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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

This Document Relates to:

ALL ACTIONS

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

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND FOR EXCLUSION OF EXPERT TESTIMONY, AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND FOR EXCLUSION OF EXPERT TESTIMONY

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 16, 2018, at 2:30 p.m., in Courtroom 2 of the above-captioned Court, located at 1301 Clay Street, Oakland, California, Defendants will, and hereby do, move the Court, pursuant to Federal Rule of Civil Procedure 56, for an Order granting summary judgment in favor of Defendants, and pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993), for an Order excluding certain opinions of Plaintiffs' experts. Defendants' Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Karen Hoffman Lent and all exhibits attached thereto, the pleadings and other documents on file in this case, and any additional materials, evidence, and argument of counsel that may be presented to the Court at or prior to the submission of this Motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Ninth Circuit's decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), precludes Plaintiffs' claims in these actions, including their request for a permanent injunction preventing enforcement of NCAA and Conference rules limiting financial aid and benefits for NCAA Division I student-athletes, and compels summary judgment in favor of Defendants, for the following reasons:

   a. *O'Bannon* established as a matter of law that the rules challenged by Plaintiffs serve the procompetitive purposes of "integrating academics with athletics, and preserving the popularity of the NCAA's product by promoting its current understanding of amateurism." *Id.* at 1073.

   b. The Ninth Circuit already considered Defendants' rules limiting athletically-related financial aid to the cost of attendance in *O'Bannon* and concluded that the Rule of Reason "does not require more." *Id.* at 1079.

   c. The entire complex of rules challenged in this case was part of the record in *O'Bannon*—including rules permitting student-athletes to receive certain awards,

benefits, and reimbursed expenses within the NCAA's shared definition of amateurism—and cannot be invalidated consistent with the Ninth Circuit's decision in that case, or the courts' longstanding recognition that the NCAA's membership must have "ample latitude to superintend college athletics." *Id.*

2. Whether Plaintiffs' Motion for Summary Judgment should be denied in its entirety, because:

a. *O'Bannon* forecloses the relief Plaintiffs seek in this case. Even if new factual developments could ever overcome such recent, binding precedent, Plaintiffs are wrong that the record in this case includes "new evidence" not considered in *O'Bannon* that could warrant a different result.

b. Even if *O'Bannon* did not control the outcome of this case, the record in this case, standing alone, provides a sufficient basis for denial of Plaintiffs' motion.

3. Whether certain opinions of Plaintiffs' experts should be excluded under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993), because opinions contradicting the Ninth Circuit's holdings in *O'Bannon* and addressing already-resolved issues do not "fit" the facts of this case in a manner that assists the finder of fact, and opinions outside of the experts' fields of expertise, and not supported by adequate scholarly, scientific or sound basis, are inadmissible.

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INTRODUCTION

For over a century, colleges and universities have come together as members of the NCAA to design and implement the rules for college sports. The central principle underlying those rules is that college sports are to be played by student-athletes, not paid professionals. As courts have repeatedly recognized, this principle is what sets college sports apart, earning them immense popularity and millions of fans both on and off campus. These amateur student-athletes no doubt dedicate time and effort to athletics, as is necessary to compete at the elite level they have achieved. But they also dedicate substantial time and effort to academics as part of obtaining a valuable college education as members of a university community. The NCAA's rules represent its members' ongoing efforts to balance these complementary aspects of a student-athlete's education and ensure that college sports do not lose their unique appeal by turning into "professional . . . minor league[s]." *O'Bannon v. NCAA*, 802 F.3d 1049, 1076-77 (9th Cir. 2015).

This balancing is both complex and essential to preserving the unique nature and special appeal of college sports. As a result, the Supreme Court and the Ninth Circuit have made clear the NCAA must have ample latitude to accomplish it. Plaintiffs ask this Court to strip the NCAA of that latitude, ignore binding legal precedent, and, in doing so, fundamentally alter college sports. They dwell on the popularity of football and men's basketball and ignore the substantial record of the benefits that college athletics provide to student-athletes and sports fans alike. But these arguments are nothing new. Plaintiffs' claims were already litigated, and lost, in *O'Bannon v. NCAA*. *O'Bannon* was brought by essentially the same classes as the Plaintiff classes here, and it presented the very same question posed by this lawsuit: whether the federal antitrust laws require the NCAA membership to "surrender[] its amateurism principles entirely," permit cash payments above and beyond the cost of education, and watch the tradition of college sports—so popular with students and sports fans alike—devolve to "minor league status." *O'Bannon*, 802 F.3d at 1079. The Ninth Circuit, in an opinion issued just two years ago, answered that question: No.

Plaintiffs survived an earlier motion for judgment on the pleadings by asserting that they would use this litigation to seek relief consistent with *O'Bannon*'s binding precedent. *See, e.g.*, Decl. of Karen Hoffman Lent in Supp. of Defs.' Mot. for Summ. J. ("Lent Decl."), Ex. 9 (Aug. 2, 2016 Hearing Tr.) 25:17-25, 26:13-16, 27:9-14. Their most recent filing reveals the opposite. It confirms that, contrary to their representations to the Court at the Rule 12(c) hearing, Plaintiffs seek to reprise the prior, failed attack on the NCAA's rules limiting student-athlete compensation and benefits, and request an injunction against the entire architecture of NCAA rules that implements them. As this Court has recognized, that case was already tried in *O'Bannon*, and the outcome of *O'Bannon* "[i]s the law." *Id.* 20:20-21.

In *O'Bannon*, the Ninth Circuit ruled that the NCAA's agreed-upon standard of amateurism, which includes its prohibition on pay-for-play, helps "preserv[e] the popularity" of college sports and promote the ongoing efforts of colleges and universities to "integrat[e] academics and athletics." 802 F.3d at 1073. The Ninth Circuit agreed that those legitimate and procompetitive objectives would not be undermined by allowing student-athletes to receive cost of attendance ("COA") athletic scholarships, *i.e.*, financial aid calculated by each college and university, based on federal regulation, to reflect the approximate cost to a student of attending his or her school. But the court rejected the notion that the antitrust laws require anything more. *Id.* at 1078-79. In particular, the Ninth Circuit refused to force the NCAA membership to permit even limited "cash sums untethered to educational expenses," *id.*, holding that such a remedy could not plausibly be squared with the collective definition of "amateurism . . . integral to the NCAA's market." *Id.* at 1079. And the Ninth Circuit specifically instructed that courts must not "micromanage organizational rules" or "strike down largely beneficial market restraints with impunity," because the NCAA must have "ample latitude" to create rules to govern college sports. *Id.* at 1074-75, 1079 (internal quotation marks omitted).

Despite this clear mandate, Plaintiffs nevertheless ask the Court to enjoin the NCAA membership from enforcing *any* limits on the compensation or benefits a student-athlete may receive, invalidating the longstanding prohibition on pay-for-play. Plaintiffs' Motion for

Summary Judgment ("MSJ") 4 & App'x A. If granted, that injunction would mean that instead of receiving scholarships set at the cost of attending college, student-athletes could be paid any amount in cash. Because compensation would be "market-driven" in Plaintiffs' proposed world, MSJ 5, payment amounts could vary by team, by teammate, by sport, by year, or by individual game—indeed, a student-athlete's aid could be increased, reduced, or even revoked depending on how he or she performed. Student-athletes who now compete for their colleges and universities as part of a broader educational experience would instead take the field or the court as hired labor, subject to the loss of their scholarships at any time. The Ninth Circuit already considered and rejected a claim for invalidation of the same rules in *O'Bannon*, and Plaintiffs are legally prohibited from trying it again in these actions.

Following a brief recitation of the relevant factual and legal background governing the instant motions, this memorandum first explains why Defendants are entitled to summary judgment under *O'Bannon*. In short, Plaintiffs challenge more than 80 rules enacted by the NCAA and its members to govern the financial aid and benefits student-athletes may receive and implement the NCAA membership's "shared conception" of amateurism. 802 F.3d at 1076 n.20. That entire complex of rules—and the principles underlying them—were part of the record in *O'Bannon*. And based on that record, the Ninth Circuit held that the Rule of Reason "requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes," but "*does not require more*." *Id.* at 1079 (emphasis added). Plaintiffs' request to enjoin *every* NCAA rule that limits student-athlete compensation and benefits *in any way* cannot survive *O'Bannon*'s holding.

Next, this memorandum refutes each of the arguments Plaintiffs offer in urging the Court to ignore binding Ninth Circuit precedent and grant summary judgment in their favor. MSJ 1. Leaving aside whether "new and undisputed evidence" supposedly not addressed in *O'Bannon* could ever justify discarding such recent and clearly applicable case law, Plaintiffs' claims ignore the record in *O'Bannon*, the facts developed in this case, and common sense.

First, contrary to Plaintiffs' flawed logic, nothing about how the NCAA's COA rules

have been implemented justifies setting *O'Bannon* aside. As the record in that case makes plain, the Ninth Circuit was aware that those rules would permit student-athletes to receive direct stipends to reimburse or cover personal expenses incurred in the amounts that the schools had calculated to represent the actual cost of attendance. *See O'Bannon* Appellee Br. (9th Cir., Case No. 14-16601, ECF No. 43-1) at 56; *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 982-83 (N.D. Cal. 2014). Moreover, even if it were true (as Plaintiffs allege) that consumer demand for college sports has not waned based on the small change from the previous scholarship limit to COA, that would only confirm that the Ninth Circuit was correct in holding that the antitrust laws require the NCAA to permit scholarships up to—but not over—COA.

Second, Plaintiffs gain nothing by reciting the awards, benefits, and reimbursed expenses that student-athletes may receive as part of their participation in college sports. Like the operation of the COA rules, these items were undeniably part of *O'Bannon*. There, as here, the plaintiffs argued that because the NCAA membership allows schools to implement their athletic programs in these ways, it thereby forfeits the right to place *any* limits on the benefits and compensation student-athletes may receive. That argument made no sense in *O'Bannon* and it makes none here. As *O'Bannon* recognized, the NCAA membership needs "ample latitude to superintend college athletics." 802 F.3d at 1079 (internal quotation marks omitted). That latitude surely permits the NCAA to decide that permitting certain awards, benefits, and expense reimbursements may promote the membership's core principles, while others would contravene them.

Third, Plaintiffs' argument that the NCAA and its members must forgo their standard of amateurism because they "do virtually nothing" to assist student-athletes in balancing the demands of academics and athletics, MSJ 3, is also a repeat from *O'Bannon* that once again fails. *See* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1122:11-17 (testimony from the plaintiffs' expert making the same argument). There is no question that student-athletes who compete at the Division I level commit significant time and effort to sports. But while being a committed athlete is undeniably part of the student-athlete's college experience, it is not the sum total of that experience. As demonstrated in *O'Bannon*, and confirmed by the record here, the

NCAA membership has taken numerous actions to ensure student-athletes can, and do, dedicate themselves to academics as well. These efforts are working, as shown by myriad positive academic outcomes including rising graduation rates for student-athletes that meet or exceed the rates for all other students. Plaintiffs' assertions to the contrary ignore what the evidence on these issues actually shows and denigrate what student-athletes accomplish throughout their college experiences.

Even if *O'Bannon* were not dispositive, Plaintiffs' motion for summary judgment would still fail. As shown below, the record in *this* case, standing alone, contains substantial evidence that the NCAA rules Plaintiffs challenge are procompetitive because, among other things, they help to preserve the popularity of college sports with consumers and assist schools in integrating academics and athletics. Plaintiffs cannot sidestep this record in a summary judgment setting and, therefore, cannot prevail on their motion.

Finally, the memorandum demonstrates why certain expert opinions proffered by Plaintiffs cannot survive *Daubert* and should therefore be excluded.

BACKGROUND

I. The NCAA's Rulemaking Function.

The 350 colleges and universities that currently make up Division I have come together through the NCAA to establish certain rules necessary to the effective operation of college athletics, including but not limited to Football Bowl Subdivision (FBS) football and Division I men's and women's basketball. These institutions have taken this step not only because a common set of rules is essential to meaningful athletic competition, but also to preserve the essential feature that distinguishes college athletics from professional sports offerings: that participants are amateur student-athletes who compete on behalf of their respective schools as part of a broader educational experience. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 101-02 (1984) ("The integrity of the 'product' cannot be preserved except by mutual agreement," and "the character and quality of the 'product'" requires that "athletes must not be paid, must be required to attend class, and the like.").

The work done by the NCAA's membership reflects that core purpose. It implements

rules, policies, and procedures to foster high-level athletic competition at the Division I level and, at the same time, ensure that the student-athletes who play Division I sports can, and are required to, fulfill their academic responsibilities in a meaningful way. Developing the best approach to accomplish that mission is sometimes complex. It requires input and approval from various parties—including college and university presidents, athletic directors, faculty representatives, alumni, and student-athletes themselves.[1] It involves balancing different, and sometimes competing, priorities. And it is an ongoing process, in which the NCAA (like any rule-making body) may adjust its approach as necessary and appropriate. *See generally O'Bannon*, 7 F. Supp. 3d at 964 (describing NCAA legislative process as of 2014).

The NCAA's rule book for Division I sports spans 400 pages and addresses a broad range of issues, including recruiting (Article 13); academic eligibility (Article 14); financial aid (Article 15); and permissible awards, benefits, and expenses for enrolled student-athletes (Article 16). Lent Decl. ¶ 2. As set forth in the preamble to the Division I manual, the rules in each of these categories are intended to advance the NCAA membership's core "commitments." Lent Decl., Ex. 1 (NCAA Bylaws) at xi. Those commitments include "maintaining a line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model." *Id.*[2] They also include the related objectives of "ensur[ing] proper emphasis on educational objectives"; promoting the role of "student-athletes [as] an integral part of the student body"; and protecting student-athlete "well-being." *Id.*

Various stakeholders may sometimes have differing views on how best to balance the relevant principles when designing the rules necessary to govern college sports. Like any

[1] *See* Lent Decl., Ex. 4 (NCAA website), *available at* http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure; Lent Decl., Ex. 3 (Recommended Governance Model), *available at* http://www.ncaa.org/sites/default/files/DI%20Steering%20Commitee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf.

[2] *See also* Lent Decl., Ex. 1 (NCAA Bylaws) § 1.3.1 ("Basic Purpose" of the NCAA "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.").

legislative authority, the NCAA cannot always satisfy everyone. But the bottom line is that this balancing is a required task of governance, and one that the NCAA is best-suited to accomplish. As the Supreme Court observed decades ago, the NCAA needs "ample latitude" to develop the rules required to superintend college athletics. *See Bd. of Regents*, 468 U.S. at 120 ("There can be no question but that [the NCAA] needs ample latitude" to maintain the "revered tradition of amateurism in college sports."). Other courts have reiterated this admonition, including most recently the Ninth Circuit in *O'Bannon*. *See* 802 F.3d at 1074 (NCAA must have "'ample latitude' to superintend college athletics"); *Law v. NCAA*, 134 F.3d 1010, 1022 n.4 (10th Cir. 1998) (NCAA must receive "plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics.").

II. The NCAA's Rules Challenged In *O'Bannon* And Again In This Case.

As noted above, one area that has long been subject to NCAA rulemaking is the financial aid and benefits that student-athletes at the Division I level may receive. In *O'Bannon*, both this Court and the Ninth Circuit held that the federal antitrust laws require the NCAA to permit schools to provide student-athletes athletic scholarships "up to the cost of attendance." 802 F.3d 1079; *see* 7 F. Supp. 3d at 1005 ("up to the full cost of attendance"). As this Court knows, COA is a defined amount that each college and university calculates, based on federal regulation, to reflect what it costs an individual student to attend that particular school. It consists of "tuition and fees," "an allowance for books, supplies, transportation, and miscellaneous personal expenses," and an allowance "for room and board costs incurred by the student." 20 U.S.C. § 1087*ll*; *see* Lent Decl., Ex. 1 (NCAA Bylaws) § 15.02.1-2. The overall amount necessarily differs from school to school, because attending certain schools is more expensive based on their geographic location, the cost of housing, cost of tuition, or other factors. *See, e.g.*, Lent Decl., Ex. 2 (Federal Student Aid Handbook, Vol. 3, Ch. 2) (allowing schools to "assess[] local housing costs" and take "periodic surveys of [the] student population" in order to determine the true COA for their students). Under the NCAA's rules, however, the COA amount that a student-athlete may receive must be calculated in the same manner as for all other students at his or her school. *See* Lent Decl., Ex. 1

(NCAA Bylaws) § 15.02.2.1 ("An institution must calculate the cost of attendance for student-athletes in accordance with the cost-of-attendance policies and procedures that are used for students in general."). Moreover, student-athletes must receive their COA funds in the same manner as all other students, which may include cash stipends for portions of the costs. *See* Lent Decl., Ex. 5 (COA Q & A), *available at* http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa.

The plaintiffs in *O'Bannon* argued, as they do in this case, that the NCAA membership lacks any justification for prohibiting payment of cash compensation to student-athletes above the COA limit. The Ninth Circuit disagreed, recognizing that aid given to student-athletes under the COA rules "cover[s] their legitimate costs to attend school," and that providing cash unconnected to the cost of their educations would be an unwarranted "quantum leap" from the existing system. *O'Bannon*, 802 F.3d at 1078 (internal quotation marks omitted).

The *O'Bannon* plaintiffs, again like Plaintiffs here, tried to support their contentions with evidence and arguments regarding various awards, benefits, and expense reimbursements, separate from financial aid, that student-athletes may receive under NCAA rules. *See, e.g.*, Lent Decl., Ex. 15 (*O'Bannon* Tr.) 2146:6-2149:4 ("special insurance polic[ies]"); *id.* 908:16-909:14 (gifts during bowl games); *id.* 1231:3-20 (use of Student Assistance Fund to reimburse "transportation to go home for an interview or a funeral").[3] This Court acknowledged that evidence and testimony as part of its analysis. *See, e.g., In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1147–48 (N.D. Cal. 2014) (citing exhibit describing gifts for tournament participants, reimbursements for family travel, and special insurance policies). And the Ninth Circuit received it as part of the plaintiffs' appeal. *See, e.g., O'Bannon* Appellee Br. (9th Cir., Case No. 14-16601, ECF No. 43-1) at 7-

[3] The *O'Bannon* record also included evidence of various benefits and services student-athletes receive that Plaintiffs choose not to cite in their brief. *See, e.g.*, Lent Decl., Ex. 15 (*O'Bannon* Tr.) 44:12-14 (academic tutoring); *id.* 3161:5-3162:5 (same); *id.* 1100:1-12 (medical care).

8 (reimbursements for family travel; gift cards provided during bowl games). Yet none of it changed *O'Bannon*'s ultimate conclusion that the law does not require that the NCAA and its members allow compensation in excess of athletic scholarships based on a school's individual COA amount. *See* 802 F.3d at 1079.

Indeed, the NCAA rules governing these awards, benefits, and expenses are fully consistent with its rules permitting athletically related financial aid only for educational expenses. Lent Decl., Ex. 13 (Decl. of Brad Hostetter in Supp. of Defs.' Mot. for Summ. J., Ex. A ("Hostetter Synopsis")) at 5. Athletics and academics are fundamental components of a student-athlete's education, and the financial aid rules and the awards, benefits, and expenses rules are designed to allow student-athletes to participate fully in both. The latter rules recognize that participating in college sports has certain built-in costs that should not be borne by the student-athletes (including jerseys, equipment, and the expenses associated with travel to games and tournaments), and that success in athletics has traditionally been met with certain rewards at all levels of competition (such as limited gifts for participation in end-of-season tournaments provided by the hosts of those tournaments). *See, e.g.*, Lent Decl., Ex. 24 (Apr. 6, 2015 Dep. of Justine Hartman ("Hartman Dep.")) 208:24-209:5 (need for uniforms and practice gear for basketball team); Lent Decl., Ex. 42 (Oct. 14, 2016 Dep. of Kathleen T. McNeely ("McNeely 30(b)(6) Dep.")) 38:8-39:18 (travel expenses); Lent Decl., Ex. 30 (Mar. 10, 2015 Dep. of Martin Jenkins ("Jenkins Dep.")) 179:3-180:2 (equipment); Lent Decl., Ex. 56 (Jan. 25, 2017 Dep. of John Swofford ("Swofford Dep.")) 96:16-97:6 (gift suites are "commemorative"); Lent Decl., Ex. 41 (June 3, 2016 Dep. of Bernadette McGlade ("McGlade Dep.")) 89:5-15 (every member of team, including managers and trainers, receives limited gifts); Lent Decl., Ex. 33 (Dec. 13, 2016 Dep. of Danette Leighton ("Leighton 30(b)(6) Dep.")) 63:13-14 ("kids are getting a memento for their experience").

The NCAA has also exercised its authority to "superintend college athletics," *O'Bannon*, 802 F.3d at 1079, to allow schools to take certain actions to ensure student-athletes can equally and fully participate in elite-level athletic competition regardless of their personal financial means. These actions include reimbursing certain travel expenses for fam-

ily members who may not otherwise be able to attend end-of-season tournaments, *see* MSJ 9-10; *O'Bannon* Appellee Br. (9th Cir., Case No. 14-16601, ECF No. 43-1) at 7 n.2, as well as requiring tutoring and career counseling services to ensure student-athletes have ample academic support. *See* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 16.3.1.1, 16.11.1.10; Lent Decl., Ex. 15 (*O'Bannon* Tr.) 3161:5-3162:5.

In addition, schools can use the Student Assistance Fund to help student-athletes with miscellaneous expenses "that crop up in the course of being an athlete that are not covered by scholarship." Lent Decl., Ex. 46 (Dec. 13, 2016 Dep. of Erik Price ("Price 30(b)(6) Dep.")) 21:8-22:10; Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1231:3-1232:13. The Student Assistance Fund also can be used to cover reimbursement for loss of value insurance, which allows the relative handful of student-athletes with professional prospects to continue to participate in college athletics and the campus environment without fear of injury. *See* Lent Decl., Ex. 13 (Hostetter Synopsis) at 12; Lent Decl., Ex. 1 (NCAA Bylaws) §§ 12.1.2.4.4, 16.11.1.4; Lent Decl., Ex. 36 (Jan. 31, 2017 Dep. of Mark A. Lewis ("Lewis 30(b)(6) Dep.")) 231:12-232:16; Lent Decl., Ex. 17 (Nov. 16, 2016 Dep. of Michael Aresco ("Aresco Dep.")) 195:23-196:17.

The NCAA has been careful to regulate these awards, benefits, and reimbursed expenses, recognizing that "[t]here comes a point in time when, by continuing to provide incidental expense[s], you really are crossing over into a—a principle of amateurism or that the benefits simply are not appropriate." Lent Decl., Ex. 35 (Jan. 25, 2017 Dep. of Kevin C. Lennon ("Jan. 25, 2017 Lennon Dep.")) 63:17-22. Taken as a whole, the rules regarding these items reflect the decisions the NCAA membership has reached through an extensive rule-making process about how best to protect and promote its core principles, including both its standard of amateurism and student-athlete welfare. *Id.*

Another argument made in *O'Bannon*, and repeated here, is that the NCAA's rules prohibiting pay-for-play are unjustified because the NCAA and its members do nothing *else* to promote the agreed-upon standard of amateurism, such as helping students balance the demands of academics and athletics. MSJ 3; *see* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1122:11-17 (plaintiffs' expert contending that football and men's basketball student-athletes are "ath-

letes first and students second"). The record refutes that contention.

To begin with, the NCAA rulebook sets forth mandatory academic standards that all student-athletes must satisfy to remain eligible to play a sport—and which institutions must monitor in order to even field teams. *See* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 14.01-14.9. To ensure that prospective student-athletes can transition successfully into college, the rules mandate that they complete certain core courses and hit other academic benchmarks in high school. *Id.* at § 14.3.1.1.3; Lent Decl., Ex. 6 (NCAA website), *available at* http://www.ncaa.org/student-athletes/future/core-courses; *see* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 2022:22-2023:25. Once student-athletes arrive at college, they must enroll in a full-time program leading to a baccalaureate or equivalent degree, Lent Decl., Ex. 1 (NCAA Bylaws) § 14.2.1; complete at least 12 semester or quarter hours of classes, *id.* at § 14.2.2; and maintain a minimum grade point average, *id.* § 14.4.3.3. These standards provide an incentive for students-athletes to succeed academically so that they will be permitted to play. Lent Decl., Ex. 49 (Oct. 25, 2016 Dep. of Gregory Sankey ("Sankey Dep.")) 208:4-9. Over the years, these rules have gotten stricter, not looser: Plaintiffs' expert acknowledges that "the NCAA [has] tightened its academic eligibility rules" over the past several years. Decl. of Jeffrey L. Kessler in Supp. of Pls.' Mot. for Summ. J. ("Kessler Decl."), Ex. 9 (Noll Decl.) at 61. [4]

The NCAA takes concrete steps to facilitate compliance with these mandatory standards. It imposes constraints on participation in athletically related activities, Lent Decl., Ex. 1 (NCAA Bylaws) §§ 17.1.7.1; 17.1.7.3; *see also* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 2024:1-11; limits the amount of class-time student-athletes can miss for sports, *e.g.*, Lent Decl., Ex. 1 (NCAA Bylaws) §§ 3.2.4.13, 12.5.3, 17.1.7.6.1, 17.1.6.2; and requires member institutions to

[4] *See* Lent Decl., Ex. 35 (Lennon Dep.) 115:15-116:9 (discussing increases in eligibility standards in 2016 to ensure that football and basketball players would be "better prepared when they enter the universities and increase their . . . likelihood of success"). Some conferences impose additional academic standards on student-athletes. *See, e.g.*, Lent Decl., Ex. 49 (Sankey Dep.) 205:12-207:5 (discussing the SEC's academic eligibility rules); *see also* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1368:17-1369:8 (describing how the University of Texas makes sure its student-athletes are prepared for the academic rigors of the University).

provide all student-athletes with academic counseling and tutoring services, *id.* § 16.3.1.1.[5] These eligibility rules have teeth—the NCAA enforces them regardless of a school's athletic success. *See id.* § 14.8. To name just one high-profile example, the University of Connecticut's men's basketball team was ruled academically ineligible to compete in the NCAA tournament in 2013 because of academic misconduct, despite winning the tournament two years before. Lent Decl., Ex. 15 (*O'Bannon* Tr.) 2575:19-24.

The NCAA membership also provides significant support for student-athletes' educational outcomes. Colleges and universities provide funding and resources to ensure their student-athletes meet and exceed academic standards. *See* Lent Decl., Ex. 88 (NCAA-GIA03423528) at -535 (97% of schools offer advice on course selection and degree progress, and 95% monitor class attendance); *id.* at -559 (FBS football schools provide a median of $655,098 annually for academic support for student-athletes, 65% of which was paid for by the athletics department). And the NCAA provides distributions to member institutions that must be used for academic enhancements for student-athletes, in amounts that have increased over time—to $46.7 million in 2017. Lent Decl., Ex. 7 (NCAA website), *available at* https://www.ncaa.org/sites/default/files/2017NCAA_DivisionI_RevenueDistributionPlan_20170426.pdf; *see also* Kessler Decl., Ex. 9 (Noll Decl.) at 61 (stating that over the last several years the NCAA has "devoted more funds to academic support services"). These funds are used for a wide range of academic expenditures, including salaries for academic counselors,

[5] Here too, conferences have complementary requirements. *See, e.g.*, Lent Decl., Ex. 65 (BIGTEN-GIA 063386) at -402-03, -407, -431-32, 441-42, -458-61, -469 (2015-16 B1G Handbook: Guiding Principles No. 1 (re: "Academic Priority"), No. 2 ("Class Time Precedence"), No. 3 ("Graduation Commitment"), and No. 14 ("Student-Athlete Experience"); SA Impact Statement requirement (Rules 4.4.2.1.E.2.a. and 5.02.2.B.); Academic Rules of Eligibility (Rules 14.3 – 14.11); and The Big Ten's GPA Requirement (Rule 14.7.C.2.)); Lent Decl., Ex. 81 (MAC_015569) at -850 (MAC missed-time policy); Lent Decl., Ex. 99 (SEC00038552) at -583 (SEC Bylaw 14.1.17 – Class Attendance Policies); Lent Decl., Ex. 79 (CUSA-GIA_00288174) at -182 (defining CUSA strategic goal of "pursu[ing] the highest levels of Academic Achievement"); Lent Decl., Ex. 59 (ACC-GIA045190) (listing ACC's commitments to academic success, including providing educational opportunities and ensuring "the integration of student-athletes into the general student-body, including safeguarding the ability of student-athletes to enjoy the same academic, social, and other developmental opportunities available to the general student population").

study labs, tutors, other academic programs, and other measures to enhance the academic success of student-athletes. Lent Decl., Ex. 42 (McNeely 30(b)(6) Dep.) 54:8-55:2.

This combination of rules and incentives is not just for show—NCAA student-athletes have achieved significant academic success.[6] For the class of students entering in 2008, the federal graduation rate for Division I student-athletes exceeded the graduation rate for all students. Lent Decl., Ex. 85 (NCAAGIA02690846) at -849; *see* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 2561:6-24 (noting that the graduation rates of student-athletes are "higher than their counterparts in the student body"). And between 1984 and 2008, the graduation rates for the sports directly at issue in this case increased significantly—men's basketball by 9 percentage points, FBS football by 14 percentage points, and women's basketball by 5 percentage points. Lent Decl., Ex. 85 (NCAAGIA02690846) at -867; *see also* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 2212:3-2213:9, 2559:11-14 (describing the increase in student-athlete graduation rates); *id.* 2311:4-2314:7 (graduation rates for student-athletes of Conference USA have been steadily improving). Student-athletes also have a significantly higher probability of obtaining at least a bachelor's degree than other college students, and basketball and FBS competitors either meet or exceed the success rate for non-athletes. *See* Lent Decl., Ex. 10 (Mar. 21, 2017 Expert Report of Prof. James J. Heckman ("Mar. 21 Heckman Rep.")) at 29, 35; *see also* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1493:13-1494:21. Most of these success-

[6] The public record reveals the same thing: The conferences widely advertise and promote their record of academic success, demonstrating that they view this success as bearing on consumer demand for collegiate athletics and provide recognition to student-athletes who excel academically. *See, e.g.*, Lent Decl., Ex. 102 (SEC00271829) (2012 SEC press release about the SEC's academic honor roll); Lent Decl., Ex. 103 (SEC00292780) (SEC promotional video); Lent Decl., Ex. 66 (BIGTEN-GIA 063769) (describing The Big Ten academic awards and honors); Lent Decl., Ex. 74 (BIGTEN-GIA 241584) at -586 (describing The Big Ten Medal of Honor); Lent Decl., Ex. 64 (BIGTEN-GIA 050514 at-15) (email describing The Big Ten Distinguished Scholar Award); Lent Decl., Ex. 67 (BIGTEN-GIA 063777) (The Big Ten press release on students recognized as Academic All-Big Ten Honorees); Lent Decl., Ex. 90 (PAC12GIA_00014468) (summarizing Pac-12 awards, including academic awards). Documents created independent of this litigation likewise reflect the emphasis that Defendants place on academic performance and values. *See* Lent Decl., Ex. 100 (SEC00098578) (survey listing academic success as a prominent "Characteristic[] of the SEC Brand" and highlighting "the number of honor roll student-athletes," the "breadth" and "strengths" of academic offerings, and the degree to which institutions are "preparing . . . student[s] for life after college" as facts to be promoted).

es are due to the hard work and determination of student-athletes—but even Plaintiffs admit that they have benefited from the supports and incentives provided by the NCAA's member institutions. *See, e.g.*, Lent Decl., Ex. 16 (May 12, 2016 Dep. of Shawne Alston ("Alston Dep.")) 57:11-58:15 (named Plaintiff met with a tutor every day during his freshman year in addition to meeting with an academic advisor); Lent Decl., Ex. 30 (Jenkins Dep.) 285:15-286:11 (named Plaintiff agreeing he received helpful academic support); Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1073:11-1074:10 (testimony from plaintiff Chase Garnham that he was proud to have obtained a diploma and a "good education" from Vanderbilt); *id.* 574:25-575:9 (testimony of plaintiff Tyrone Prothro that he aimed to get a good education at Alabama).

Even one of Plaintiffs' economic experts in this case agrees that the effectiveness of these rules at integrating academics and athletics would be altered if student-athletes were paid for athletic performance above the cost of attendance—whether on a salary basis, or per game, or per win. Dr. Lazear, one of Plaintiffs' experts, testified that student-athletes would put more effort into athletics if pay were offered. *See* Lent Decl., Ex. 32 (Aug. 17, 2017 Dep. of Edward P. Lazear ("Lazear Dep.")) 223:24-228:17 (admitting that, if student-athletes were paid more, "their incentive to play hard and stay on the [team] would be greater"); *id.* 82:12-21, 83:17-84:3, 90:18-25 (similar). And Defendants' experts testified to the same effect. *See* Lent Decl., Ex. 12 (May 16, 2017 Rebuttal Report of Kenneth G. Elzinga ("May 16 Elzinga Rep.")) at 52 (opining that if students were paid for their athletic participation, "students would have an incentive to focus their attention on athletics because that would become what they get paid to do"); Lent Decl., Ex. 27 (Aug. 18, 2017 Dep. of James J. Heckman ("Heckman Dep.")) 315:5-316:18 ("People respond to incentives," and if student-athletes were paid for performing their sport, it would divert their efforts "away from actually being students towards just being athletes.").

ARGUMENT

I. Summary Judgment Should Be Granted For Defendants Because *O'Bannon*'s Binding Precedent Precludes Plaintiffs' Claims.

Plaintiffs' motion mounts a broad-scale assault on more than 80 NCAA rules that is

completely foreclosed by the Ninth Circuit's decision in *O'Bannon*. Despite the Ninth's Circuit's ruling permitting them, Plaintiffs seek an injunction against the enforcement of any rules limiting athletically related financial aid to the cost of attendance or limiting the amounts of other benefits student-athletes receive. As noted above, under the regime Plaintiffs are pursuing, student-athletes could receive a salary, or pay per game or per win, or less than they currently receive (and for some, nothing at all)—free from any limitations imposed by the NCAA or the conferences acting in concert. *See* MSJ 4; *see also id.* App'x A (challenging conference rules). It is therefore unsurprising that Plaintiffs' primary target is the COA limit itself, *see id.* 8-11, which is the cornerstone of the NCAA's prohibition on pay-for-play. But *O'Bannon* forecloses that challenge, as this Court has recognized. *See In re NCAA Athletic GIA Cap Antitrust Litg.*, 2016 WL 4154855, at *2 (N.D. Cal. Aug. 5, 2016) (noting that *O'Bannon* "is binding on this Court," that it "limits the types of relief Plaintiffs may seek," and that it "forecloses one type of relief Plaintiffs *previously sought*, namely cash compensation untethered to educational expenses" (emphasis added)).

Given Plaintiffs' broader goal, they do not include in their motion any of the rule- or benefit-specific challenges they promised to bring when arguing at the hearing on Defendants' 12(c) motion. *See, e.g.*, Lent Decl., Ex. 9 (Aug. 2, 2016 Hearing Tr.) 25:17-25, 26:13-16, 27:9-14. But any such claims would fall short too, because the rules Plaintiffs challenge either were directly at issue in *O'Bannon* or are inextricably intertwined with the rules and principles that were. The Court should therefore grant summary judgment for Defendants on all of Plaintiffs' claims.

A. *O'Bannon* Forecloses Plaintiffs' Pay-For-Play Claims.

It is not often that recent published authority from a higher court directly addresses a nearly identical challenge by essentially the same classes—but that is the case here. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("[C]aselaw on point *is* the law."). In *O'Bannon*, the Ninth Circuit held that the NCAA's financial aid and compensation rules promote competition in two ways: by "integrating academics with athletics, and preserving the popularity of the NCAA's product by promoting its current understanding of amateur-

ism." *O'Bannon*, 802 F.3d at 1073; *see also id.* at 1076 ("Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits."). The Ninth Circuit also ruled that courts must not "micromanage organizational rules" or "strike down largely beneficial market restraints with impunity," because the NCAA must have "ample latitude" to create rules to govern college sports and maintain the standard of amateurism. *Id.* at 1074-75, 1079; *see also Bd. of Regents*, 468 U.S. at 120. Most importantly, the Ninth Circuit held that the NCAA need not allow colleges to provide student-athletes with compensation above the cost of attendance. *See O'Bannon*, 802 F.3d at 1079 ("The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. *It does not require more.*") (emphasis added). Indeed, the Ninth Circuit concluded that the antitrust laws do not require the NCAA to place even $5,000 of additional money in trust for student-athletes, because that alternative would not be "*equally* effective in promoting amateurism and preserving consumer demand." *Id.* at 1076; *see id.* ("[N]ot paying student-athletes is precisely what makes them amateurs," and "paying students cash compensation would [not] promote amateurism as effectively as not paying them.").

As the Court explained:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status.

Id. at 1078-79 (quoting *Bd. of Regents*, 468 U.S. at 101-02) (footnote omitted).

These rulings necessarily foreclose Plaintiffs' claims as a matter of *stare decisis*. "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 804 n.4 (9th Cir. 2012) (internal quotation marks omitted); *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc) (same).

Here, the *O'Bannon* panel "resolve[d]," *see Alcoa, Inc.*, 698 F.3d at 804 n.4, that promoting amateurism and integrating academics with athletics are procompetitive justifications, *O'Bannon*, 802 F.3d at 1073, 1076. That necessarily precludes Plaintiffs' efforts to claim that those justifications are either "non-economic" or "legally irrelevant." *See, e.g.*, MSJ 1, 4. Likewise, *O'Bannon*'s holding that the Sherman Act does not require payments of $5,000 above COA necessarily forecloses Plaintiffs' efforts to obtain *unlimited* compensation and benefits. *See* 802 F.3d at 1079.

This Court has recognized that *O'Bannon* precludes Plaintiffs' pay-for-play claims. *See In re NCAA Athletic GIA Cap Antitrust Litg.*, 2016 WL 4154855, at *2 (noting that *O'Bannon* "is binding on this Court" and that it "limits the types of relief Plaintiffs may seek"); *see also* Lent Decl., Ex. 9 (Aug. 2, 2016 Hearing Tr.) 8:16-21 ("I think we could say it's pretty clear that, at least in the Ninth Circuit, money untethered to educational expenses paid on top of cost of attendance can't be required."); *id.* 21:1-3 ("[T]he Ninth Circuit has said that payment above cost of attendance untethered to educational expenses can't be ordered."); *id.* 22:13-14 ("[C]ertain things have been decided in the circuit, and I can't re-hear those things."). The Court has also correctly acknowledged that it is irrelevant that Plaintiffs might have litigated *O'Bannon* differently, or that this case may involve some different parties: "Even if they were decided in a case that wasn't tried as you might have tried it, it was tried and it's the law." Lent Decl., Ex. 9 (Aug. 2, 2016 Hearing Tr.) 20:20-21; *see id.* 27:4-8 ("[T]here's stare decisis in the sense that there's case law that applies to facts. And unless there's some meaningful distinction between women basketball players and men basketball players, that case law would apply to women just as it would to men."). Indeed, "*[s]tare decisis* would be largely meaningless if a lower court could change an appellate court's interpretation of the law based only on a new argument." *Rambus Inc. v. Hynix Semiconductor Inc.*, 569 F. Supp. 2d 946, 972 (N.D. Cal. 2008).

Two other doctrines compel the same conclusion. First, Plaintiffs' pay-for-play claims are foreclosed under *res judicata* principles, because all three elements of that doctrine are satisfied. It is undisputed that *O'Bannon* ended in "a final judgment on the merits."

Stratosphere Litig. L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137, 1143 n.3 (9th Cir. 2002) (internal citation omitted). Plaintiffs' claims are "identical" to those raised in *O'Bannon*. *See Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (detailing the elements of claim identity) (internal citation omitted). These cases arise out of the same transactional nucleus of facts (the NCAA Bylaws restricting compensation and benefits), and they involve the alleged infringement of the same rights.[7] *See O'Bannon*, 802 F.3d at 1052 ("The question presented in this momentous case is whether the NCAA's rules are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade."). Plaintiffs are not raising any antitrust challenges to the NCAA Bylaws that could not have been raised in *O'Bannon*, and even admit that "the evidence of Defendants' agreements—memorialized in Bylaws—*is the same evidence* of a 'contract, combination, or conspiracy' held sufficient in *O'Bannon*." MSJ 4-5 (quoting *O'Bannon*, 802 F.3d at 1070-72 (emphasis added)). The rights established in *O'Bannon* would thus be destroyed if Plaintiffs' challenge succeeded.

In addition, there is "privity" between the relevant parties in *O'Bannon* and here. *Stratosphere*, 298 F.3d at 1142 n.3 (internal citation omitted). For purposes of the *O'Bannon* litigation,[8] the NCAA was in privity with its member Conference Defendants. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003). For Plaintiffs, most of the male athletes here were class members in *O'Bannon*, and the remaining class members were completely aligned in interest with Plaintiffs in *O'Bannon*, who understood they were acting in a representative capacity on behalf of future student-athletes by seeking prospective injunctive relief with respect to the NCAA's compensation rules.[9] Moreover, this Court in *O'Bannon* took special care to protect the interests

[7] As set forth in Part II, *infra*, there have been no material factual developments since the *O'Bannon* trial other than the implementation of the relief ordered in *O'Bannon*.

[8] Defendant Conferences and the NCAA expressly reserve all rights to contest whether they are in privity with respect to any other litigation. *See FTC v. Garvey*, 383 F.3d 891, 897 (9th Cir. 2004) ("Privity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases." (internal citation and quotation marks omitted)).

[9] *See Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (nonparty preclusion can apply where the non-party to the prior litigation was "adequately represented by someone with the same in- *(cont'd)*

of future student-athletes, awarding injunctive relief to prospective, as well as current and former, FBS football and Division I men's basketball players beginning nearly a year after the issuance of the Court's injunctive order. *See Taylor*, 553 U.S. at 900 (noting that alignment of interests, understanding of representative capacity, and procedural safeguards are among factors that justify nonparty preclusion).

Plaintiffs' claims are likewise foreclosed under collateral estoppel principles. As just explained, *O'Bannon* ended in a final judgment on the merits, and the Plaintiffs were either parties in *O'Bannon* or in privity with such parties. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008). The key issue that was both fully litigated and decided in *O'Bannon*—whether the "[Rule of Reason] require[s] more" than COA, 802 F.3d at 1079—is the very issue Plaintiffs wish to relitigate now. *Kendall*, 518 F.3d at 1050. The *O'Bannon* plaintiffs also exhaustively litigated (1) whether the NCAA's limits on financial aid and benefits promoted procompetitive objectives, and (2) whether less restrictive alternatives existed that would be equally effective at preserving amateurism as the NCAA's current rules limiting athletics-based financial aid to the cost of attendance. The Ninth Circuit conclusively resolved these issues in Defendants' favor. 802 F.3d at 1076, 1079 & n.25.

As with *stare decisis*, it would be irrelevant to the application of these doctrines even if this case contained "new and undisputed evidence" (though it does not). *See supra* at 7-8; *infra* at 28-30. A party cannot reopen a judgment if the arguments or evidence it seeks to present "could have been brought" earlier. *Tahoe-Sierra*, 322 F.3d at 1077-78 (*res judicata*). It is likewise irrelevant that a party has "additional evidence that might lead a trier-of-fact to a different result." *United States v. Weems*, 49 F.3d 528, 533 (9th Cir. 1995) (collateral estoppel); *see also Kamilche Co. v. United States*, 53 F.3d 1059, 1063 (9th Cir. 1995) ("[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular

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terests who [wa]s a party to the suit"); *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011) (describing privity as "'a flexible concept dependent on the particular relationship between the parties in each individual set of cases'") (quoting *Tahoe–Sierra*, 322 F.3d at 1081-82).

arguments raised in support of it in the first case.") (internal citation omitted) (emphasis in original). Were it otherwise, then no matter how many times a court found that a certain rule was procompetitive, a new set of plaintiffs could argue that the supposedly "new facts" in a "new record" compelled a different factual finding. These preclusion doctrines prevent that kind of repetitive litigation in the interest of finality and efficiency. *See, e.g.*, *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (*res judicata* and collateral estoppel "conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions").

In sum, whether considered through *stare decisis*, *res judicata*, or collateral estoppel, *O'Bannon* precludes Plaintiffs' effort to obtain compensation above COA. The precise legal nomenclature is less important than the clear bottom line: In seeking unlimited compensation for student-athletes, Plaintiffs are asking this Court to do something the Ninth Circuit already held the antitrust laws do not require. *O'Bannon*, 802 F.3d at 1079. Summary judgment for Defendants therefore is warranted.

B. *O'Bannon* Necessarily Resolves Any Rule-Specific Challenges Plaintiffs Have Brought.

Plaintiffs' arguments for avoiding Defendants' earlier motion for judgment on the pleadings based on *O'Bannon* have proved illusory. Having been confronted with *O'Bannon*'s preclusive impact, one would have expected Plaintiffs to tailor their lawsuits and target specific NCAA rules limiting particular benefits student-athletes may or may not already receive. *See, e.g.*, Lent Decl., Ex. 9 (Aug. 2, 2016 Hearing Tr.) 33:6-21 (Plaintiffs arguing that "[t]here's a whole group of rules that limit the schools from giving anything to the athletes other than the [grant-in-aid (GIA)] and we think there's a whole host of things the athletes could get tethered to education which are prohibited by those rules"). But Plaintiffs have not presented such arguments in their summary judgment filing. Instead, they included an appendix listing over *80* "Challenged Rules" they seek to enjoin.[10] MSJ 4 n.2 & App'x A.

[10] This lengthy appendix is not properly before the Court. *See, e.g.*, *Jonna Corp. v. City of Sunnyvale*, 2017 WL 2617983, at *2 n.4 (N.D. Cal. June 16, 2017) (striking plaintiff's ap- *(cont'd)*

Nor do they make any effort to explain how each of the identified rules, or even groups of these rules, purportedly violate the antitrust laws in any way not previously adjudicated in *O'Bannon*. These facts underscore that Plaintiffs are not seeking to challenge particular rules or obtain particular benefits, but want to undo *O'Bannon* and invalidate the system as a whole.

Moreover, any rule-specific challenges would fail under *O'Bannon*. To begin, more than a third of the challenged rules define and preserve the regime that *O'Bannon* already upheld.[11] *See* 802 F.3d at 1076-79 (explaining "that not paying student-athletes is *precisely what makes them amateurs*"). With the GIA cap now set at the federally defined cost of attendance (as "require[d]" by *O'Bannon*, *id.* at 1079), there is no doubt that the specific by-laws relating to that cap and the calculation of cost of attendance[12] are permissible.

The second set of challenged rules relates to the organization, structure, and operation

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pendix as "argument in excess of the page limit set forth by the Civil Local Rules"); *Todd v. Tempur-Sealy Int'l, Inc.*, 2016 WL 5746364, at *4 n.3 (N.D. Cal. Sept. 30, 2016) (finding that appendix was nothing "other than an unsubtle vehicle for deliberately circumventing the page limits imposed on the parties' briefing").

[11] *See, e.g.*, Lent Decl., Ex. 1 (NCAA Bylaws) §§ 12.01 ("General Principles"), 12.01.1 (setting forth, inter alia, the requirement that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport"), 12.01.4 (providing that a permissible grant-in-aid "is not considered to be pay or the promise of pay for athletics skill"), 12.1.2 (setting out conditions by which "[a]n individual loses amateur status and thus shall not be eligible for intercollegiate competition"), 12.1.2.1 ("Prohibited Forms of Pay"), 12.1.2.2 (establishing, inter alia, that an individual who participates in an athletic competition for pay loses eligibility), 13.2.1 (limiting what Plaintiffs call "monetary remuneration," MSJ App'x A, to prospective student-athletes and their friends/relatives), 13.2.1.1 (same), 15.01.2 (declaring that a student-athlete who receives impermissible financial aid is not eligible for intercollegiate athletics).

[12] *See* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 15.02.5 ("Full Grant-in-Aid," defining a full grant-in-aid as the federally calculated cost of attendance), 15.1 ("Maximum Limit on Financial Aid—Individual," making student-athletes ineligible if they receive financial aid that exceeds cost of attendance), 15.02.2 ("Cost of Attendance," mandating that individual institutions calculate cost of attendance "using federal regulations"), 15.02.2.1 ("Calculation of Cost of Attendance," requiring that schools "must calculate the cost of attendance for student-athletes in accordance with policies and procedures used for students in general"), 15.2.4 ("Other Expenses Related to Attendance"), 15.1.2 ("Types of Aid Included in Limit"), 15.1.3 ("Reduction When Excess Aid Is Awarded"), 15.2.5 ("Government Grants"), 15.01.1.1 (generally restricting institutions to provide financial aid *to attend that institution*).

of the NCAA itself—an issue that was for all intents and purposes adjudicated in *O'Bannon*. For example, Plaintiffs challenge such basic requirements as those mandating that student-athletes "meet all eligibility requirements of the member institution(s), the athletics conference(s) involved and the NCAA," Lent Decl., Ex. 1 (NCAA Bylaws) § 3.1.2.4, and that member institutions operate their athletics programs "in accordance with the constitution, bylaws and other legislation of the [NCAA]," *id* at §§ 3.2.1.2, 3.2.4.1.[13] Plaintiffs' list also includes a number of generally applicable Bylaws regarding NCAA disciplinary standards and penalties for rules violations.[14] These existential attacks on the NCAA must be foreclosed by *O'Bannon*, given that an implied (but core) premise of that ruling was that the NCAA is permitted to exist, and to set and enforce its rules. *See, e.g.*, 802 F.3d at 1079 (acknowledging "the Supreme Court's admonition that we must afford the NCAA 'ample latitude' to superintend college athletics") (quoting *Bd. of Regents*, 468 U.S. at 120). The Supreme Court made the same point explicitly in *Board of Regents*, when it observed that "the NCAA seeks to market a particular brand of football—college football," and "the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed." 468 U.S. at 101-02. Plaintiffs offer no effort to distinguish these precedents, or any explanation of how these organizational rules could possibly constitute violations of the federal antitrust laws in and of themselves.[15]

[13] *See also* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 1.3.2 (obligating member institutions "to apply and enforce [NCAA] legislation"), 5.01.1 (requiring that NCAA legislation be adopted consistent with the NCAA Constitution); App'x A at 2-4 (listing similar Conference-level rules). Plaintiffs' "Challenged Rules" also include certain Bylaws relating to "Areas of Autonomy" for five of the Conference Defendants. *See id.* at ¶¶ 5.3.2.1.2(e)-(g).

[14] *See* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 2.8.3 ("Penalty for Noncompliance"), 3.2.4.10 ("Discipline of Members"), 3.2.5 *et seq.* ("Loss of Active Membership"), 3.2.6 *et seq.* ("Discipline of Active Members"), 3.3.5 *et seq.* ("Loss of Member-Conference Status"), 3.3.6 *et seq.* ("Discipline of Member Conferences"), 19.01.2 ("Accountability"), 19.01.4 ("Penalty Structure"), 19.3.6 ("Authority and Duties of Committee").

[15] And thus any such arguments are waived. *See, e.g., McNaboe v. Safeway Inc.*, 2016 WL 80553, at *4 (N.D. Cal. Jan. 7, 2017) ("It is well-settled in this Circuit that '[a]rguments made in passing and inadequately briefed are waived.'") (quoting *Maldonado v. Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009)).

Finally, Plaintiffs' challenge to a handful of rules from Article 16, which generally governs "Awards, Benefits and Expenses for Enrolled Student-Athletes," likewise fails under *O'Bannon*.[16] These rules govern the items schools can provide to student-athletes as part of their participation in athletics. As explained above, these rules, as well as evidence of what they permit and foreclose, were part of the record in *O'Bannon*. *See, e.g.*, Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1119:14-19 (introducing into evidence "Plaintiffs' Exhibit 2340," the "NCAA's Division I Manual for 2013 and 2014"); *see also supra* at 8-9 (discussing evidence from *O'Bannon*). More importantly, enjoining these rules would effectively vitiate the *O'Bannon* decision by permitting all kinds of easy end-runs around the prohibition on pay-for-play the Ninth Circuit upheld.

A few examples illustrate the point. Bylaw 16.02.3—which Plaintiffs challenge—prohibits schools from giving an "extra benefit" to a student-athlete or his or her family. Lent Decl., Ex. 1 (NCAA Bylaws) § 16.02.3. If this rule were enjoined, a school could formally offer a student-athlete direct financial aid up to COA, but then tack on an "enrollment gift" of substantial value and thus exceed COA. Similarly, Bylaw 16.1.4 (also challenged by Plaintiffs) restricts the type of "awards" that schools may bestow upon student-athletes. Without that rule, a school could comply with the COA limitation on direct financial aid, but then give student-athletes the same $5,000 cash payment struck down in *O'Bannon* in the form a cash "award" for attending practice. It is hard to imagine that the Ninth Circuit in *O'Bannon* meant to leave open such easy work-arounds of the regime it broadly upheld—especially given that both it and this Court had evidence of these benefits rules and how they are applied. If the *O'Bannon*-sanctioned COA regime is to have any practical viability, the NCAA must be free to enforce rules that prevent schools from using creative labels to exceed the COA limit. The NCAA is therefore entitled to summary judgment on these rules as well.

[16] *See* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 16.02.2 (defining "excessive expense"); 16.02.3 (defining "extra benefit"), 16.02.5 (articulating that the "receipt of funds, awards, or benefits not permitted by governing legislation [of the NCAA]" constitutes "pay"), 16.1.4 *et seq.* (enumerating permissible awards a student-athlete may receive), 16.11.2.1 ("General Rule" regarding "extra benefit[s]").

Further, the NCAA enjoys "ample latitude to superintend college athletics"—latitude that should not be constrained or second-guessed by Plaintiffs using "antitrust law to make marginal adjustments to broadly reasonable market restraints." *O'Bannon*, 802 F.3d at 1074-75; *see Bd. of Regents*, 468 U.S. at 120 (noting the "ample latitude" the NCAA must be afforded given the "critical role" it plays in college sports). Even if Plaintiffs had chosen to quibble with where the NCAA membership has drawn the line with respect to certain benefits rules, such quibbles are not for antitrust courts to resolve.

In the end, the sheer breadth of NCAA rules challenged by Plaintiffs, and the arguments they make in support of those challenges, belie any suggestion that they intended this litigation to narrowly focus on particular rules. And Plaintiffs' request for elimination of *Conference*-specific rules prohibiting any limitations on financial aid, *see* MSJ App'x A, underscores their unwillingness to accept any meaningful restriction on compensation for college athletes, and the hollowness of their suggestion that "Conferences or schools" could "enact new rules" if Plaintiffs prevail here, MSJ 4. Plaintiffs want a system in which some student-athletes can receive compensation above COA and others less. *See* MSJ 4. That relief is foreclosed by *O'Bannon*.

II. Plaintiffs' Motion For Summary Judgment Should Be Denied Because It Ignores Binding Precedent And Record Evidence.

Plaintiffs' request for summary judgment involves a series of efforts to sidestep *O'Bannon* based on a spate of supposedly "new and undisputed evidence" establishing that the NCAA's restrictions on compensation and benefits are anticompetitive. Those efforts fail at every step. Virtually all of the evidence and arguments Plaintiffs raise were presented in *O'Bannon*. The Ninth Circuit nevertheless held that the antitrust laws foreclosed the plaintiffs' efforts to obtain additional payments for athletic performance. There is no basis for a different outcome here.

Moreover, the record evidence in this case, standing on its own, establishes that the challenged rules are procompetitive. Even if *O'Bannon*'s rulings did not directly foreclose Plaintiffs' claims, that evidence compels the same conclusions. Plaintiffs' request for sum-

mary judgment should be denied.

A. The NCAA's Financial Aid Rules Are Fully Consistent With The NCAA's Longstanding Principle Of Treating Student-Athletes As Amateurs.

O'Bannon upheld the NCAA's rules permitting schools to offer scholarships set at COA, but no higher, to student-athletes. Against that backdrop, Plaintiffs' challenge to "Defendants' Post-*O'Bannon* 'Cost of Attendance' Rules" makes no sense. Those rules—and the Ninth Circuit's decision to uphold them—did not represent a post-*O'Bannon* "natural experiment" to test whether increased financial aid "would destroy consumer demand," subject to further revisions through relitigation. MSJ 3. Instead, the Ninth Circuit's holding that those rules are all that the antitrust laws require is binding precedent that controls the outcome of this case.

The foregoing analysis is enough to resolve this challenge, but Plaintiffs' efforts to undermine *O'Bannon*'s holding regarding COA scholarships also ignore both basic logic and the factual record. For starters, Plaintiffs' suggestion that cash payments above COA should be permitted because scholarships tied to COA have not affected consumer demand is a non-sequitur. *See* MSJ 13. In *O'Bannon*, the Ninth Circuit concluded that permitting scholarships up to COA was a "substantially less restrictive alternative" that was "virtually as effective" in protecting amateurism, and thus consumer demand, as "the NCAA's [then-]current rules" setting scholarships at a lower amount. 802 F.3d at 1074. Even if (as Plaintiffs insist) consumer demand has remained constant after the small change to COA, that fact would simply confirm the wisdom of the Ninth Circuit's holding on that issue—not suggest that the time has come to adopt a further and more drastic step that the Ninth Circuit expressly rejected. Any consistency of consumer demand would also be unsurprising, because both the previous GIA limitation and COA are intended to cover "'legitimate costs' to attend school," *id.* at 1075, and thus reflect the same underlying principles.[17]

[17] Because *O'Bannon* held that providing scholarships up to the cost of attendance promotes consumer demand as well as the NCAA's previous limit, there is no need for Defendants to once again "come forward with . . . evidence" that their "compensation rules promote con- *(cont'd)*

Similarly, Plaintiffs' claim that COA payments themselves constitute cash payments untethered to education that vary from school to school, MSJ 10, is flawed in multiple respects. The first is that the Ninth Circuit already held that cost of attendance payments represent the "'legitimate costs' to attend school," *O'Bannon*, 802 F.3d at 1075, a fact that Plaintiffs cannot reasonably dispute. As the court observed, the cost of attendance is a financial metric, established by federal regulation, that measures expenses associated with college attendance, including "tuition and fees, room and board, []required course-related books," "[nonrequired] books and supplies," "transportation," and "other expenses related to attendance at the institution." *Id.* at 1054 & n.3; *see* 20 U.S.C. § 1087*ll*; Lent Decl., Ex. 1 (NCAA Bylaws) § 15.02.2. Because some of those expenses necessarily vary from school to school, the cost of attending schools naturally differs as well. *See, e.g.*, Lent Decl., Ex. 2 (Federal Student Aid Handbook, Vol. 3, Ch. 2) (allowing schools to "assess[] local housing costs" and take "periodic surveys of [the] student population" in order to determine the true COA for their students).

In addition, the fact that COA payments are often administered through lump-sum distributions (*see* MSJ 10) is both unsurprising and uncontroversial. COA encompasses many different expenses, from obvious ones like books and tuition to less obvious expenses like a computer and toothpaste. *See* 20 U.S.C. § 1087*ll*(2) (including "a reasonable allowance for the documented rental or purchase of a personal computer"). Some of these expenses might be things students would buy anyway, *see* Lent Decl., Ex. 47 (July 26, 2017 Dep. of Daniel A. Rascher ("Rascher Dep.")) 66:25-67:7 (challenging inclusion of toothpaste), but Congress has determined that they collectively represent what it costs to attend college today, *see* Lent Decl., Ex. 2 (Federal Student Aid Handbook, Vol. 3, Ch. 2) (COA is "an estimate of that student's educational expenses for the period of enrollment"). Because those expenses are so varied, institutions naturally decide to provide direct financial aid rather than engage in

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sumer demand." MSJ 12-13; *see O'Bannon*, 802 F.3d at 1074-79. But as explained below, there is ample evidence to that effect in the record. *See infra* at 40-46.

the arduous task of attempting to manage a complicated process of receipts and reimbursements for every single purchase of toothpaste or books.

The critical point is not that aid is provided through payment rather than reimbursement, but that institutions treat student-athletes the same as other students in calculating and administering COA. Aid must be calculated using the same "cost-of-attendance policies and procedures that are used for students in general." Lent Decl., Ex. 1 (NCAA Bylaws) § 15.02.2.1; *see id.* § 15.2.2 (similar for room and board). The actual amount of aid must be what "normally is incurred by students enrolled in a comparable program at that institution." *Id.* § 15.01.6. And the aid must be distributed in the same way. *See* Lent Decl., Ex. 5 (COA Q & A) (school must "distribute the money according to its individual financial aid policies"). These undisputed facts confirm what the Ninth Circuit already held: Providing cost of attendance aid to student-athletes does not constitute pay-for-play. *O'Bannon*, 802 F.3d at 1079.

Plaintiffs' complaint that Defendants "do not regulate or restrict how Class Members use their COA cash payments," and that such payments are often used for costs "untethered to their education," MSJ 10, is irrelevant for much the same reason. Colleges do not "regulate or restrict" how other students use their scholarship funds either, *see* Lent Decl., Ex. 5 (COA Q & A), but that does not mean that payments to those students are untethered to education or disguised cash compensation. And there is no basis for concluding that student-athletes are more in need of guidance and oversight than other students regarding the use of financial aid.

Plaintiffs' remaining (and cursory) argument that the COA limitation is underinclusive because it forecloses certain expenses that are allegedly tethered to education, *see* MSJ 11, only underscores Plaintiffs' desire to undo *O'Bannon*. Many of the purportedly educational benefits in Plaintiffs' Appendix B of "Benefits Not Allowed" are simply thinly disguised cash compensation to student-athletes for their continued participation in athletics—including cash payments of "up to $10,000" for maintaining academic eligibility or earning a degree while playing sports, "[s]upplemental compensation to replace the lost income" from

the time pressures of athletics and academics, and "[m]oney placed in trust" to be used for student-athletes' post-graduate living expenses. *Id.* App'x B. The inclusion of these entries on a list of "Benefits Tethered to Education" demonstrates the ease of disguising athletics-related cash compensation as an "educational" benefit. Limiting financial aid for student-athletes to the same federally regulated cost of attendance calculation used for all students helps avoid these kinds of abuses—in addition to being an outcome endorsed by *O'Bannon*. And as this Court has recognized, the fact that some of these proposed benefits may not have been presented in *O'Bannon* is immaterial. *See* Lent Decl., Ex. 9 (Aug. 2, 2016 Hearing Tr.) 20:20-21 ("Even if they were decided in a case that wasn't tried as you might have tried it, it was tried and it's the law.").

B. The NCAA's Longstanding Rules Permitting Student-Athletes To Receive Certain Awards, Benefits, And Reimbursements Related To Participation In Athletics Were Part Of The Record In *O'Bannon* And Reinforce The NCAA's Standard Of Amateurism.

The NCAA rules have long permitted student-athletes to receive certain non-cash items and reimbursements related to athletics. These items include, for example, obvious essentials of athletic competition, such as apparel, equipment, and reimbursement for the costs of attending tournaments or other competitive events. *See* MSJ 9. They also include modest, non-cash awards commemorating athletic participation, and reimbursement through the Student Assistance Fund for certain student-athlete expenses that may fall within gaps in NCAA rules. *Id.* 10-11. Within its "ample latitude to superintend college athletics," *O'Bannon*, 802 F.3d at 1079 (internal quotation marks omitted), the NCAA has periodically tweaked existing rules regarding these items and enacted new rules to address the evolving needs of student-athletes and the circumstances they face. But the NCAA has always sought to ensure that the items permitted do not undermine the tradition of amateurism in college sports, and so has limited the type and quantity of awards, benefits, goods, and reimbursements that student-athletes can receive.

Plaintiffs erroneously claim that these items constitute "new and undisputed evidence" that student-athletes already are paid for play "in excess of COA" through in-kind

payments "not related to the principle of amateurism" or education. MSJ 1-2. Plaintiffs are incorrect: These items were acknowledged by this Court in *O'Bannon*, and the NCAA's decision to permit them, within limits, does not subvert its commitment to amateurism or student-athlete integration. As noted above, *see supra* at 8-9, witnesses repeatedly testified about these benefits during the *O'Bannon* trial. *See* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 44:12-14 (testimony of Ed O'Bannon regarding academic tutoring he received at UCLA); *id.* 1393:25-1395:25 (testimony of Christine Plonsky, University of Texas Department of Athletics, regarding incidental benefits related to equipment, nutrition, travel expenses, and medical support services); *id.* 2146:6-2149:4 (testimony from Todd Petr, NCAA, regarding permissible uses of the Student Assistance Fund, including for "a special insurance policy"); *id.* 3161:5-3162:5 (testimony of Mark Lewis, NCAA, regarding academic tutors and advisors available to student-athletes). Plaintiffs' experts repeatedly highlighted these items as well, noting the types permitted and the amounts schools can spend on them. *See* Expert Report of Daniel Rascher ¶ 83 (*O'Bannon* Dist. Ct. Dkt., Case No. 4:09-cv-01967-CW, ECF No. 888-3) (Sept. 25, 2013) ("[T]he average FBS school spends tens of thousands of additional dollars per athlete" in "in-kind benefits."); Expert Report of Ellen Staurowsky (*O'Bannon* Dist. Ct. Dkt., Case No. 4:09-cv-01967-CW, ECF No. 898-20) (Sept. 25, 2013) at 51 (opining that basketball and football players receive awards and gifts up to $6,280); Lent Decl., Ex. 15 (*O'Bannon* Tr.) 908:16-909:14 (testimony of Daniel Rascher, describing gift cards student-athletes could receive for participating in football bowl games).

In addition, this Court noted that evidence in rendering its decisions. For example, in its summary judgment opinion, this Court highlighted exhibits to Roger Noll's expert report describing NCAA rules regarding many of the exact same items Plaintiffs claim are "new" here, MSJ 1, including awards and gifts that can be provided to tournament participants, reimbursements for travel for certain family members, and special insurance policies. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d at 1147–48; Expert Report on Liability of Roger G. Noll Ex. 1A (*O'Bannon* Dist. Ct. Dkt., Case No. 4:09-cv-01967-CW, ECF No. 898-15) (Sept. 25, 2013) (describing limits on gifts at bowl games,

championship per diems, and permissible uses of Student Assistance Fund). The Court also noted, in ruling on the merits, that certain "special financial need[s]," such as "'clothing, needed supplies, a computer,' or other academic needs" could be reimbursed through the Student Assistance Fund, and that such aid could go "beyond the cost of attendance." 7 F. Supp. 3d at 972 n.5 (citing Trial Ex. 2340 at 211). The Ninth Circuit was presented with this evidence on appeal. *See, e.g., O'Bannon* Appellee Br. (9th Cir., Case No. 14-16601, ECF No. 43-1) at 7 (discussing payment of certain travel expenses for family members); *id.* at 19 (highlighting testimony regarding gift cards provided to student-athletes who participate in bowl games). Yet the Ninth Circuit did not conclude that student-athletes are already receiving "*quid pro quo* for athletic services," MSJ 2, such that there is no justification for prohibiting pay-for-play. Just the opposite: The Ninth Circuit upheld the NCAA's decision to impose limits on the types of financial aid students can receive because "not paying student-athletes is *precisely what makes them amateurs*." *O'Bannon*, 802 F.3d at 1076.

In short, the linchpin of Plaintiffs' argument about this evidence is that it is "new and undisputed." MSJ 2 ("[T]he significance of the new evidence presented herein cannot be overstated."). But the record in *O'Bannon* proves otherwise. And if Plaintiffs are correct that these "participation benefits have not hurt consumer demand" post-*O'Bannon*, *id.*, that should not come as a surprise—these "benefits" were part of the system that *O'Bannon* upheld because it *promoted* consumer demand.[18]

There is also no basis for concluding that the NCAA's decision to permit student-athletes to receive these items, many of which are merely provision of or reimbursement for essentials of participation in college sports, somehow nullifies the prohibition on pay-for-play. Plaintiffs cannot credibly maintain that it is inconsistent with amateurism for schools to provide student-athletes with "apparel, equipment, and supplies," "contest entry fees and

[18] Plaintiffs also highlight irrelevant evidence that the NCAA permits student-athletes to accept payments from international sports federations for participation in Olympic and other international competitions. MSJ 11. Allowing payments relating to "outside athletic events implicates amateurism differently than allowing schools to pay student-[athletes] directly." *See O'Bannon*, 802 F.3d at 1077 n.21.

costs of facility usage," or *per diems* for meals while traveling for road games. *See id.* 9.[19] The other items Plaintiffs highlight are also consistent with amateurism and well within the NCAA's "ample latitude" for rulemaking. *O'Bannon*, 802 F.3d at 1079. For example, the NCAA permits student-athletes to receive certain forms of recognition for making it to post-season competition—such as limited gifts for participation in end-of-season tournaments, and reimbursement for family members to attend certain championship-level events. *See* MSJ 9-10. Cash awards are not permitted. Lent Decl., Ex. 1 (NCAA Bylaws) § 16.1.1.2. As explained in a synopsis of the NCAA rules prepared by Brad Hostetter, the ACC's Executive Associate Commissioner and Chief of Internal Affairs, the bylaws governing these gifts and awards "balance the preservation of the long-standing tradition in sport of bestowing gifts and awards for participation and commitment against the potential for abuse if there were no limits on the amounts of gifts or awards." Lent Decl., Ex. 13 (Hostetter Synopsis) at 10; *see id.* (noting that "awards structure is consistent with the tradition that varying levels of achievement . . . deserve their own recognition and reward"). Other than observing that these awards are permitted, Plaintiffs offer no argument as to why the NCAA's longstanding rules are inconsistent with amateurism, let alone any challenge to Mr. Hostetter's explanation of the rationale for these or any other rules.

Similarly, Plaintiffs miss the mark in underscoring the use of the Student Assistance Fund for reimbursement for so-called loss of value insurance, MSJ 10-11. That is just one type of expense reimbursable from the Fund, which exists to help student-athletes deal with certain expenses "that crop up in the course of being an athlete that are not covered by scholarship," Lent Decl., Ex. 46 (Price 30(b)(6) Dep.) 21:23-24, such as unexpected travel, *see* Lent Decl., Ex. 15 (*O'Bannon* Tr.) 2148:6-2149:4. Students apply for such reimbursements,

[19] Nor do Plaintiffs contest the NCAA members' decision to permit other "benefits" under the same Bylaw, such as tutoring and counseling services to help student-athletes complete their academic coursework. *See* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 16.3.1.1, 16.11.1.10. Plaintiffs' pick-and-choose approach only underscores that their arguments cannot be squared with the discretion the NCAA must receive in rulemaking. *O'Bannon*, 802 F.3d at 1079.

Lent Decl., Ex. 24 (Hartman Dep.) 126:3-127:6; Lent Decl., Ex. 26 (Mar. 3, 2015 Dep. of Nigel Hayes ("Hayes Dep.")) 88:6-90:4; schools must track them, Lent Decl., Ex. 54 (Dec. 8, 2016 Dep. of Jon A. Steinbrecher ("Steinbrecher 30(b)(6) Dep."), Ex. 530); and the NCAA regulates their use, Lent Decl., Ex. 58 (Dec. 1, 2016 Dep. of Bradford Traviolia ("Traviolia 30(b)(6) Dep.")) 118:9-120:9; *see* Lent Decl., Ex. 1 (NCAA Bylaws) § 16.11.1.8; *see also* Lent Decl., Ex. 13 (Hostetter Synopsis) at 16 (citing NCAA Bylaw § 16.11.1.8 and listing permissible uses). Indeed, many uses of the Student Assistance Fund represent situations that can likewise warrant an emergency grant under an institution's need-based financial aid policies. *See* Lent Decl., Ex. 31 (June 16, 2016 Dep. of Leo Lambert Dep. ("Lambert Dep.")) 113:3-114:9. Reimbursing for loss of value insurance is consistent with the purposes of the SAF and the NCAA's standard of amateurism—that insurance allows the limited number of student-athletes with prospects to play professionally to remain in school and continue to compete as an amateur for a longer period of time while mitigating the risks of a career-threatening injury, rather than having to leave college athletics and abandon its educational and physical benefits. Lent Decl., Ex. 13 (Hostetter Synopsis) at 12; *see* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 12.1.2.4.4, 16.11.1.4; Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 231:12-232:16; Lent Decl., Ex. 17 (Aresco Dep.) 195:23-196:17.

These items, separately and collectively, do not represent compensation "in excess of COA" provided "in exchange for participation in sports," MSJ 2—they are provided to *facilitate* student-athletes' efforts to meet the often demanding requirements of participation in Division I sports while also meeting the academic demands of college. Permitting these items, within limits, is therefore consistent with the NCAA's procompetitive goals of protecting amateurism and ensuring student-athlete integration, and well within its discretion to superintend amateur athletics. *O'Bannon*, 802 F.3d at 1077-79. But a world in which there are no limits on these items is one in which the cost of attendance limit upheld in *O'Bannon*, and the demand-preserving standard of amateurism that limit protects, would have no practical effect, because student-athletes easily could be converted from amateurs into professionals by being paid in kind (rather than cash). *See supra* at 23. As Mr. Hostetter noted, "[b]ecause

the basic prohibition against pay for play can be evaded by providing benefits in kind or inappropriate 'expense reimbursement,'" it is essential to "establish a line between benefits that are permissible and impermissible . . . to permit uniform enforcement of the rules and prevent abuses of the concept of amateurism." Lent Decl., Ex. 13 (Hostetter Synopsis) at 5.

The testimony of Kevin Lennon, the Vice President for Division I Governance at the NCAA, confirms that these rules are consistent with the NCAA's standard of amateurism, notwithstanding Plaintiffs' efforts to mischaracterize his testimony by quoting snippets of it out of context. Lennon distinguished the rules just discussed from what he called, as a technical matter, the "amateurism rules," which are limited to addressing the permissible sources and amount of direct financial aid. The rules regarding awards, benefits, and expenses may be "in a different category" from the rules prohibiting pay, Lent Decl., Ex. 34 (Jan. 24, 2017 Dep. of Kevin C. Lennon ("Lennon 30(b)(6) Dep.") 62:24-63:5, in the sense that they are separately located in the NCAA's rulebook and provided in kind, *see* Lent Decl., Ex. 1 (NCAA Bylaws) §§ 12, 16. But while Lennon testified that determining whether to allow schools to *provide* these items related to athletics may be "not related to the principle of amateurism" for those reasons, MSJ 2, he made clear that these items *must be restricted* in order for amateurism to have meaning. As he observed, "[t]here comes a point in time when, by continuing to provide incidental expense[s], you really are crossing over into a—a principle of amateurism or that the benefits simply are not appropriate." Lent Decl., Ex. 35 (Lennon Dep.) 63:17-22. For this reason, the NCAA rules regulating this second category "operat[e] within . . . the principle of amateurism."[20] Lent Decl., Ex. 34 (Lennon 30(b)(6) Dep.)

[20] Nor did Lennon more broadly erode the notion of amateurism or the NCAA's commitment to it. *See* MSJ 2. Lennon made clear at the beginning of his deposition that amateurism is "the bedrock of the collegiate model," Lent Decl., Ex. 34 (Lennon 30(b)(6) Dep.) 25:17-23, and a "fundamental historic principle . . . that distinguishes the collegiate model." *Id.* 47:1-4. And throughout his testimony, he confirmed that the NCAA's membership has a "*common understanding* that the principle of amateurism, as noted in [its] constitution, is an overarching value." *Id.* 270:6-12 (emphasis added); Lent Decl., Ex. 12 (May 16 Elzinga Rep., Ex. A ("Lennon Decl.")) ¶ 13 (stating that all NCAA rules are designed to "maximize student-athlete well-being and the overall educational experience, which is inclusive of athletics participation").

174:17-25; *see* Lent Decl., Ex. 12 (Lennon Decl.) ¶ 7 ("The measure of whether a particular benefit is consistent with and supportive of amateurism, and thus properly not considered pay, is inherent in every Division I rule that addresses these topics, regardless of whether the benefit is related to educational expenses or is incidental to athletics participation.").[21]

The upshot is that the headline of Plaintiffs' motion is misleading: The so-called "benefits incidental to participation" identified by Plaintiffs were part of the record in *O'Bannon*, and thus cannot justify setting aside that binding precedent. And in any event, those items, properly regulated, are consistent with and motivated by the same purposes as the rules that *O'Bannon* upheld.

C. Student-Athletes Are Both Students And Athletes.

Plaintiffs' argument that the NCAA is not really committed to its standard of amateurism because it does not ensure that "Class Members are students first, athletes second," MSJ 14 (emphasis removed), was likewise considered and rejected in *O'Bannon*. The plaintiffs in *O'Bannon* called an expert witness, Ellen Staurowsky, who testified at length about this exact point, using the exact same words Plaintiffs now recycle: "[W]hen we look at what supports th[e] assertion [that students are not professionals], the notion that *athletes are students first and athletes second*, what we really see . . . is we see that the enterprise really makes participants in the sports of football and men's basketball athletes first and students second." Lent Decl., Ex. 15 (*O'Bannon* Tr.) 1122:11-17 (emphasis added); *see also id.* 1073:1-4 (testimony from plaintiff Chase Garnham that he "was an athlete first, student sec-

[21] Plaintiffs wrongly claim that the Court should ignore this declaration because it represents an attempt by the NCAA to "disavow[] its own binding legal admissions." MSJ 23. The cases they cite, however, involved situations where a party attempted to *repudiate* the testimony of a 30(b)(6) witness—not clarify statements that the party (ultimately correctly) believed would be quoted misleadingly and out of context. *See Slot Speaker Techs., Inc. v. Apple, Inc.*, 2017 WL 386345, at *4 (N.D. Cal. Jan. 27, 2017) (rejecting effort to "de-designate" 30(b)(6) testimony); *AngioScore, Inc. v. TriReme Med., Inc.*, 2015 WL 4040388, at *23-24 (N.D. Cal. July 1, 2015) (noting that defendants could not "rebut the testimony of their Rule 30(b)(6) witness," and that the Ninth Circuit has not yet decided the binding effect of such testimony). Likewise, Plaintiffs' reference to the "sham affidavit rule" is equally inapplicable because Lennon's declaration is not "clear[ly] and unambiguous[ly]" inconsistent with his deposition testimony—it supports and clarifies it. *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009)).

ond"); MSJ 14-16. Despite these contentions—and the evidence the *O'Bannon* plaintiffs introduced to try to support them—this Court concluded that the NCAA's pay-for-play prohibition does promote amateurism, as well as the integration of "student athletes into the academic communities of their schools." 7 F. Supp. 3d at 980; *see O'Bannon*, 802 F.3d at 1072.

The record in this case once again refutes Plaintiffs' baseless argument. As noted above, Defendants require student-athletes to meet specific academic standards, penalize noncompliance, and attempt to incentivize and reward success. *See supra* at 11-12. The prohibition on pay-for-play does not stand apart from these academic rules—it works hand in glove with them to ensure that student-athletes can meaningfully participate in the academic life of their schools rather than serving as paid entertainers. *O'Bannon*, 7 F. Supp. 3d at 980. And these rules have in fact worked to improve academic outcomes over time. *See supra* at 13 (noting improved graduation rates for student-athletes and their success in obtaining degrees). Indeed, even some of the handful of student-athletes who turn professional return to school to complete their degree—a development that would be unexpected if they merely attended college as a way station to their future professional athletic career. *See, e.g.*, Lent Decl., Ex. 15 (*O'Bannon* Tr.) 11:2-13 (testimony from Ed O'Bannon that he went back to UCLA to complete his degree after turning professional).

Plaintiffs' few cherry-picked facts regarding academics provide no basis for concluding that Defendants "care far more about maximizing revenues" than maintaining a focus on education as part of the standard of amateurism. MSJ 14. Plaintiffs assert, for example, that student-athletes identify as athletes first, *id.* 14-15, but that is unsurprising: It is common for college students to identify with the extracurriculars they love—such as the newspaper, the debate society, or athletics—but that does not mean they are not students as well. Lent Decl., Ex. 34 (Lennon 30(b)(6) Dep.) 248:3-8 ("[M]ost young people, when they have a passion, identify themselves with that passion first and foremost."). Indeed, the majority of athletes in *all* NCAA sports—across all Divisions—identified primarily as athletes in the survey cited by Plaintiffs, yet Plaintiffs cannot seriously contend that Division II and Division III student-athletes are exploited to maximize revenues. *See* Lent Decl., Ex. 39 (June 29, 2016 Dep. of

Bernie Machen ("Machen Dep.")), Ex. 102) at 13-15.

It is likewise true, but unsurprising, that student-athletes face challenging time demands, MSJ 15. Excelling in college is hard; excelling in college while also competing in elite-level athletics is harder. But that is part of what makes being a student-athlete a rewarding experience—students learn to balance competing and difficult demands. Plaintiffs quote Oliver Luck, the NCAA's Executive Vice President of Regulatory Affairs, as saying that "a lot of the time spent [on athletics] falls outside" the time limits on athletic participation, *id.*, but ignore the context: "[A]ll . . . sorts of things fall outside of those 20 hours. Good students use those opportunities to study." Lent Decl., Ex. 37 (Nov. 22, 2016 Dep. of Oliver Luck ("Luck Dep.")) 83:4-20. And Defendants work to assist student-athletes in learning to strike the right balance for themselves, by conducting surveys of the student-athlete experience and considering changes based on the feedback they receive. *See, e.g.*, Kessler Decl., Ex. 66 (Pac-12 Report on Student-Athlete Time Demands) at 6, 17 (noting that student-athletes are "generally satisfied with their collegiate experience," and providing that new rules and best practices should aim to "prioritize academic demands," "manage expectations of future time demands for prospective student-athletes," and "make schedules more transparent and effectively communicated"); Lent Decl., Ex. 86 (NCAAGIA02739639) at -642-47, -654-63 (GOALS Survey). [22]

Similarly, it is true that television broadcast contracts reflect intense consumer demand for college sports. *See* MSJ 15. But it is also true that on those broadcasts, conferences advertise the academic success of their student-athletes because they believe in the im-

[22] Plaintiffs misleadingly claim that the NCAA "disclaims any 'duty to ensure the quality of the education' athletes receive." MSJ 16. The document they cite in support is the NCAA's motion to dismiss a complaint alleging that the NCAA breached legal and fiduciary duties in failing to prevent academic fraud by the University of North Carolina. Mem. ISO Def.'s Mot. to Dismiss at 7, *McCants v. Univ. of N.C. at Chapel Hill*, No. 1:15-CV-176 (M.D.N.C. Mar. 30, 2015), ECF No. 21. Whether the NCAA has a *legal duty* to protect students from fraud is completely distinct from the issue whether the NCAA promotes and cares about the academic success of student-athletes. Similarly, Plaintiffs cite the decision of an NLRB regional director allegedly establishing that Defendants' limitations on time for athletics are illusory, MSJ 15 n.30, but fail to mention that the NLRB unanimously declined to assert jurisdiction over that case. *See Nw. Univ. & CAPA*, 362 N.L.R.B. 167 (2015).

portance of student-athletes being students. *See supra* at 13 n.6; *infra* at 45-46 and n.26. It follows, then, that Defendants take academics into account when creating game schedules—rather than having "surrender[ed] control over scheduling games to broadcasters." MSJ 15. The conferences consider student-athletes' academic calendars when determining game and championship schedules, as does the NCAA. Lent Decl., Ex. 52 (Nov. 10, 2016 Dep. of Michael Slive ("Slive Dep.")) 57:10-25; Lent Decl., Ex. 48 (Oct. 26, 2016 Dep. of Gregory Sankey ("Sankey 30(b)(6) Dep.")) 91:2-92:16; Lent Decl., Ex. 57 (Dec. 9, 2016 Dep. of Craig D. Thompson ("Thompson 30(b)(6) Dep.")) 109:20-110:22; Lent Decl., Ex. 28 (Dec. 9, 2016 Dep. of Carolayne Henry ("Henry 30(b)(6) Dep.")) 48:5-49:15; Lent Decl., Ex. 55 (Jan. 24-25, 2017 Dep. of John Swofford ("Swofford 30(b)(6) Dep.")) 172:15-173:7; Lent Decl., Ex. 40 (Dec. 9, 2016 Dep. of Judy MacLeod ("MacLeod 30(b)(6) Dep.")) 153:12-20, 154:3-14, 219:8-16; Lent Decl., Ex. 17 (Aresco Dep.) 63:10-24; Lent Decl., Ex. 37 (Luck Dep.) 88:5-89:8, 91:18-92:16. They also solicit input from faculty members regarding how changes to the schedule would affect academics. *See* Lent Decl., Ex. 65 (BIGTEN-GIA 063386) at -431-32, -441-42 (2015-16 Big Ten Handbook, Rules 4.4.2.1.E.2.a. and 5.02.2.B, rules requiring consideration of Student Athlete Impact Statements from faculty representatives); Lent Decl., Ex. 62 (BIGTEN-GIA 000664) at -668, -672-84 (considering impact statements); *see also* Lent Decl., Ex. 49 (Sankey Dep.) 28:14-20 (discussing scheduling policies with faculty athletics representatives).

There are also strict limits on broadcasters' input into schedules. Lent Decl., Ex. 19 (Dec. 8, 2016 Dep. of David Berst ("Berst Dep.")) 150:16-151:12 (testifying that agreements between conferences and broadcast partners provide limits on broadcasters' input on scheduling); Lent Decl., Ex. 57 (Thompson 30(b)(6) Dep.) 109:20-110:22, 144:8-24 (testifying that broadcast partners can make scheduling requests but that the Mountain West Conference has full control over the schedule). Indeed, Defendants have testified that despite the intense consumer demand reflected in broadcast deals, Defendants sometimes forgo additional revenues to the extent scheduling games would be unduly disruptive to student-athletes' academic commitments. *See, e.g.*, *id.*144:8-24 (testifying that the Mountain West turned down mil-

lions of dollars for a broadcast deal that required the conference to schedule a certain number of midweek games).[23]

The more fundamental point, however, is that Plaintiffs' proposed alteration to the current regime would reduce rather than enhance the incentives to maintain a balance between academics and athletics. Plaintiffs' own expert confirms the point. At his deposition, Dr. Lazear repeatedly testified that student-athletes would put more effort into athletics if pay were offered. Lent Decl., Ex. 32 (Lazear Dep.) 82:12-21, 83:17-84:3, 90:18-25, 223:24-225:13; *see also* Lent Decl., Ex. 12 (May 16 Elzinga Rep.) at 52 (opining that if students were paid for their athletic participation, "students would have an incentive to focus their attention on athletics because that would become what they get paid to do"). That system—unlike the current one—would have no meaningful limitations to discourage student-athletes from "devot[ing] themselves to generating billions of dollars in revenues for their respective sports at the expense of their academic and collegiate experience." MSJ 3.

[23] Recent changes in conference composition do not represent an effort to subordinate academics to athletics. *See* MSJ 16. In addition to financial considerations, the conferences also weighed the academic profile of potential new members and their geography. *See* Lent Decl., Ex. 52 (Slive Dep.) 81:23-85:14; Lent Decl., Ex. 57 (Thompson 30(b)(6) Dep.) 71:8-72:18; Lent Decl., Ex. 38 (Machen Dep.) 82:18-84:12; Lent Decl., Ex. 21 (Aug. 17, 2016 Dep. of David Brandon ("Brandon Dep.")) 106:9-107:13; Lent Decl., Ex. 73 (BIGTEN-GIA 171537) (press release about Nebraska joining The Big Ten, mentioning "high academic quality" as first criterion considered); Lent Decl., Ex. 71 (BIGTEN-GIA 113865) (University of Maryland president's explanation that one reason it joined The Big Ten was that the opportunity "for collaborations with our peer [Association of American Universities] and flagship universities in education, research, and innovation will boost the University of Maryland's ascendancy in academic excellence"); Lent Decl., Ex. 94 (PAC12GIA_00119814) at pp. 7, 31–33 (considering academic benchmarks in considering expansion of Pac-10); Lent Decl., Ex. 104 (SEC00293119) (analysis of how Texas A&M would fit into SEC, based on multiple academic metrics); Lent Decl., Ex. 80 (MAC_013521) (listing "academic standards" and "academic profile of general student population" as first two criteria considered by MAC in evaluating prospective members). Alignment of schools with academically similar peers is also important to fans. *See* Lent Decl., Ex. 44 (May 3, 2016 Dep. of Harvey Perlman ("Perlman Dep.")) 52:2-53:5; Lent Decl., Ex. 108 (WAC_GIA_086113) at -135 (survey showing that over one-third of Western Athletic Conference fans expressed opposition to expanding the conference to include schools perceived as being "not strong academically").

D. The Record Contains Ample Evidence Of The Procompetitive Justifications For The Rules Plaintiffs Have Challenged.

Beyond *O'Bannon*'s legal findings on the "procompetitive purposes" of the NCAA's rules, 802 F.3d at 1073, substantial record evidence supports the same conclusion here. That evidence requires denial of Plaintiffs' summary judgment motion, which rests on the premise that there is an "absence of a genuine factual dispute in the record" as to this issue. MSJ 18:6-8.

What Plaintiffs refer to as an "absence of any . . . evidence" in support of Defendants' procompetitive justifications, *id.* 23, is in reality the result of Plaintiffs' unilaterally choosing which evidence to credit and which to ignore. For example, Plaintiffs completely disregard substantial survey evidence—both surveys developed by Defendants' retained expert and surveys generated independent of litigation—that demonstrates the consumer appeal of amateurism. Plaintiffs also brush aside the testimony of college administrators, conference personnel, and NCAA executives as "self-serving *ipse dixit*," suggesting that the only witnesses who can be trusted in this matter are Plaintiffs' paid experts. *Id.* 25. And Plaintiffs do not even attempt to engage with the scores of documents identified by Defendants in response to interrogatories soliciting precisely the type of evidence Plaintiffs now claim does not exist. The reason Plaintiffs ask the Court to ignore this evidence is no mystery: The evidence of procompetitive benefits reinforces the similar conclusions reached in *O'Bannon* and compels the denial of Plaintiffs' motion.[24]

[24] The foregoing is more than enough to defeat Plaintiffs' motion, but by no means all of the evidence Defendants would be able to produce at trial if a trial on any issue were necessary. Plaintiffs did not notice any conference deposition on the topic of their procompetitive justifications and failed to depose many of the individual Conference witnesses identified in Rule 26 disclosures as having knowledge on that topic. *See* Lent Decl. ¶ 110. During fact discovery, Plaintiffs also did not depose any of the over twenty university administrators identified in Defendants' Rule 26 disclosures. *Id.* Any absence of evidence in the discovery record on these issues stems from Plaintiffs' decision not to develop that evidence in discovery.

1. Evidence Developed In Discovery That The Challenged Rules Promote Amateurism And Thus Consumer Demand.

The Ninth Circuit held in *O'Bannon* that "there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers." *O'Bannon*, 802 F.3d at 1073. The existing record in this case yields the same conclusion. From surveys of consumers themselves, to the opinions of media and sponsorship partners, to the analyses of witnesses who have spent decades working in college administration and college sports, the record contains ample evidence of the procompetitive effects amateurism has on consumer demand.

a. Survey Evidence Produced And Developed In This Case Demonstrates The Value Of Amateurism To Consumers.

The survey evidence proffered by Defendants demonstrates a clear consumer preference for amateurism. Dr. Bruce Isaacson conducted a survey that found that between 56% and 64% of college sports fans oppose eliminating the restrictions on compensating student-athletes, and allowing unrestricted pay-for-play. Kessler Decl., Ex. 28 (May 16, 2017 Rebuttal Report of Dr. Bruce Isaacson ("May 16 Isaacson Rep.") ¶¶ 126, 149(iv). Dr. Isaacson's survey also found that between 26% and 38% of college sports fans watch or attend college sports games because "college players are amateur and/or are not paid." *Id.* ¶¶ 133, 150-151. Based on this evidence, Dr. Isaacson opined that "there's a significant or substantial risk to attendance and watching of college sports given the scenarios that [he] tested in [his] survey." Lent Decl., Ex. 29 (June 14, 2017 Dep. of Dr. Bruce Isaacson ("Isaacson Dep.")) 48:4-17, 61:15-62:7; *see also* Kessler Decl., Ex. 28 (May 16 Isaacson Rep.) ¶ 155 ("[T]he results of my survey indicate that various forms of compensation and benefits provided to student-athletes (particularly unlimited payments) are opposed by a substantial percentage of fans, and that amateurism is an important reason why fans are drawn to college football and college basketball.").

Plaintiffs wrongly dismiss Dr. Isaacson's opinion because he did not attempt to "measure future behaviors" of respondents to his survey. MSJ 12, 24. Instead of asking col-

lege sports fans to predict their own future behavior and attempting to quantify the difference, Dr. Isaacson surveyed respondents about their current preferences. The full extent of the relationship between consumer preference and future consumer behavior may be subject to variation, but its ultimate connection clearly exists. Kessler Decl., Ex. 28 (May 16 Isaacson Rep.) ¶ 40 (citing Pierre Chandon et al., *Do Intentions Really Predict Behavior? Self-Generated Validity Effects in Survey Research*, 69 J. MARKETING, Apr. 2005 at 1, and Manohar U. Kalwani & Alvin J. Silk, *On the Reliability and Predictive Validity of Purchase Intention Measures*, 1 MARKETING SCI. 243 (1982)); Lent Decl., Ex. 29 (Isaacson Dep.) 50:17-23, 55:16-56:6. Indeed, the reason companies engage in market research to assess consumer preferences is because those preferences, in the aggregate, "will eventually affect behavior." *Id.* 54:5-56:17, 60:17-61:14. In any event, Plaintiffs have not challenged Dr. Isaacson's testimony under *Daubert*, which means their objections to his testimony go only to its weight and cannot provide a basis for discarding his testimony at the summary judgment stage. *See First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, 2017 WL 3593369, at *3 (N.D. Cal. Aug. 21, 2017) (objections may go only to weight if party fails to object to evidence under *Daubert*); *see also Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) ("[O]bjections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility.").

Meanwhile, Plaintiffs submitted a survey that did not even attempt to measure what would happen in the but-for world Plaintiffs are actually seeking. Plaintiffs' expert, Mr. Poret, admitted that his survey does not measure how consumers would react if Plaintiffs got what they want—namely, elimination of the NCAA's compensation rules, such that student-athletes could receive unlimited compensation or be subject only to regulations set at the conference level. Lent Decl., Ex. 45 (July 20, 2017 Dep. of Hal Poret ("Poret Dep.")) 105:11-106:9, 141:12-142:9; *see* MSJ 4. And while Mr. Poret did address certain additional benefits in his survey, he admitted that he did not measure how consumers would react if any *combination* of those benefits were provided to student-athletes. Lent Decl., Ex. 45 (Poret Dep.)

102:13-104:19. Accordingly, Mr. Poret's survey results provide no relevant evidence of consumer reaction to the relief Plaintiffs actually seek.

Plaintiffs also misleadingly claim that "Defendants never have conducted any empirical studies of consumer demand in devising their current compensation restraints." MSJ 12. In reality, Defendants have conducted market research that—like Dr. Isaacson's survey—identified strong consumer opposition to paying student-athletes. One such study was commissioned by the Pac-12 Conference in 2014, and found that the majority of those surveyed opposed paying student-athletes. Lent Decl., Ex. 96 (PAC12GIA_00220281) at -283. The Big Ten also conducted market research reflecting a similar conclusion: "The appeal of college athletics is driven by purity of the game and the passion of the athletes (e.g., playing for the love of the sport, teamwork and don't play for pay.)." Lent Decl., Ex. 72 (BIGTEN-GIA 124849) at -853, -860–61; *see also* Lent Decl., Ex. 83 (NCAAGIA00791115) at -125 (NCAA-commissioned research showing that sports fans are more than twice as likely to believe student-athletes "play for the love of the sport" than professional athletes).[25] And independent surveys conducted by third parties likewise demonstrate public opposition to paying student-athletes. *See, e.g.*, Lent Decl., Ex. 87 (NCAAGIA02824852) (email to Mark Lewis with Washington Post-ABC News poll showing 64% opposition to paying student-athletes); Lent Decl., Ex. 89 (PAC12GIA_00008636) at -643–44 (Marist poll reporting that 68% of

[25] Plaintiffs misrepresent the record in suggesting that no deponent ever testified about such studies and that no such survey was identified in Defendants' interrogatory responses, MSJ 19:17-21 & n.17. For example, Plaintiffs quote Pac-12 Conference Commissioner Larry Scott as testifying that he was not aware of any studies about "the reaction of fans to *the provision of full cost of attendance scholarships*." MSJ 12 n.17 (citing Lent Decl., Ex. 50 (Jan. 12, 2017 Dep. of Larry Scott ("Scott Dep.")) 21:24-22:8) (emphasis added). But this is not a case about paying full cost of attendance scholarships; it is a case about paying above cost of attendance. And when Commissioner Scott was asked about studies related to that issue, he testified that he was aware of studies "where fans have made it clear they would have a diminished view of collegiate athletics if they viewed student athletes as being paid or as employees." Lent Decl., Ex. 50 (Scott Dep.) 72:24-73:15; *see also, e.g.*, Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 57:20-59:13 (similar). Market research on consumer preferences was also identified in interrogatory responses. *See* Kessler Decl., Ex. 44 at 698 (identifying PAC12_GIA00220281), Ex. 37 at 627 (identifying BIGTEN-GIA 124849), Ex. 42 at 676 (identifying NCAAGIA00791115).

college sports fans opposed paying student-athletes and that 27% of college sports fans responded that they would enjoy watching college sports less if student-athletes were paid).

b. The Testimony Of Lay Witnesses Shows That Fans, Sports Broadcasters, And Corporate Sponsors Value The Amateur Nature Of College Sports.

Multiple witnesses have explained the importance of amateurism to many of the core constituencies that make college sports so popular. Some of those witnesses explained that amateurism is essential to preserving alumni and fan demand—and that these consumers would oppose a pay-for-play model of college sports. *See, e.g.*, Lent Decl., Ex. 22 (Jan. 12, 2017 Dep. of Mark A. Emmert ("Emmert Dep.")) 110:9-114:4; Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 64:2-66:7; Lent Decl., Ex. 50 (Scott Dep.) 70:9-76:10, 79:19-80:19, 82:20-84:3, 86:2-23; Lent Decl., Ex. 25 (May 11, 2017 Dep. of Nathan O. Hatch ("Hatch Dep.")) 14:22-16:19; Lent Decl., Ex. 18 (May 4, 2017 Dep. of Mitch Barnhart ("Barnhart Dep.")) 19:15-20:1, 21:23-23:9. Witnesses also testified that media and sponsorship partners find amateurism to be a unique characteristic of college sports that promotes their interest in affiliating with college sports. *See, e.g.*, Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 27:21-33:1, 64:13-65:1, 268:8-269:20; Lent Decl., Ex. 50 (Scott Dep.) 70:9-76:10, 79:19-80:19, 82:20-83:3; Lent Decl., Ex. 25 (Hatch Dep.) 76:17-77:18.

Indeed, at least two witnesses deposed on this topic formerly worked in the sports broadcasting industry. One of those witnesses, American Athletic Conference Commissioner Mike Aresco, was formerly with ESPN, was in charge of all of college sports at CBS, and negotiated college sports television contracts for both broadcasters. Lent Decl., Ex. 17 (Aresco Dep.) 19:14-23:15; 32:7-18. He developed an understanding of the "tremendous value in amateurism" in college sports while working for those networks, and he publicly testified about that value while working in the broadcasting industry. *Id.* 72:2-20. The other witness, Mark Lewis, has "been in the sports business for most of [his] professional career," working at the Olympics and at NBC negotiating television and sponsorship deals. Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 45:17-21, 126:20-127:7. Based on his professional experience, Lewis testified that consumer demand for college athletics would lessen if student-

athletes were paid to play "because people would view it as professional sports, and, in that case, once you change college sports to professional sports, it becomes a minor league, and there's less demand for minor leagues than the top professional league in any sport that exists." *Id.* 46:3-9; *see also id.* 154:21-155:25 ("It's not just consumer demand. It's that you take a product [college sports] that's viewed by the marketplace in one [way], and you put it into a different pool of competition for a finite amount of resources, be they television, ticketing, sponsorship, or whatever."). His testimony is supported by the economic reality of minor league sports. "Minor League Baseball and professional baseball don't sell tickets for the same price[;] . . . they don't get the same sponsorship dollars, because minor league sports are perceived as a lower class of baseball or hockey or basketball or football or whatever it is." *Id.* 97:21-98:3; *see generally id.* 96:11-101:14.

These witnesses offered multiple explanations for the adverse effects of pay-for-play on consumer demand. Many witnesses testified that amateurism is one of the elements that makes college sports unique and differentiates them from professional sports. Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 147:1-148:13, 157:22-158:22; Lent Decl., Ex. 51 (Jan. 26, 2017 Dep. of Gregory A. Shaheen ("Shaheen Dep.")) 181:9-182:20; Lent Decl., Ex. 50 (Scott Dep.) 70:9-76:10; Lent Decl., Ex. 25 (Hatch Dep.) 14:22-16:19; Lent Decl., Ex. 55 (Swofford 30(b)(6) Dep.) 314:20-315:14; Lent Decl., Ex. 69 (BIGTEN-GIA 070087) at -090-91 (Decl. of University of Michigan President Mary Sue Coleman on why paying student-athletes would change how fans view college sports and reduce consumer demand). Like Lewis, some testified that, without this defining characteristic, college sports would be a form of minor-league sports, which have been unable to gain substantial fan interest in the United States. Lent Decl., Ex. 22 (Emmert Dep.) 110:9-114:4; Lent Decl., Ex. 19 (Berst Dep.) 70:22-71:23; Lent Decl., Ex. 17 (Aresco Dep.) 238:23-242:13; Lent Decl., Ex. 53 (Dec. 9, 2016 Dep. of Jon A. Steinbrecher ("Steinbrecher Dep.")) 44:21-45:20; Lent Decl., Ex. 25 (Hatch Dep.) 76:17-77:18; *see also* Lent Decl., Ex. 91 (PAC12GIA_00018644) at -650 (describing how the Pac-12 differentiates itself from professional leagues with audiences abroad). Other witnesses testified that amateur sports draw on a different fan base than pro-

fessional sports, in part because they are amateur. Lent Decl., Ex. 57 (Thompson Dep.) 191:10-25; Lent Decl., Ex. 23 (May 12, 2017 Dep. of Gregory Fenves ("Fenves Dep.")) 37:25-39:1, 43:7-44:20; *see also* Lent Decl., Ex. 22 (Emmert Dep.) 110:9-114:4. And still others testified that the prohibition on paying student-athletes is necessary to preserve the academic nature of college sports by ensuring student-athletes are *bona fide* students—a feature fans find attractive. Lent Decl., Ex. 35 (Lennon Dep.) 33:11-34:5; Lent Decl., Ex. 34 (Lennon 30(b)(6) Dep.) 309:23-311:22; Lent Decl., Ex. 18 (Barnhart Dep.) 23:19-24:9; Lent Decl., Ex. 52 (Slive Dep.) 188:5-192:2, 192:17-194:4, 194:9-195:8; Lent Decl., Ex. 20 (June 1, 2016 Dep. of Rebecca M. Blank ("Blank Dep.")) 123:7-124:17, 125:21-127:15; *see also* Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 40:15-42:9, 109:10-112:1; Lent Decl., Ex. 25 (Hatch Dep.) 68:12-69:20, 70:19-72:20.

Contrary to Plaintiffs' contention, MSJ at 21, these statements reflect Defendants' understanding of intercollegiate athletics based upon decades of experience. And the evidence confirms that Defendants make financial decisions based upon this understanding by, for example, marketing college sports by reference to the athletic/academic balance maintained by student-athletes or by distinguishing college sports from professional sports. Lent Decl., Ex. 33 (Leighton Dep.) 32:24-33:5; Lent Decl., Ex. 48 (Sankey 30(b)(6) Dep.) 48:5-20; Lent Decl., Ex. 49 (Sankey Dep.) 214:14-22; Lent Decl., Ex. 40 (MacLeod Dep.) 126:12-127:14, 129:6-16; Lent Decl., Ex. 55 (Swofford 30(b)(6) Dep.) 174:12-175:7. As just one example among many, in 2015, the SEC began a campaign entitled "Scholars. Champions. Leaders." to promote the conference by reference to academics, as well as athletics and community leadership. *See* Lent Decl., Ex. 107 (SEC00296880) at -885–88 (describing "Scholars. Champions. Leaders." campaign); *see also* Lent Decl., Ex. 105 (SEC00295369) (example of "Scholars. Champions. Leaders." promotional video); Lent Decl., Ex. 106 (SEC00296878) (example of "Scholars. Champions. Leaders." print ad).[26]

[26] For other examples of Defendants' efforts to market themselves by promoting the balance between academics and athletics in college sports or by differentiating college sports from professional sports, *see* Lent Decl., Ex. 92 (PAC12GIA_00105769) (describing Pac-12 marketing campaign emphasizing academic focus of student-athletes); Lent Decl., Ex. 93 *(cont'd)*

2. Evidence That The Challenged Rules Facilitate The Integration Of Academics And Athletics.

In addition to promoting consumer demand for college sports, the Ninth Circuit concluded that "the NCAA's compensation rules serve the . . . procompetitive purpose[] [of] integrating academics with athletics." *O'Bannon*, 802 F.3d at 1073. Here too, the record compels the same conclusion, in two ways. First, experts on both sides have testified that payments for athletic performance would incentivize student-athletes to spend even more time on athletics, which could reduce the amount of time they spend on academics. Second, paying student-athletes would drive a wedge between student-athletes and the rest of the campus community, impeding their integration into that community.

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(PAC12GIA_00109064) (email to Pac-12 Council re Pac-12 academic-focused marketing campaign); Lent Decl., Ex. 91 (PAC12GIA_00018644) at -650 (describing how the Pac-12 differentiates itself from professional leagues with audiences abroad); Lent Decl., Ex. 95 (PAC12GIA_00207266) (Pac-12 promotional video referencing the Pac-12 as being at "the cutting edge of academics" and "ensuring student-athlete success," and visually referencing academic pursuits); Lent Decl., Ex. 97 (PAC12GIA_207274) (Pac-12 promotional video referencing the Pac-12 as having an "academic culture [that] is ambitious" and the conference's "unprecedented" "history of unifying higher learning and athletic preeminence," and visually referencing academic pursuits); Lent Decl., Ex. 98 (SEC00001740) (press release re 36 SEC student-athletes being named Academic All-Americans); Lent Decl., Ex. 101 (SEC00193294) (describing SEC promotional campaign highlighting the academic and philanthropic contributions of its schools); Lent Decl., Ex. 103 (SEC00292780) (SEC promotional video focusing on academic accomplishments of thousands of student-athletes); Lent Decl., Ex. 61 (ACC-GIA131910) (ACC promotional video emphasizing balance between academics and athletics); Lent Decl., Ex. 60 (ACC-GIA131909) (ACC Network clip reporting on number of football players with GPAs above 3.0 named to All-ACC Academic Football Team); Lent Decl., Ex. 70 (BIGTEN-GIA 072773) at p. 21 (presentation by The Big Ten market research firm recommending The Big Ten market itself by "conveying the strengths of Tradition, Academics and Athletics"); Lent Decl., Ex. 63 (BIGTEN-GIA 002089) (The Big Ten Academic Fact Sheet); Lent Decl., Ex. 75 (BIG12-GIA_00217332) (Big 12 promotional video emphasizing member schools' academic innovation); Lent Decl., Ex. 76 (BIG12-GIA_00217342) (Big 12 promotional video emphasizing academic success of student-athletes and academic resources provided by member schools); Lent Decl., Ex. 77 (BIG12-GIA_00217355) (Big 12 promotional video emphasizing student-athletes' academic and vocational accomplishments); Lent Decl., Ex. 78 (BIG12-GIA_00273740) (Big 12 promotional video emphasizing academic support provided to student-athletes); Lent Decl., Ex. 84 (excerpts from NCAAGIA02109366) (NCAA promotional videos emphasizing student-athletes' academic pursuits and fact that most will not play sports professionally).

a. The Testimony Of Both Sides' Experts Confirms That Paying Student-Athletes Would Change Their Incentives And Motivate Them To Dedicate More Effort To Athletics Than Academics.

Plaintiffs' own expert, Dr. Edward Lazear, testified that, if student-athletes were paid more than they currently are, they likely would devote more effort to and spend more time on their sports:

> Q Do I understand correctly that your view on the supply side of this market is that some individuals would be motivated to supply more labor at a higher wage than currently do?
>
> A It's . . . likely that some individuals would, and, possibly, given individual might supply more hours, more effort, at that wage as well.

Lent Decl., Ex. 32 (Lazear Dep.) 82:12-21. Dr. Lazear elaborated that this shifting of effort would happen because, as a basic matter of economics, "[w]hen people are compensated on the basis of their effort, and when those wages are allowed to increase with effort, then we tend to see more effort being provided." *Id.* 223:24-225:14.

Applying that principle to student-athletes, Dr. Lazear testified that if student-athletes were paid more, "their incentive to play hard and stay on the [team] would be greater." *Id.* 227:14-16. Even though student-athletes may already be dedicating substantial effort to their sports now, Dr. Lazear opined that he would expect them to dedicate even more effort and possibly more time to their sports if they were paid. *Id.* 227:1-228:17. Moreover, Dr. Lazear testified that this rebalancing of student-athletes' priorities—with increased effort given to their sports—would occur regardless of whether the increased compensation was the same for all student-athletes or varied depending on their performance. *Id.* 225:14-226:16. Other experts testified to the same effect. *See* Lent Decl., Ex. 27 (Heckman Dep.) 315:5-316:18 (the "most basic principle" of economics is that "[p]eople respond to incentives," and if student-athletes were paid for performing their sport, it would divert their efforts "away from actually being students towards just being athletes."); Lent Decl., Ex. 11 (June 21, 2017 Rebuttal Report of Prof. James J. Heckman ("June 21 Heckman Rep.")) ¶ 14 ("It also follows that altering incentives for both students and universities may produce very different outcomes for some students. If Plaintiffs' requests are granted, . . . these benefits will be altered.").

Several lay witnesses testified to the same point. *See, e.g.*, Lent Decl., Ex. 35 (Lennon Dep.) 33:11-34:5 (payment above cost of attendance "would change the motivation of some of our students in terms of why they go to college, what they're to get out of the college, why they're to continue to pursue eligibility only"); Lent Decl., Ex. 34 (Lennon 30(b)(6) Dep.) 310:20-311:22 (paying student-athletes more than the cost of attendance would "reorient the student's perspective in terms of why they are in college" and could "dilute their opportunities to receive the full benefits of the student experience"); Lent Decl., Ex. 52 (Slive Dep.) 188:5-17 (rules preventing payments for playing college sports are designed to prevent student-athletes from being "interested in the money and not in the education"); Lent Decl., Ex. 18 (Barnhart Dep.) 23:19-24:9 (payment of "[a]nything that goes beyond our normal scholarship and cost of attendance changes the focus a little bit of—of what our student athletes see as the experience"); Lent Decl., Ex. 25 (Hatch Dep.) 68:12-69:20, 71:18-72:6 (if student-athletes were paid more than the cost of attendance, they would prioritize their athletic obligations). As one student-athlete wrote, by not having to focus on making more money from playing sports, they could "focus on the most important aspect of being a student-athlete which was my education." Lent Decl., Ex. 82 (MWC_GIA_074264). The last quote reflects a commonsense point: Student-athletes have many competing demands that must be carefully balanced, and that balance would inevitably be disrupted by paying them to play sports.

b. The Record Also Shows That Paying Student-Athletes Would Interfere With Their Integration Into Their Campus Communities.

Plaintiffs also ignore another form of academic integration—the integration of student-athletes into the communities of the colleges and universities they attend. Multiple witnesses testified about the potential wedge paying student-athletes would create between those students and the rest of the campus community.

As just one example, Kevin Lennon testified that providing student-athletes more than cost of attendance and allowable benefits would "distinguish" them from other students and could potentially "create a wedge between the student athletes and the regular student

body, who are not receiving that type of compensation." Lent Decl., Ex. 34 (Lennon 30(b)(6) Dep.) 309:23-311:15. Lennon further elaborated that integration would suffer because of the different motivations between student-athletes and other students, if student-athletes were incentivized to attend college by the promise of being paid to pay sports. Lent Decl., Ex. 35 (Lennon Dep.) 33:11-34:17.

Other witnesses testified to this adverse effect on integration as well. *See, e.g.*, Lent Decl., Ex. 22 (Emmert Dep.) 64:3-65:13 (describing importance of relationship "between the student, between the university, and the other students and the other universities around the country" and how that relationship would change if "people are participating in those events for money"); Lent Decl., Ex. 49 (Sankey Dep.) 198:3-20 (describing how paying student-athletes more than cost of attendance would harm their participation as part of the campus community because they would be paid more than other full scholarship students by the university); Lent Decl., Ex. 52 (Slive Dep.) 54:19-55:7, 192:11-194:4, 194:9-195:8 (testifying that the integration of student-athletes into their college community is important and other students might be "less welcoming" to student-athletes who are paid or might be more demanding of their athletic performance); Lent Decl., Ex. 20 (Blank Dep.) 104:13-108:1, 109:6-110:11 (describing how paying student-athletes would change relationships with other students, faculty, and fans); Lent Decl., Ex. 68 (BIGTEN-GIA 070072) at -076 (University of Wisconsin-Madison Chancellor Rebecca Blank Declaration describing why student-athletes would be less integrated if they were paid).

Further, the evidence demonstrates that the integration of student-athletes into the campus community promotes demand by ensuring that college sports continue to be played by student-athletes enthusiastically supported by their fellow students and alumni. The NCAA's former Executive Vice President for Championships and Alliances, Mark Lewis, testified that paying student-athletes above the cost of receiving an undergraduate degree would "fundamentally alter the relationship of the student athlete to their fellow students" to such an extent that it might even reduce consumer demand for college sports. Lent Decl., Ex. 36 (Lewis 30(b)(6) Dep.) 40:15-42:9, 157:22-158:22. Many non-athlete students, Lewis tes-

tified, must pay for their own education (many by "taking on a lot of school debt") and already "feel like student athletes have a very good deal." *Id.* 41:4-42:9. These students would be less supportive of college sports if student-athletes were paid more than the cost of receiving an undergraduate degree, thereby reducing on-campus demand for the school's teams. *Id.* 40:15-42:9. Thus, by enhancing the support of college communities for amateur student-athletics, integration promotes consumer demand.

3. Plaintiffs Utterly Ignore All Other Procompetitive Justifications Identified By Defendants.

Plaintiffs offer no meaningful argument as to why the Court should ignore the other ways in which the challenged rules benefit competition.[27] Instead, Plaintiffs offer the bare assertion that Defendants have "abandoned" their remaining procompetitive justifications because they "have developed no record to support these rationales."[28] MSJ 25:16-24. This

[27] These include: 1) "expanding output in the college education market . . . by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundational principle, thereby distinguishing amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic rivalry and as an essential component of a comprehensive college education;" 2) "widening opportunities for student-athletes to attend college through athletics scholarships in all sports in a manner compliant with Title IX and related regulatory requirements;" 3) "promoting support for colleges and universities from alumni, government bodies, and other supporters;" 4) "creating a more diverse student body;" 5) "providing a broader scope of athletic program offerings in which student-athletes can participate, compete, and gain exposure as team members in intercollegiate competition and in which other students, alumni, and other supporters of college athletics can be involved and participate as fans;" 6) "promoting competitive balance between and among NCAA member institutions by encouraging intercollegiate athletic rivalries wherein amateur student-athletes are competing only against other amateur student-athletes, thereby fostering more uncertain outcomes in athletic contests and increasing the prospect that each institution will be competitive both within their conferences and in inter-conference competition;" and 7) "promoting competitive fairness and improving the quality of college education by encouraging intercollegiate athletic rivalries wherein all institutions and student-athletes have a fair and equable opportunity to compete against similarly situated institutions and amateur student-athletes, rather than against professional contestants, both within their conferences and in inter-conference competition." *See* Lent Decl., Ex. 8 (NCAA Amended Interrogatory Responses).

[28] Plaintiffs also asserted that some of these procompetitive justifications "have nothing to do with *economic* justifications for their restraints and therefore are insufficient as a matter of law." MSJ 25:19-21 (emphasis in original). But even if economic effects were required, Plaintiffs did not even identify which procompetitive justifications they contend have a relevant economic effect and which do not, much less explain why any particular justification is not sufficiently economic for the Court to consider.

single, conclusory paragraph does not fulfill Plaintiffs' burden to demonstrate an absence of evidence sufficient for summary judgment.

Plaintiffs must do more than merely assert that Defendants have no evidence of an essential element of their defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring). Plaintiffs instead must "'*show*[]'—that is, point[] out to the district court—that there is an absence of evidence to support [Defendants'] case." *Id.* at 325 (emphasis added); *see Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105 (9th Cir. 2000) ("A moving party may not require the nonmoving party to produce evidence supporting its claim or defense simply by saying that the nonmoving party has no such evidence."); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) ("Even after *Celotex*, it is never enough simply to state that the non-moving party cannot meet its burden at trial.").

Indeed, courts in the Ninth Circuit routinely deny this type of "no-evidence" motion for summary judgment where, as here, the movant has failed to meet its initial burden of production. *See, e.g., Morton & Bassett, LLC v. Organic Spices, Inc.*, 2017 WL 1425908, at *7 (N.D. Cal. Apr. 21, 2017) (movant could not force nonmovant to proffer evidence supporting its claim simply by asserting that the nonmovant lacked such evidence); *Caldera v. Am. Med. Collection Agency*, 2017 WL 2423793, at *2 (C.D. Cal. Mar. 15, 2017) (movant cannot simply say the nonmovant does not have enough evidence; it must use normal tools of discovery and point to materials on file demonstrating the party will not be able to meet its burden at trial); *Molieri v. Cnty. of Marin*, 2012 WL 1309172, at *5 (N.D. Cal. Apr. 16, 2012) (conclusory assertion that plaintiffs lack any evidence was insufficient to meet their initial burden on summary judgment). By failing to point to *any* record evidence demonstrating that Defendants cannot meet their burden at trial, Plaintiffs have failed to meet their burden of production on this aspect of their motion. *See Diodem, LLC v. Lumenis Inc.*, 2005 WL 6220667, at *21 (C.D. Cal. Jan. 10, 2005) (holding that movant's failure to point to any admission, disclosure, or response in the record to show nonmovant would be unable to meet its burden at trial was insufficient to show a lack of evidence entitling movant to summary

judgment).

Nevertheless, it is clear that Defendants have not "abandoned" (*contra* MSJ 25) their other asserted procompetitive justifications, summarized *supra* at fn. 27, and have disclosed more than sufficient evidence supporting them. To provide just one example, Defendants' economic expert, Dr. Kenneth Elzinga, described the economic benefits conferred by the restrictions Plaintiffs challenge, including the expansion of output in the college education market and an increase in financial support from the many constituents of colleges and universities. As Dr. Elzinga opined, the value colleges and universities offer in the market for educational services is dependent upon the dynamic interaction of a unique blend of participating, interdependent constituencies. Kessler Decl., Ex. 10 (Mar. 21, 2017 Expert Report of Kenneth G. Elzinga ("Mar. 21 Elzinga Rep.")) at 9, 29. That participation comes at a "price," and each collegiate community strives to strike the right balance to achieve optimal participation by each of its constituencies. *Id*. at 35. Price changes in one constituency—such as wage-like payments to student-athletes—will disrupt that balance through resulting volume changes in other constituencies, which include, among others, non-athlete students, alumni, coaches and athletic staff, faculty, other staff, the local community and (for public institutions) the state itself. *Id*. at 27-28, 32-33, 35.

Notably, Plaintiffs' own expert, Dr. Edward Lazear, agrees that the interaction between colleges and universities and student-athletes is not isolated from the interests of the other participants in the university community. In his own words, Dr. Lazear agreed that there is a "derived demand" within a university community wherein "direct parts of the market" including the "multiple players" in the markets ("which might include alums, it might include viewers, it might include other students") inform the interaction between the university and the student-athletes they enroll. Lent Decl., Ex. 32 (Lazear Dep.) 171:2-9, 217:19-218:24. That derived demand directly affects the amount of "output," which in Dr. Lazear's opinion is the "amount of athletes used." *Id.* 171:18-20. Thus, far from there being "abandon[ment]" on certain of Defendants' other procompetitive justifications, there is an *agreement* among the parties' experts tending to support, not refute, the existence of those addi-

tional justifications.

The key point, however, is that Defendants have identified substantial evidence augmenting *O'Bannon*'s conclusions that the challenged rules promote competition. Plaintiffs' Motion for Summary Judgment thus necessarily fails.

III. *Daubert* Compels The Exclusion Of Several Opinions Offered By Plaintiffs' Experts.

In a further effort to avoid the Ninth Circuit's controlling decision in *O'Bannon*, Plaintiffs have brought forth several economics experts to contest the Ninth Circuit's holdings. But those holdings are not subject to relitigation, *see supra* at 15-20. As a result, expert opinions contradicting those holdings do not "fit" the facts of this case in a manner that assists the finder of fact. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). For that reason, and others set forth below, several of Plaintiffs' experts' opinions should be excluded.[29]

A. Opinions That Seek To Relitigate Binding Holdings Of The Ninth Circuit Should Be Excluded.

It is a fundamental tenet of Rule 702 and *Daubert* that an expert opinion must "fit" the facts of the case and assist the factfinder. *Daubert*, 509 U.S. at 591. Opinions that address already-resolved issues are, by definition, unhelpful and should be excluded. *See, e.g.*, *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2015 WL 6750899, at *9 (E.D. Pa. Nov. 5, 2015) (excluding expert opinion on the validity of a patent that the court had, in a prior decision, determined was invalid, on the ground that expert testimony contrary to the court's prior ruling did not "fit the facts of this case and [is] not admissible"); *A & M Records, Inc. v. Napster, Inc.*, 2000 WL 1170106, at *10 (N.D. Cal. Aug. 10, 2000) (excluding expert testimony that conflicted with past rulings of the court on the same subject).

Here, Plaintiffs' economics experts, Drs. Rascher, Noll, and Lazear, all proffer opin-

[29] Consistent with the parties' earlier stipulation, Defendants expressly reserve all rights to make further *Daubert* motions at a later date. (MDL Dkt. 651.)

ions that contradict the Ninth Circuit's clear holding that the NCAA's financial aid rules serve the procompetitive purposes of integrating academics with athletics and promoting amateurism. *O'Bannon*, 802 F.3d at 1073. Because those issues were litigated and resolved in *O'Bannon*, opinions contradicting them are "not admissible." *A & M Records*, 2000 WL 1170106, at *10; *see supra* at 15.

To start, all three experts dispute that "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism" is a procompetitive objective justifying the challenged rules, contradicting *O'Bannon*, 802 F.3d at 1073 (quoting *O'Bannon*, 7 F. Supp. 3d at 1005).

- Dr. Rascher opines, for instance, that "[t]here is no economic evidence to support the claim that collusive enforcement of amateurism enhances consumer demand." Kessler Decl., Ex. 4 (Mar. 21, 2017 Expert Report of Dr. Daniel A. Rascher ("Mar. 21 Rascher Rep.")) § 7.3; *see also id.* ¶ 247 ("amateurism has not been proven to enhance demand"). That is contrary to the Ninth Circuit's conclusion that "the amateur nature of collegiate sports increases their appeal to consumers." *O'Bannon*, 802 F.3d at 1073.

- Dr. Noll expressly "*disagree[s] with the 9th Circuit's conclusion* that the NCAA's amateurism rules have procompetitive benefits."[30] *See O'Bannon*, 802 F.3d at 1073 (concluding that "there is a concrete procompetitive effect in the NCAA's commitment to amateurism").

- Indeed, Dr. Noll goes even further and attempts to redefine the scope of amateurism, opining that "[t]he distinguishing characteristic of college athletes is not that they are amateurs (which they are not), but that they are full-time college students who play for their schools." Kessler Decl., Ex. 9 (Noll Decl.) at 26. But the Ninth Circuit held that forcing the NCAA to "surrender[] its amateurism principles entirely" would "transition[]" college sports "to minor league status." *O'Bannon*, 802 F.3d at 1079.

- Dr. Noll also opines that "any payment for participation, even if 'tethered to education,' is not consistent with the principles of amateurism,"[31] contravening the Ninth Circuit's holding that providing aid "to cover th[e] 'legitimate costs' to at-

[30] *See* Lent Decl., Ex. 43 (July 27, 2017 Dep. of Roger Noll ("Noll Dep.")) 102:15-19 (emphasis added); *see also id.* 99:1-9 ("Q. Based on the colloquy we had before the break, I would assume, but please correct me if I'm wrong, that you would dispute the 9th Circuit's conclusion in *O'Bannon* that amateurism distinguishes DI/FBS schools from other sports leagues? A. I disagree with it." (objection omitted)).

[31] Kessler Decl., Ex. 9 (Noll Decl.) at 27; *see also* Lent Decl., Ex. 43 (Noll Dep.) 75:23-76:3 ("Q. So, if I understand your definition of amateurism correctly, then compensation or vocational aspiration in any form takes it out of the amateur context? A. It seems to me that the only exception to that is reimbursement for expenses[.]")

tend school" would not violate the NCAA's principles of amateurism. *O'Bannon*, 802 F.3d at 1074-75.

- Dr. Lazear similarly disputes the Ninth Circuit's conclusion that the challenged rules are justified by the procompetitive goal of preserving amateurism, opining that, "[e]ven if evidence existed to the contrary, i.e., that consumers prefer so-called 'amateur' athletes, it is well established in economics that consumer preference is not an economic justification for labor market exploitation."[32] In *O'Bannon*, by contrast, the court held that "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism" is a "procompetitive purpose[]" under the antitrust laws. *O'Bannon*, 802 F.3d at 1073 (quoting *O'Bannon*, 7 F. Supp. 3d at 1005).

- Dr. Lazear further opines that FBS football and Division I basketball, "are not amateur sports in any real sense even with the constraints. Tickets are sold, revenue is collected for TV contracts, coaches are paid, sometimes very well, and the athletes receive compensation—just not as much as they would receive were the schools less restricted in competing with each other for athletes' services. Even if consumers had a demand for amateurism, it is difficult to understand how the current situation would satisfy that taste, given the already existing commercialization." Lent Decl., Ex. 14 (June 21 Lazear Rep.) ¶ 35. The Ninth Circuit held that the current situation *does* enhance consumer demand, concluding that "the amateur nature of collegiate sports increases their appeal to consumers." *O'Bannon*, 802 F.3d at 1073.[33]

In addition, Drs. Rascher and Noll disagree that academic integration is a procompetitive justification for the challenged rules. *Cf. O'Bannon*, 802 F.3d at 1073.

- Dr. Rascher explicitly denies that "academic integration is an economically procompetitive objective," Kessler Decl., Ex. 4 (Mar. 21 Rascher Rep.) § 7.4 (capitalization modified from original), even though the Ninth Circuit confirmed that "integrating academics with athletics" is a "procompetitive purpose[]." *O'Bannon*, 802 F.3d at 1073.

[32] Kessler Decl., Ex. 8 (Mar. 21, 2017 Expert Report of Edward P. Lazear ("Mar. 21 Lazear Rep.")) ¶ 51; *see also id.* ¶ 53 ("Even if it were true that some people somehow valued this exploitation as a matter of 'taste,' it would be an economically inappropriate justification."); Lent Decl., Ex. 14 (June 21, 2017 Reply of Edward P. Lazear ("June 21 Lazear Rep.")) ¶ 35 ("It strains credulity to believe that whatever joy customers receive from amateurism would be lost by raising the compensation[.]"); *id.* ¶ 36 ("[F]orcing labor, in this case college athletes, to accept anti-competitive compensation cannot be justified by an appeal to a consumer desire for 'amateurism.'").

[33] In addition to contradicting *O'Bannon*, Dr. Lazear's opinions about what constitutes amateurism under the NCAA rules and regulations is beyond his admitted expertise, which does not include any expertise on the NCAA rules and regulations relating to amateurism. Lent Decl., Ex. 32 (Lazear Dep.) 163:12-14 ("I don't know the NCAA rules well enough to understand what they mean about amateurism.")

- Dr. Noll similarly disputes that the challenged rules promote the integration of athletics with academics and student-athletes into campus life,[34] which likewise contradicts binding precedent that "the NCAA's compensation rules" help "integrat[e] academics with athletics." *O'Bannon*, 802 F.3d at 1073.

Finally, Dr. Noll disputes another point resolved by the *O'Bannon* court—that the cost of attendance limitation is tied to educational expenses.

- Dr. Noll testified at his deposition that "the federal guidelines are not written in a way that they're the direct cost of education. They're—they're not written for that purpose. So, when the NCAA adopts cost of attendance as a guideline for athletic scholarships, it's—it's buying on to something that was designed for another purpose, so it's not really adopting something that, for a student, would be like cost reimbursement of what are the direct costs of attending college." Lent Decl., Ex. 43 (Noll Dep.) 90:12-22. The Ninth Circuit, however, held that "giving student-athletes scholarships up to their full cost of attendance would . . . cover their 'legitimate costs' to attend school." *O'Bannon*, 802 F.3d at 1075.

These opinions, part of Plaintiffs' effort to relitigate issues tried and lost in *O'Bannon*, have no place before the Court in this case, and should be excluded.

B. Opinions That Plaintiffs' Experts Are Not Qualified To Offer Are Inadmissible.

Neither Dr. Lazear nor Dr. Noll is a qualified expert in college athletics or the laws and NCAA rules and regulations that govern them. Nevertheless, they opine extensively on those subjects. Because such opinions are outside the scope of their specialized skill or knowledge, they are unreliable and must be excluded. *See, e.g.*, *United States v. Santini*, 656 F.3d 1075, 1078-79 (9th Cir. 2011) (per curiam).[35]

[34] *See* Lent Decl., Ex. 43 (Noll Dep.) 107:24-108:17 ("Q. At the time of the *O'Bannon* decision, did you disagree with the 9th Circuit's conclusion that the challenged rules to eliminate compensation to student athletes furthered the procompetitive effect of promoting integration of academics and athletics. A. I don't recall that part of the 9th Circuit's decision. So, if it actually says, in words, what you just said, then I would disagree with that. I testified in the opposite, so they were disagreeing with me when they wrote—and if that's the words—if those are the words they used, then that's inconsistent with my testimony in *O'Bannon* where I actually gave examples of how that was not true.").

[35] *See also In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 990-95 (C.D. Cal. 2012) (granting defendant's motion to exclude testimony regarding the market for "rock music concerts" because, among other reasons, plaintiffs' expert economist "made a concert-by-concert determination of whether the performer(s) at issue qualified as 'rock' artists," but had no expertise as a music analyst; "[t]he mere quotation of a dictionary definition—absent more—simply does not constitute meaningful expert *economic* analysis"); *United States v. Diaz*, 2006 WL 2699042, at *4 (N.D. Cal. Sept. 19, 2006) (excluding certified gang professional's *(cont'd)*

Dr. Lazear improperly opines that, as reflected in the federal antitrust laws, society has determined that an agreement that (purportedly) has the effect of reducing compensation below fair market value could never be justified by a countervailing procompetitive benefit of the agreement. Lent Decl., Ex. 32 (Lazear Dep.) 176:20-178:13. Asked for the basis for this opinion, Dr. Lazear testified that he was relying on "my understanding of the—of *anti-trust law* when I—when I studied and when I understood it." *Id.* 178:10-13. This testimony confirms that Dr. Lazear's opinion regarding what he referred to as "an unambiguous societal judgment," *id.* 176:25, is not objectively based in economics. The opinion should be excluded as beyond his area of expertise.

Likewise, Dr. Noll's opinion that the federal statutes and regulations "are not written" for the "purpose" of reflecting "the direct cost of education" is not an economics opinion, but an (incorrect) interpretation of statutory and regulatory material. *See supra* at 7-8. Dr. Noll has no legal or regulatory expertise in that area. Like Dr. Lazear's opinion about what he believes the antitrust laws require, Dr. Noll's opinion about the meaning of federal statutes and regulations should therefore be excluded both as an inadmissible legal opinion and as beyond his expertise. *See, e.g., Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 322 (6th Cir. 2014) (affirming district court's exclusion of expert economic testimony "as to his ultimate opinion that a conspiracy likely existed among the defendants during the class period" because it "embrace[d] a legal conclusion which depends on antitrust doctrine in which [the expert] is not qualified to offer an opinion"); *A & M Records, Inc.*, 2000 WL 1170106, at *10 ("Lay persons may not offer expert testimony about the content of the law.") (collecting cases).

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testimony as to his interpretation of one phrase used by defendants' gang because his "only articulated basis for his interpretation was the context in which it was uttered in [this] very case," despite having found the expert qualified to interpret other gang jargon).

C. Opinions Based On No Accepted Or Recognized Methodology Should Be Excluded.

The opinions of Drs. Rascher and Lazear that spending on coaches, administrators, and facilities is currently inflated (supra-competitive) and that, absent the challenged rules, such spending would be reduced and redirected to student-athletes as cash compensation, are unsupported by any econometric or other analysis reflecting a generally accepted methodology.

Indeed, neither expert has done any econometric or other analysis to support these opinions. Dr. Rascher conceded, for example, that he has conducted no analysis—economic or otherwise—that would permit him to determine the extent to which coaches' salaries have been increased by what he considers to be the inefficient expenditure of monopsony rents, or to compare the increase in any university's expenditures of athletic facilities to the increase in that university's spending on other facilities, or even to know how much money any individual school has spent on other facilities. Lent Decl., Ex. 47 (Rascher Dep.) 225:21-228:24. For his part, Dr. Lazear bases his opinions in this regard on his view that the NCAA rules have created an "underutilization of labor and possible overuse of capital." Lent Decl., Ex. 32 (Lazear Dep.) 194:22-23. But during his deposition, Dr. Lazear admitted that he has not "done empirical analysis to establish that there has been a possible overuse of capital in this market." *Id.* 196:10-13.

In short, these opinions are predicated solely on the say-so of Drs. Rascher and Lazear, and therefore should be excluded as inadmissible in this case. *See, e.g.*, *Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal. 2001) (granting defendants' motion to exclude plaintiffs' expert's economic model because it "contain[ed] entirely too many assumptions and simplifications that [were] not supported by real-world evidence"; "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

CONCLUSION

Plaintiffs' attempts to relitigate *O'Bannon* should be rejected and Defendants' motion for summary judgment should be granted in its entirety. Plaintiffs' motion for summary judgment should be denied and the identified portions of Plaintiffs' proffered expert testimony excluded.

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Respectfully submitted.

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FILER'S ATTESTATION

I, Karen Hoffman Lent, am the ECF user whose identification and password are being used to file Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Karen Hoffman Lent