aspects of amateurism, the Supreme Court has made clear that only economic justifications relating to the enhancement of competition—not social or other public policies—are relevant to the rule of reason analysis. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (boycott by lawyers in support of greater funds for indigent representation could not be justified by social policy objectives); *Nat'l. Soc'y. of Prof'l.*

Eng'rs v. United States, 435 U.S. 679, 692 (1978) (rejecting public safety justification for a restraint and holding "the purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry."). The NCAA itself admitted to the Supreme Court in *Board of Regents* that neither "educational or amateurism goals" "are a good reason for the NCAA to engage in monopolistic practices" because *Professional Engineers* holds that "***goals other than economic are not reasons for monopolistic practices***." NCAA Oral Arg., (emphasis added).[42]

Nor, as a matter of law, can Defendants be heard to argue that competition would be ruinous—that is a judgment to be made by Congress, not antitrust courts. *Prof'l Eng'rs*, 435 U.S. at 695 ("Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.").

B. By Currently Permitting Various Participation Benefits Significantly in Excess of COA, Defendants are Precluded from Proving That Their Compensation Restraints Are Necessary to Maintain Consumer Demand

Defendants make the repeated conclusory assertion that the challenged restraints are necessary because consumers of Division I basketball and FBS football would purportedly turn away from these sports if Class Members were provided with even one penny more than COA. [redacted] Aresco Tr. 247:7-12. This was the same kind of argument the NCAA made to the Ninth Circuit in *O'Bannon* as a basis for challenging this Court's liability determination and injunction.[43] But the factual and economic record here is markedly different than the record in *O'Bannon*, and the factual landscape has changed in critical respects, precluding Defendants from carrying their burden to prove that permitting Conferences or colleges to provide additional benefits in excess of COA would harm consumer demand.

The undisputed facts, as testified to by NCAA 30(b)(6) designee Kevin Lennon, establish that Defendants already permit numerous benefits that colleges may provide Class Members in exchange

[42] Available at http://www.oyez.org/cases/1980-1989/1983/1983_83_271.

[43] The NCAA argued in *O'Bannon* that it "has adhered to its foundational rules: that student athletes pursue their education, and that they receive no remuneration other than for the purpose of reimbursing the expenses of doing so." NCAA Oral Arg., *O'Bannon v. NCAA*, Case No. 14-16601 (9th Cir.), Mar. 17, 2015, available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000014187.

for their athletic services substantially in excess of COA. *See supra* SUF § III. These participation benefits are "not related to amateurism," are not tethered to education, and yet have not damaged consumer demand. NCAA (Lennon) Tr. 58:20-59:1, 72:22-73:2, 287:6-13; s*ee also e.g.*, *supra* n.10.

Following Mr. Lennon's deposition (and his review and signing of the deposition transcript), Defendants have tried to have him explain away his testimony [redacted] Rule 30(b)(6), however, does not permit such gamesmanship. *Slot Speaker Techs., Inc. v. Apple, Inc.*, 2017 WL 386345, at *4 (N.D. Cal. Jan. 27, 2017) (rejecting plaintiff's request to "unbind itself from [its 30(b)(6) witness's] testimony" and finding there was no authority to support plaintiff's "extraordinary request").[44] Indeed, even outside of Rule 30(b)(6) depositions, "[t]he general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting . . . prior deposition testimony." *Yeager v. Bowlin*, 693 F. 3d 1076, 1080 (9th Cir. 2012).[45] Defendants were on notice that Mr. Lennon would testify on these subjects before the deposition, and afterward he reviewed and signed the transcript without changing a single one of these critical admissions. The NCAA may not now contrive a factual dispute by disavowing its own binding legal admissions.

Mr. Lennon's testimony aside, the incidental-to-participation-benefits rules are themselves an undisputed part of the record. And it does not take an NCAA executive to discern that permitting schools to provide benefits such as thousands in "gift suites" including electronics and designer accessories, or paying for "loss-of-value" insurance against lost NBA, WNBA, or NFL wages, is neither related to amateurism nor tethered to education. Nor is there any dispute that consumer demand continues to thrive despite Defendants permitting such benefits. *See supra* SUF § III.A. On this basis alone, Defendants cannot present a genuine dispute of fact that restricting benefits to COA is necessary to maintain consumer demand.

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[44] *See AngioScore, Inc. v. TriReme Medical, Inc.*, 2015 WL 4040388, at *23, 24 (N.D. Cal. July 1, 2015) ("[D]efendants cannot rebut the testimony of their Rule 30(b)(6) witness when, as here, the opposing party has relied on the Rule 30(b)(6) testimony, and defendants have provided no adequate explanation for the rebuttal offered . . . .").

[45] *See also Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) ("sham affidavit" rule prevents "a party who has been examined at length on deposition" from "rais[ing] an issue of fact simply by submitting an affidavit contradicting his own prior testimony," which "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact").

C. Additional Undisputed Evidence—And the Absence of Any Consumer Demand Evidence from Defendants—Further Demonstrates That Defendants Cannot Meet Their Burden to Prove That the Challenged Restraints Are Procompetitive

The additional evidence concerning the economic impact of Defendants' amateurism restraints is overwhelmingly contrary to Defendants' purported justifications for their rules. It is undisputed that Defendants' COA rules both *permit* expenses *untethered* to education and *prohibit* expenses *tethered* to education. *See supra* SUF § III.B. As a matter of law, Defendants cannot sustain a "not-one-penny-more-than-COA" defense when it is undisputed that they, *e.g.*, (i) do not restrict how Class Members may use their thousands-of-dollars COA cash payments to pay for expenses, (ii) permit schools to use SAF funds to pay thousands of dollars for expenses above COA, and (iii) permit students to accept unlimited payments from international and domestic sports federations. *See id.* Yet, despite these permissible benefits, consumer demand indisputably has not suffered. *See supra* SUF § III.

Defendants' previous claims that the compensation restraints are needed to maintain consumer demand were disproven when the NCAA previously opposed COA scholarships on the ground that such scholarships would destroy consumer demand. But the undisputed evidence on college revenues, ratings, and sponsorships demonstrates no adverse economic impact, despite Defendants permitting COA scholarships and, increasingly, beyond. *See supra* SUF § III. Indeed, one of Defendants' experts testified that increased benefits may actually ***foster*** consumer demand because fans may appreciate schools providing more benefits to Class Members. Isaacson Tr. 238:23-239:6.

To rebut this evidence and carry their burden, Defendants have come forward with nothing. Whereas Plaintiffs commissioned a consumer survey demonstrating that there would be no negative impact on consumer demand from permitting various additional benefits beyond COA (Poret Rep. 19-20), Defendants responded with a survey that does not even purport to measure future consumer behavior. *Supra* SUF § III.C. Instead, their survey expert declined to conduct such a survey because he stated it would be unreliable to predict demand, but in *O'Bannon*, the NCAA did just that. This time around, Defendants only had their survey expert ask respondents whether they would "favor" or "oppose" particular additional benefits—without asking whether such opinions would have any impact on their viewing or attending Division I college basketball or FBS football games. Isaacson Rep. 53-67. As this Court has previously found, such "favor" or "oppose" survey responses are "not relevant"

to assessing consumer demand because they "say little about how consumers would actually behave." *O'Bannon*, 7 F. Supp. 3d at 975. And no defense witness could identify any consumer survey, market research, or other empirical analysis that they had ever conducted (or heard of) to determine whether there is any link between Defendants' compensation restraints and demand. *Supra* SUF § III.C.

Defendants' economic expert, Dr. Elzinga, has likewise done nothing to study the impact of the challenged restraints on consumer demand by way of economic data or any other empirical analysis. Instead, he relies solely upon his speculative, unconventional, and inadmissible theory about colleges being platform markets and the self-serving, *ipse dixit* statements of a few cherry-picked college administrators. Mot. to Exclude Elzinga 11 n.37, 18-19.

Finally, there is no record support for Defendants' contention that the challenged compensation restraints are necessary for Class Members to be students first and athletes second. *See supra* SUF § III.D. Defendants' own conduct is at odds with this "principle," and they cite no evidence showing any relationship between paying above-COA benefits to Class Members and a decline in their devotion to academics. Rather, [redacted]

D. Defendants Have Abandoned All Other Asserted Procompetitive Justifications

Through interrogatory responses, Defendants have identified a laundry list of additional asserted justifications for the challenged restraints—including competitive balance, Title IX, and the desire to better integrate Class Members into student life.[46] But Defendants have developed no record to support these rationales, most of which have nothing to do with *economic* justifications for their restraints and therefore are insufficient as a matter of law. *See e.g.*, *Trial Lawyers Ass'n*, 493 U.S. at 424; *Prof'l Eng'rs*, 435 U.S. at 692. Because Defendants have failed to come forward with evidence capable of raising a genuine issue of material fact in support of any proffered procompetitive justification, summary judgment in favor of the Classes is warranted. *Parth*, 630 F.3d 798-99.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted.

[46] Defendants retained an expert, Professor Heckman, to testify about the benefits of education to Class Members. This point is as unremarkable as it is irrelevant [redacted]

Dated: August 11, 2017

Respectfully submitted,

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatories above.

By: */s/ Jeffrey L. Kessler*
Jeffrey L. Kessler

APPENDIX A: CHALLENGED RULES

Challenged Rule	Entity and Number of Challenged Rule
Eligibility Requirements for Student-Athletes	NCAA Bylaw 3.1.2.4
Compliance With Association Rules	NCAA Bylaw 3.2.1.2
Discipline of Members	NCAA Bylaw 3.2.4.10
Loss of Active Membership	NCAA Bylaw 3.2.5 et seq.
Discipline of Active Members	NCAA Bylaw 3.2.6 et seq.
Loss of Member—Conference Status	NCAA Bylaw 3.3.5 et seq.
Discipline of Member Conferences	NCAA Bylaw 3.3.6 et seq.
Areas of Autonomy: Pre-enrollment Expenses and Support	NCAA Bylaw 5.3.2.1.2(e) (as pertaining to pre-enrollment expenses and other monetary remuneration)
Areas of Autonomy: Financial Aid	NCAA Bylaw 5.3.2.1.2(f)
Areas of Autonomy: Awards, Benefits and Expenses	NCAA Bylaw 5.3.2.1.2(g)
General Principles	NCAA Bylaw 12.01
Eligibility for Intercollegiate Athletics	NCAA Bylaw 12.01.1
Permissible Grant-in-Aid	NCAA Bylaw 12.01.4
Pay	NCAA Bylaw 12.02.9
Amateur Status	NCAA Bylaw 12.1.2
Prohibited Forms of Pay	NCAA Bylaw 12.1.2.1
Use of Overall Athletics Skill – Effect on Eligibility	NCAA Bylaw 12.1.2.2
General Regulation	NCAA Bylaw 13.2.1 (as pertaining to monetary remuneration)
Specific Prohibitions	NCAA Bylaw 13.2.1.1 (as pertaining to monetary remuneration)
Financial Aid to Attend Another Institution	NCAA Bylaw 15.01.1.1
Improper Financial Aid	NCAA Bylaw 15.01.2
Cost of Attendance	NCAA Bylaw 15.02.2
Calculation of Cost of Attendance	NCAA Bylaw 15.02.2.1
Full Grant-in-Aid	NCAA Bylaw 15.02.5

Types of Aid Included in Limit	NCAA Bylaw 15.1.2
Reduction When Excess Aid Is Awarded	NCAA Bylaw 15.1.3
Other Expenses Related to Attendance	NCAA Bylaw 15.2.4
Government Grants	NCAA Bylaw 15.2.5
Excessive Expense	NCAA Bylaw 16.02.2
Extra Benefit	NCAA Bylaw 16.02.3
Pay	NCAA Bylaw 16.02.5
Types of Awards, Awarding Agencies, Maximum Value and Numbers of Awards	NCAA Bylaw 16.1.4, *et seq.*
Nonpermissible: General Rule	NCAA Bylaw 16.11.2.1
Accountability	NCAA Bylaw 19.01.2
Penalty Structure	NCAA Bylaw 19.01.4
Authority and Duties of Committee	NCAA Bylaw 19.3.6
Obligations of Member Institutions	NCAA Constitution, Article 1.3.2
Penalty for Noncompliance	NCAA Constitution, Article 2.8.3
Conditions and Obligations of Membership: General	NCAA Constitution, Article 3.2.4.1
Legislative Authority and Process: Basis of Legislation	NCAA Constitution, Article 5.01.1
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[redacted]	[redacted]
[redacted]	[redacted]
Adherence to NCAA Rules	Big 12 Bylaw 1.3.2
Institutional Athletically Related Financial Aid: Minimum Amount	Big 12 Bylaw 1.3.3.1
Eligibility Rules	Big 12 Rule 6.1
Financial Aid Reports	Big 12 Rule 6.5.3

Recruiting Code of Ethics	Big 12 Rule 6.6(a) (as pertaining to monetary remuneration)
[redacted]	[redacted]
Purposes	MAC Constitution Article II(B)
Recruitment of Prospective Student-Athletes	MAC Bylaw 3.03 (as pertaining to monetary remuneration)
Mid-American Conference Eligibility	MAC Bylaw 5.01
NCAA 14.01.3 – Compliance with Other NCAA and Conference Legislation	MAC Bylaw 5.05
NCAA Student Assistance Fund Administrative Procedures	MAC Bylaws, Appendix, pp. 284-285
[redacted]	[redacted]
[redacted]	[redacted]
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Application of NCAA Legislation	Ex. 76, Pac-12 Bylaw 4.29
Recruiting	Pac-12 Executive Regulation 2-1 (as pertaining to monetary remuneration)
NCAA Rules	Pac-12 Executive Regulation 3-1
NCAA Rules	Pac-12 Executive Regulation 4-1
Governance	Ex. 77, SEC Constitution, Article 5.01.1
Compliance with Other NCAA and Conference Legislation	SEC Bylaws, Article 14.01.1
General Principles	SEC Bylaws, Article 15.01
Institutional Financial Aid Permitted	SEC Bylaws, Article 15.01.1
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APPENDIX B: BENEFITS NOT ALLOWED

Disallowed Benefits Tethered to Education	NCAA 30(b)(6) Testimony Confirming Alternative is Impermissible Under Current Rules
A guaranteed post-eligibility scholarship to complete a bachelor's degree at any time after eligibility expires.	NCAA (Lennon) Tr. 195:5-195:14
Subsidized tutoring costs associated with completing a bachelor's degree at any time after eligibility expires.	NCAA (Lennon) Tr. 196:8-19
Expanded opportunities to participate in study-abroad programs.	NCAA (Lennon) Tr. 196:20-197:15
A guaranteed post-eligibility scholarship or grant for a graduate degree.	NCAA (Lennon) Tr. 197:17-198:10
Subsidized vocational training.	NCAA (Lennon) Tr. 198:11-199:17
Subsidized professional certifications or licensure programs and fees.	*See* Ex. 80, Additional Information Provided by NCAA on February 24, 2017 (at p. 4-5).
A health savings account funded by schools with a maximum contribution for each year of academic progress and an additional contribution upon graduation.	NCAA (Lennon) Tr. 213:14-214:9
A cell phone and call/texting/data plan subsidized by the member school.	NCAA (Lennon) Tr. 214:12-17
A local/campus travel stipend.	NCAA (Lennon) Tr. 214:18-23
A clothing stipend.	
Subsidized travel costs for family to attend regular season and post-season games.	NCAA (Lennon) Tr. 214:24-215:5
Money placed in trust by Conference Defendants and schools that could then be used by the trustee to pay in cash for in-kind benefits for fundamental living expenses—either before or following graduation—that achieve specified benchmarks that are tethered to educational objectives, such as making academic progress toward a degree, earning academic all-conference recognition, graduating, or pursuing postgraduate education.	NCAA (Lennon) Tr. 212:20-213:12
Incentive payment of up to $10,000, made in installments, for each school year in which a class member completes at least 1/5th of the units required to earn a degree and also has a GPA at or above the NCAA eligibility minimum.	NCAA (Lennon) Tr. 201:23-202:13
A one-time incentive of up to $10,000 for a class member who earns an undergraduate degree, with the payment made available for those class	NCAA (Lennon) Tr. 202:14-22

members who earn their degrees after their eligibility expires.	
Cash payments for computers, science equipment, musical instruments, and other items not currently included in the cost of attendance amounts permitted by current NCAA rules but nonetheless related to the pursuit of various academic studies.	NCAA (Lennon) Tr. 212:11-19
Cash compensation to pay for study abroad during the summer or a semester abroad.	NCAA (Lennon) Tr. 196:20-197:15
Supplemental compensation to replace the lost income that Class Members cannot earn due to the long hours devoted to basketball or football while also completing schoolwork.	NCAA (Lennon) Tr. 215:6-215:14

APPENDIX C: DEFENDANT CONTRACT TERMS

Contract	Duration	Total Value	Scheduling Provisions
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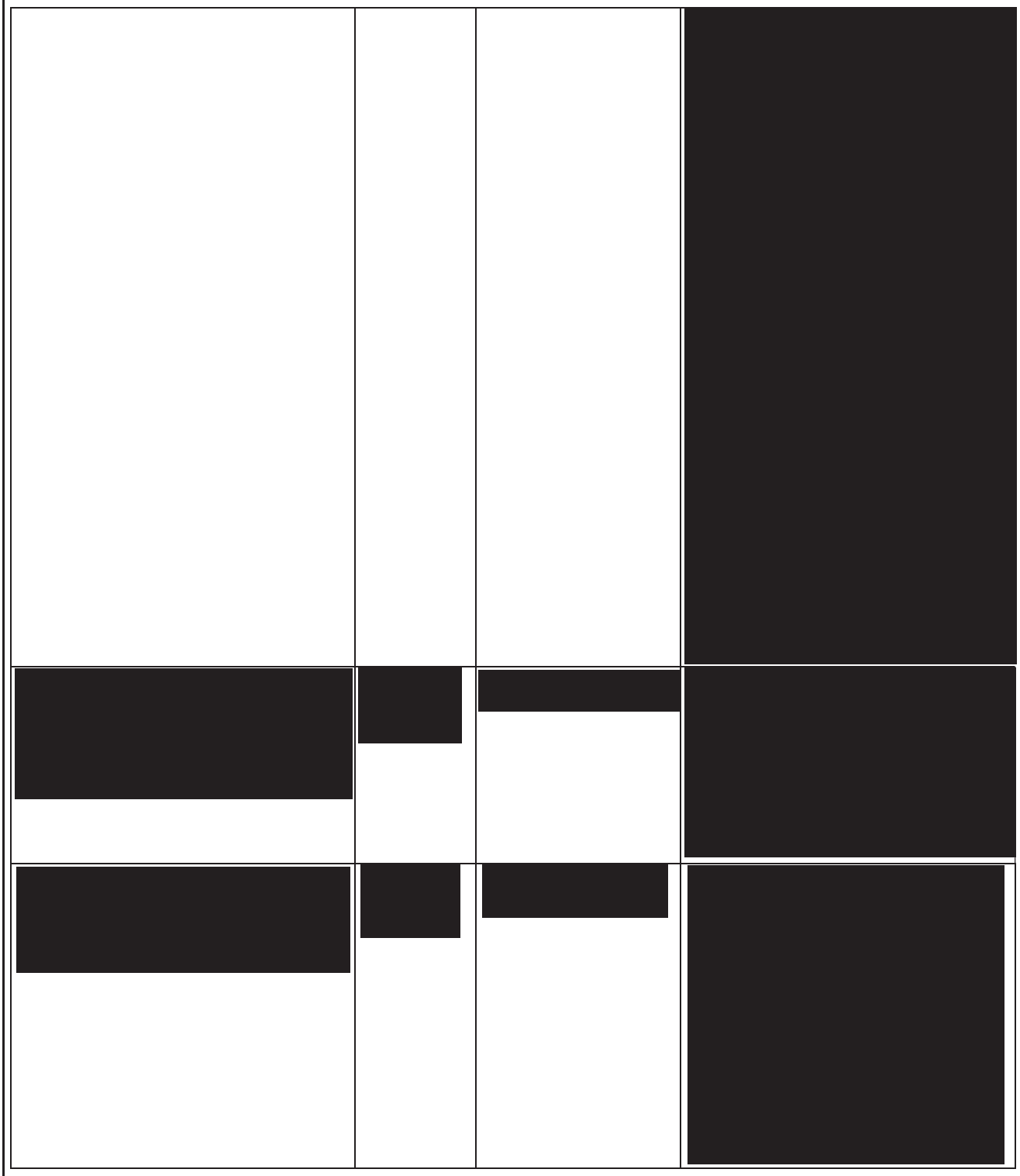

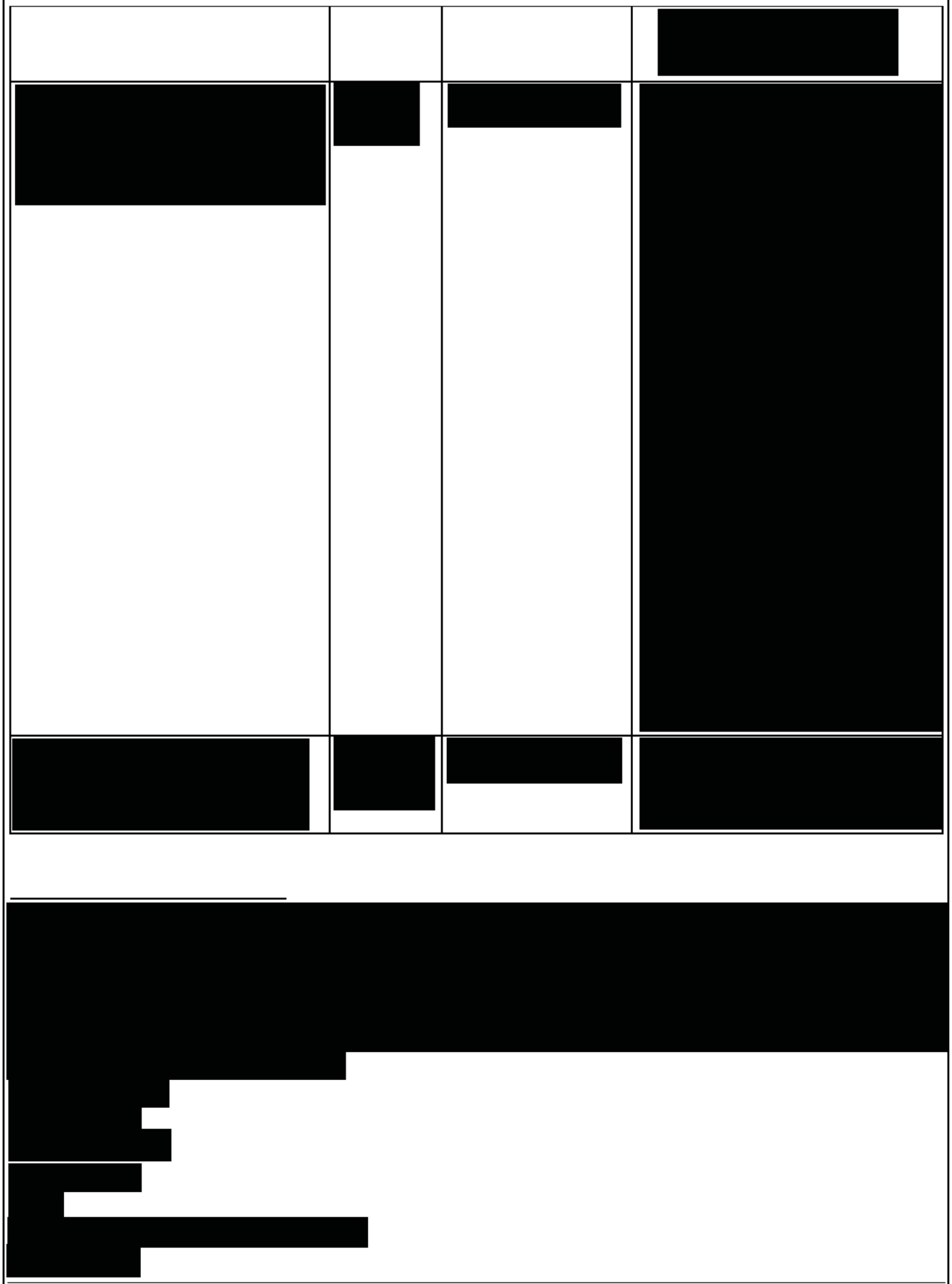

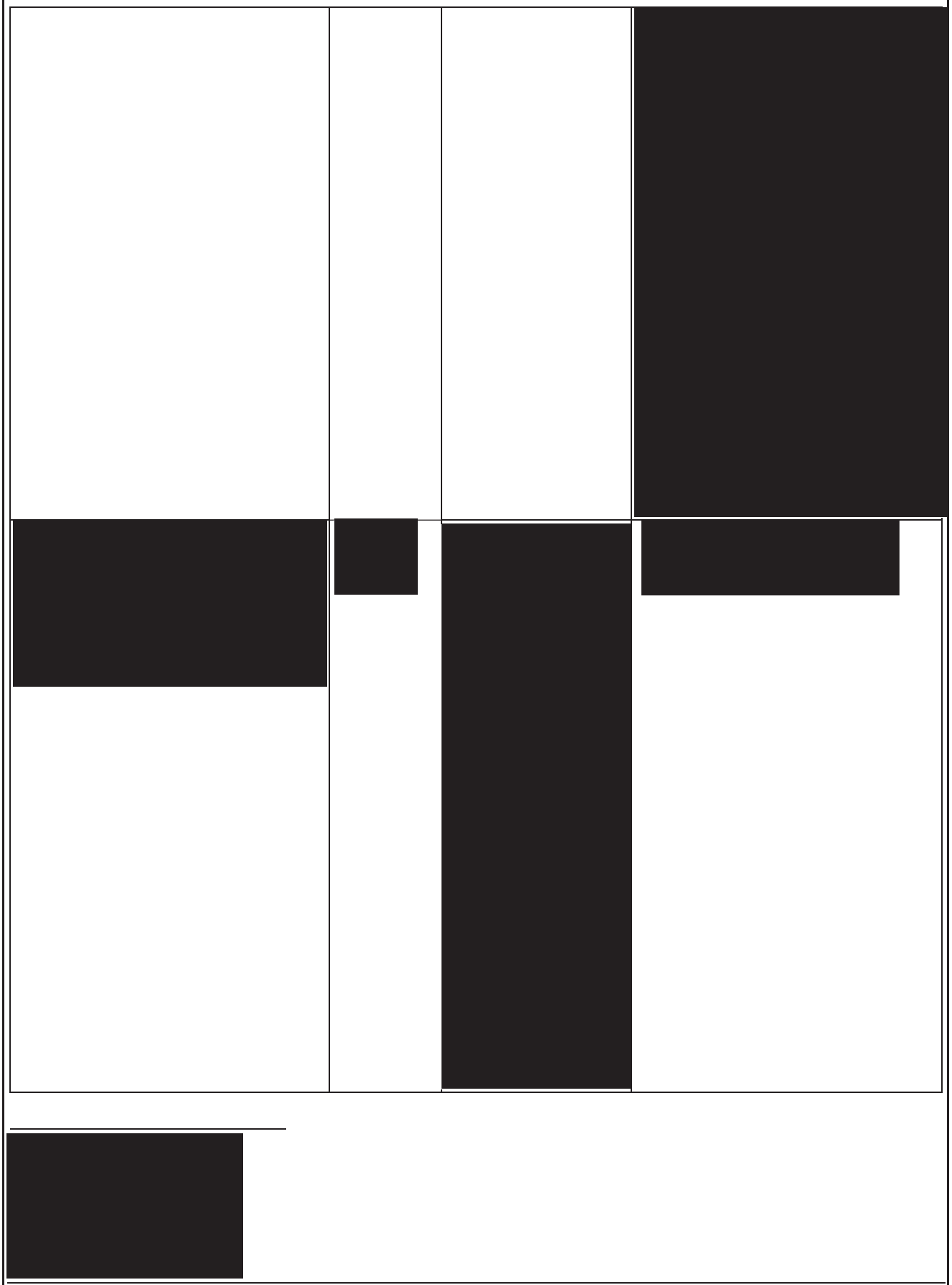

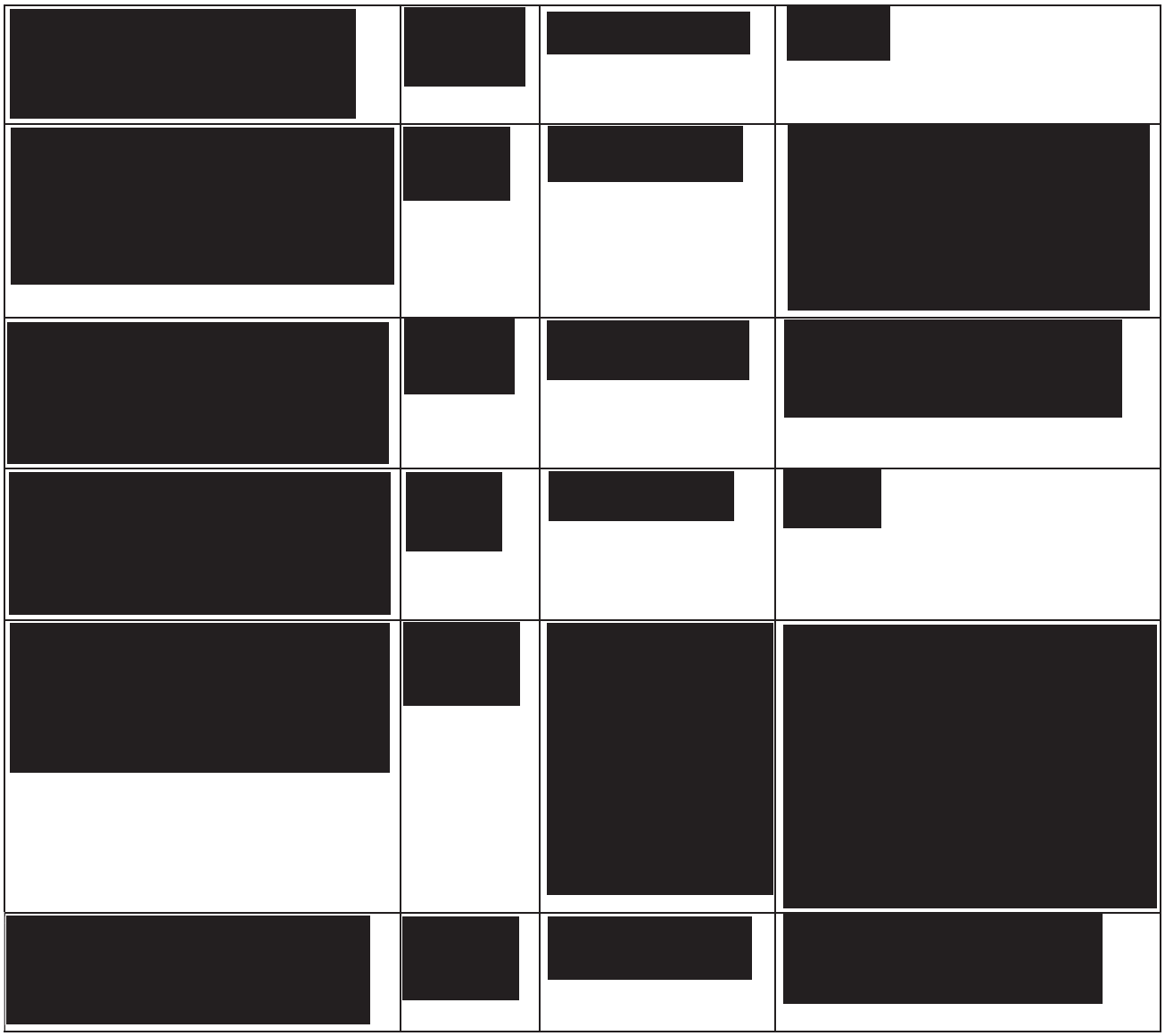

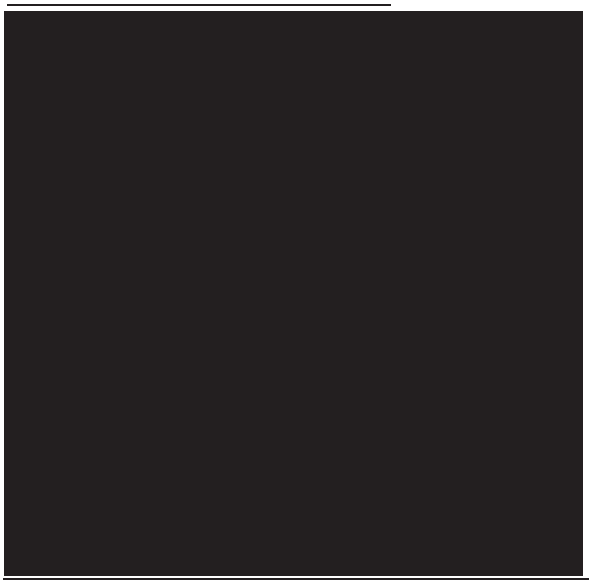

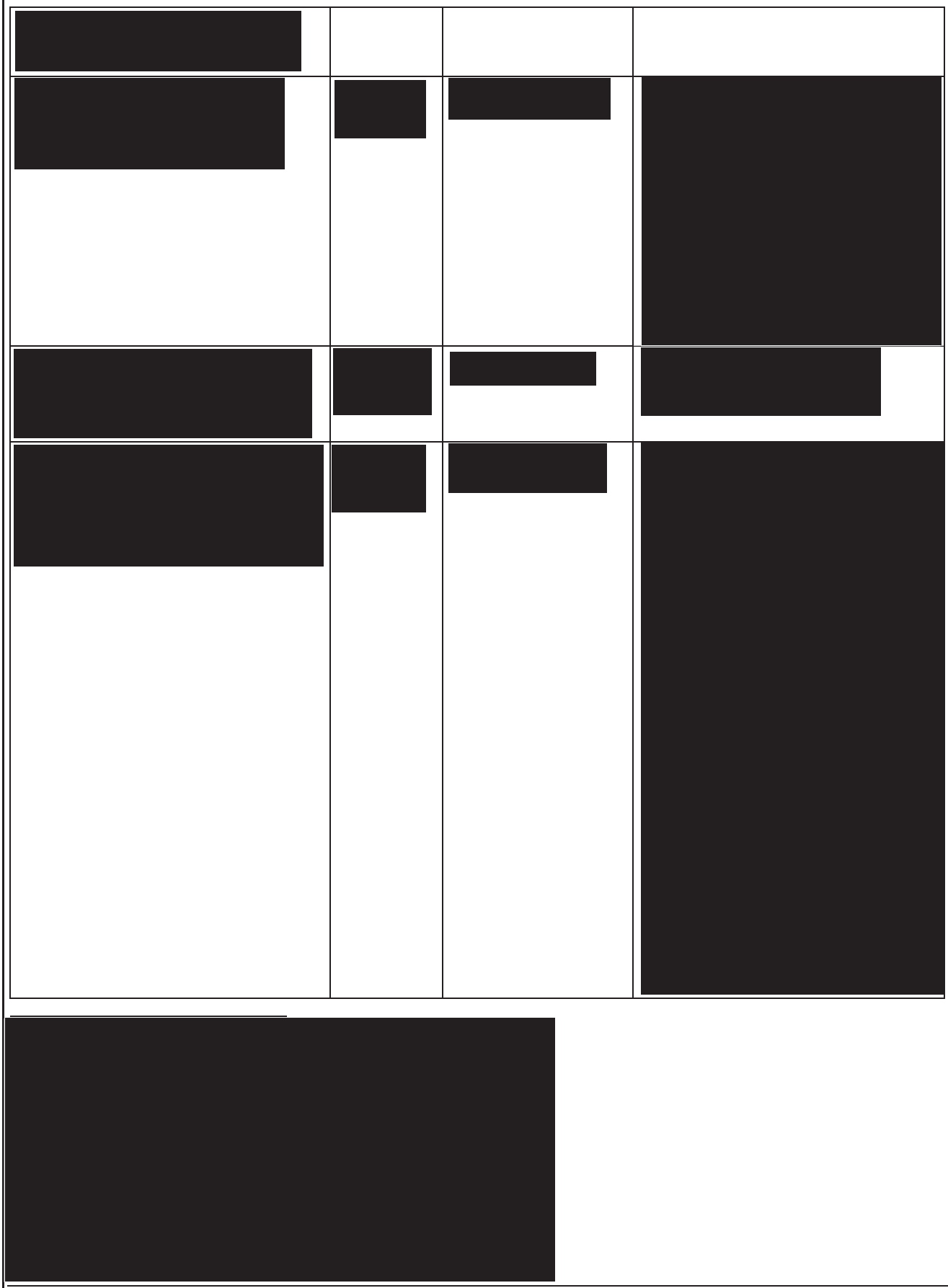

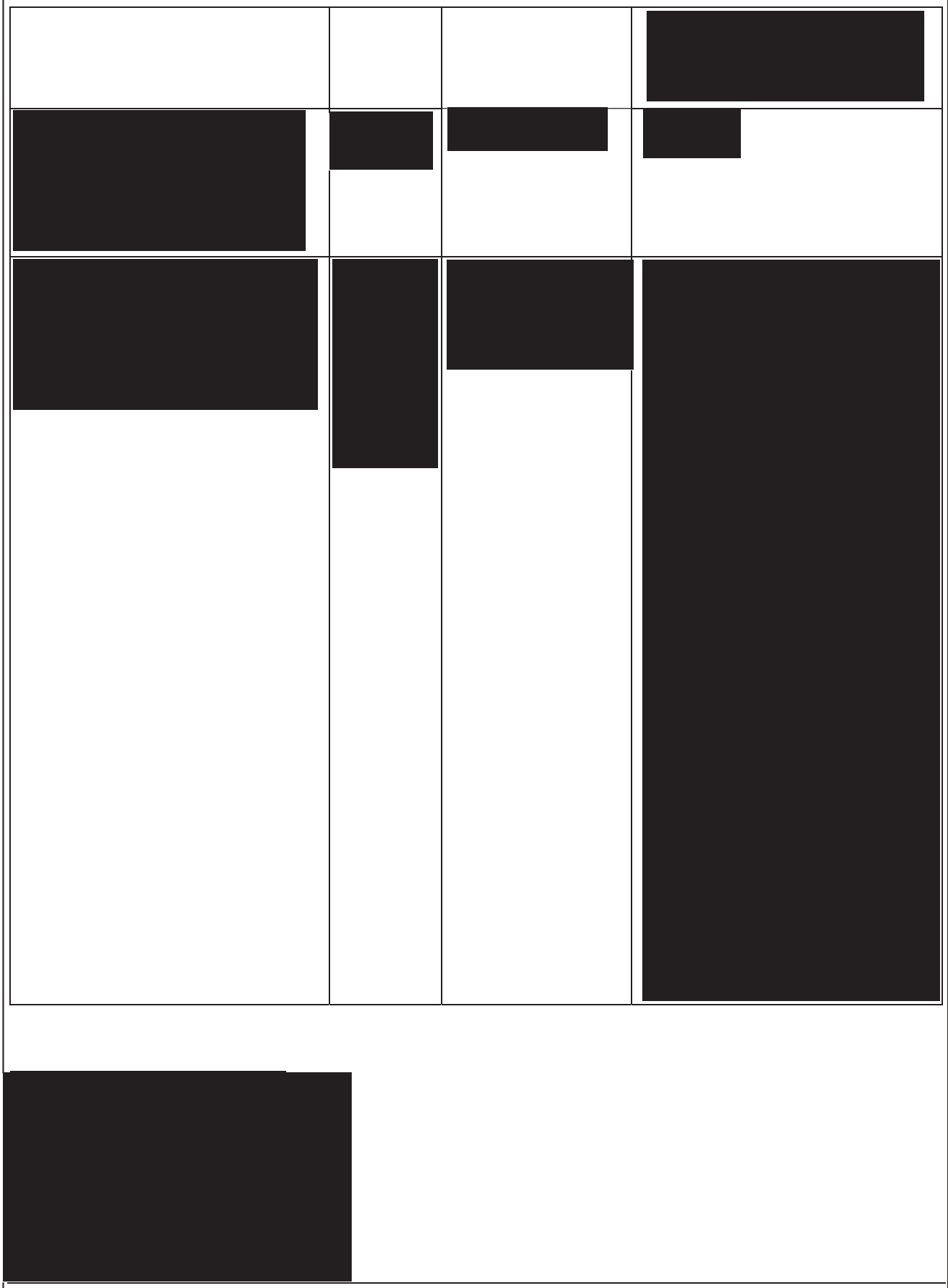

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