

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

3  
4    IN RE: NATIONAL COLLEGIATE  
5    ATHLETIC ASSOCIATION ATHLETIC  
6    GRANT-IN-AID CAP ANTITRUST  
7    LITIGATION

Case Nos. 14-md-02541-CW  
            14-cv-02758-CW

8    THIS DOCUMENT RELATES TO:  
9    ALL ACTIONS

ORDER GRANTING IN PART AND  
DENYING IN PART CROSS-MOTIONS  
FOR SUMMARY JUDGMENT

(Dkt. Nos. 657, 704, 797,  
800)

10            In this multidistrict litigation, student-athlete Plaintiffs  
11 allege that Defendants National Collegiate Athletic Association  
12 (NCAA) and eleven of its member conferences fixed prices for the  
13 payments and benefits that the students may receive in return for  
14 their elite athletic services. Now pending are cross-motions for  
15 summary judgment.<sup>1</sup> For the reasons set forth below, the cross-  
16 motions for summary judgment are granted in part and denied in  
17 part.<sup>2</sup>

18                                    BACKGROUND

19            Plaintiffs are current and former student-athletes in the  
20 sports of men's Division I Football Bowl Subdivision (FBS)  
21 football and men's and women's Division I basketball. Defendants  
22 are the NCAA and eleven conferences that participated, during the  
23 relevant period, in FBS football and in men's and women's

24  
25            <sup>1</sup> The Court will rule by separate order on the pending  
motions to seal and to exclude proposed expert testimony.

26            <sup>2</sup> In the exercise of discretion, the Court denies Defendants'  
27 Motion for Supplemental Briefing and Plaintiffs' Motion to File  
28 Supplemental Evidence for the Summary Judgment Record. See Civil  
Local Rule 7-3(d). The Court does not, at this time, rule on  
whether Plaintiffs' proposed supplemental evidence will be  
admissible at trial.

1 Division I basketball. Plaintiffs allege that Defendants  
2 violated federal antitrust law by conspiring to impose an  
3 artificial ceiling on the scholarships and benefits that student-  
4 athletes may receive as payment for their athletic services.

5 I. O'Bannon v. NCAA

6 In 2009, a group of college Division I student-athletes  
7 brought an antitrust class action against the NCAA to challenge  
8 the association's rules preventing men's football and basketball  
9 players from being paid, either by their school or by any outside  
10 source, for the sale of licenses to use the student-athletes'  
11 names, images, and/or likenesses (NIL) in videogames, live game  
12 telecasts, and other footage. O'Bannon v. NCAA, 7 F. Supp. 3d  
13 955, 962-63 (N.D. Cal. 2014). The rules challenged by the  
14 O'Bannon plaintiffs, which furthered the agreement of the NCAA  
15 and its members to fix the value of student-athletes' NIL at  
16 zero, included the then-applicable maximum limit on financial  
17 aid. Under that limit, student-athletes were prohibited from  
18 receiving "financial aid based on athletics ability" that  
19 exceeded the value of a full grant-in-aid. O'Bannon, 7 F. Supp.  
20 3d at 971. The rules defined "grant-in-aid" as "financial aid  
21 that consists of tuition and fees, room and board, and required  
22 course-related books." Id. Other expenses related to school  
23 attendance, such as supplies and transportation, were not  
24 included in the grant-in-aid limit, although they were calculated  
25 in a school-specific figure called "cost of attendance." Id.

26 The Court held a bench trial and ruled that the challenged  
27 NCAA rules violated Section 1 of the Sherman Act, 15 U.S.C. § 1.  
28 Id. at 963. The Court found that the evidence presented at trial

1 established that FBS football and Division I men's basketball  
2 schools compete to recruit the best high school football and  
3 men's basketball players in a relevant market for a college  
4 education combined with athletics. 7 F. Supp. 3d at 965-68, 986-  
5 88. In exchange for educational and athletic opportunities, the  
6 FBS and Division I schools compete "to sell unique bundles of  
7 goods and services to elite football and basketball recruits."  
8 Id. at 965, 986. The Court found that this market,  
9 alternatively, could be understood as a monopsony, in which the  
10 NCAA member schools, acting collectively, are the only buyers of  
11 the athletic services and NIL licensing rights of elite student-  
12 athletes. Id. at 973, 993.

13 The Court found that the plaintiffs met their burden to show  
14 that the NCAA had fixed the price of the student-athletes' NIL  
15 rights, which had significant anticompetitive effects in the  
16 relevant market. Id. at 971-73, 988-93. On the question of  
17 procompetitive justifications of the restraints, the Court found  
18 that the NCAA's challenged restrictions on student-athlete  
19 compensation played "a limited role in driving consumer demand  
20 for FBS football and Division I basketball-related products."  
21 Id. at 1001. The Court also found that the challenged rules  
22 "might facilitate the integration of academics and athletics  
23 . . . by preventing student-athletes from being cut off from the  
24 broader campus community." Id. at 1003.

25 The O'Bannon plaintiffs proposed three alternatives that  
26 they asserted were less restrictive than the NCAA rules that they  
27 challenged: (1) raising the grant-in-aid limit to allow schools  
28 to award stipends, derived from specified sources of licensing

1 revenue, to student-athletes; (2) allowing schools to deposit a  
2 share of licensing revenue into a trust fund for student-athletes  
3 which could be paid after the student-athletes graduate or leave  
4 school for other reasons; and (3) permitting student-athletes to  
5 receive limited compensation for third-party endorsements  
6 approved by their schools. 7 F. Supp. 3d at 982. Each of these  
7 proposed less restrictive alternatives related specifically to  
8 the use of revenue derived from NIL licensing and endorsements.

9 This Court found that the first two of these proposed  
10 alternatives "would limit the anticompetitive effects of the  
11 NCAA's current restraint without impeding the NCAA's efforts to  
12 achieve its stated purposes." Id.; see also id. at 983-84. The  
13 Court rejected the plaintiffs' third proposed alternative. Id.  
14 at 984. Accordingly, this Court enjoined the NCAA from enforcing  
15 any rules that would prohibit its member schools and conferences  
16 from offering their FBS football and men's Division I basketball  
17 recruits a limited share of the revenues generated from the use  
18 of their NIL in addition to a full grant-in-aid, but permitted  
19 the NCAA to implement rules capping the amount of compensation  
20 that could be paid to student-athletes while they are enrolled in  
21 school at the cost of attendance. Id. at 1007-08. The Court  
22 also prohibited the NCAA from enforcing rules to prevent member  
23 schools and conferences from offering to deposit a limited share  
24 of NIL licensing revenue in trust for their FBS football and  
25 Division I basketball recruits, payable when they leave school or  
26 their eligibility expires. Id. at 1008.

27 The Ninth Circuit largely affirmed this Court's decision,  
28 including the finding that allowing NCAA member schools to award

1 grants-in-aid up to the student-athletes' full cost of attendance  
2 would be a substantially less restrictive alternative to the  
3 existing compensation rules. O'Bannon v. NCAA, 802 F.3d 1049,  
4 1079 (9th Cir. 2015). It held that "the grant-in-aid cap has no  
5 relation whatsoever to the procompetitive purposes of the NCAA:  
6 by the NCAA's own standards, student-athletes remain amateurs as  
7 long as any money paid to them goes to cover legitimate  
8 educational expenses." Id. at 1075. However, it vacated the  
9 judgment and injunction insofar as they required the NCAA to  
10 allow its member schools to pay student-athletes limited deferred  
11 compensation in a trust account. Id. at 1079. The circuit court  
12 found that allowing "students to receive NIL cash payments  
13 untethered to their education expenses" would not promote the  
14 NCAA's procompetitive purposes as effectively as a rule  
15 forbidding cash compensation, even if the payment was limited and  
16 took the form of a trust fund. Id. at 1076.

17 II. This Litigation

18 Plaintiffs initiated these actions in 2014 and 2015,  
19 attacking the NCAA's cap on their grant-in-aid itself, rather  
20 than merely the association's restrictions on sharing NIL  
21 revenue. The United States Judicial Panel on Multidistrict  
22 Litigation transferred actions filed in other districts to this  
23 Court pursuant to 28 U.S.C. § 1407 for coordinated or  
24 consolidated pretrial proceedings. All but one of the actions  
25 were consolidated. The operative pleading in the consolidated  
26 action is Plaintiffs' consolidated amended complaint, filed July  
27 11, 2014. The consolidated amended complaint has been amended by  
28 orders incorporating additional allegations about named

1 Plaintiffs in subsequently-filed cases (Docket Nos. 86, 184,  
2 197). One case, Jenkins v. NCAA, No. 14-cv-02758, has not been  
3 consolidated, but all pending motions were briefed together in  
4 the consolidated action and in Jenkins.<sup>3</sup>

5 On December 4, 2015, the Court certified three injunctive  
6 relief classes in the consolidated action, under Federal Rule of  
7 Civil Procedure 23(b)(2): a Division I FBS Men's Football Class,  
8 a Division I Men's Basketball Class, and a Division I Women's  
9 Basketball Class, each consisting of student-athletes who  
10 received or will receive a written offer for a full grant-in-aid  
11 as defined by NCAA Bylaw 15.02.5 during the pendency of this  
12 action. In the Jenkins action, the Court certified the men's  
13 football and basketball classes; the women's basketball class was  
14 not sought in that case. As part of the class certification  
15 proceedings, all Plaintiffs committed to seek to stay either the  
16 consolidated case or the Jenkins case prior to trial of the other  
17 in order to avoid duplicative trials on behalf of identical  
18 classes and a race to determine which judgment would be binding  
19 under principles of res judicata.

20 Defendants and the consolidated Plaintiffs reached a  
21

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22 <sup>3</sup> The Jenkins Plaintiffs raise one separate issue in a  
23 footnote to Plaintiffs' opposition to Defendants' cross-motion  
24 for summary judgment. They request that if the Court grants  
25 Defendants' summary judgment motion in the consolidated action,  
26 the Court not apply the ruling to the Jenkins action, but instead  
27 remand it back to the District of New Jersey, where the decisions  
28 of the Ninth Circuit and this Court in O'Bannon would not control  
under the doctrine of stare decisis. At the hearing on the  
motion, the Jenkins Plaintiffs clarified that they do not seek  
remand if the Court grants summary judgment only in part. See  
Jan. 16, 2018 Tr. at 50. Because the Court grants summary  
judgment in part and denies it in part, the Jenkins Plaintiffs'  
request for remand prior to summary judgment is moot.

1 settlement of all claims for damages, and the Court granted final  
2 approval of that settlement and entered a partial judgment under  
3 Federal Rule of Civil Procedure 54(b) on December 6, 2017. The  
4 Jenkins Plaintiffs have not sought damages. Therefore, only  
5 claims for injunctive relief remain pending.

6 LEGAL STANDARD

7 Summary judgment is properly granted when no genuine and  
8 disputed issues of material fact remain, and when, viewing the  
9 evidence most favorably to the non-moving party, the movant is  
10 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
11 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
12 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
13 1987).

14 The moving party bears the burden of showing that there is  
15 no material factual dispute. Therefore, the court must regard as  
16 true the opposing party's evidence, if supported by affidavits or  
17 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
18 815 F.2d at 1289. The court must draw all reasonable inferences  
19 in favor of the party against whom summary judgment is sought.  
20 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
21 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co.,  
22 952 F.2d 1551, 1558 (9th Cir. 1991).

23 Material facts which would preclude entry of summary  
24 judgment are those which, under applicable substantive law, may  
25 affect the outcome of the case. The substantive law will  
26 identify which facts are material. Anderson v. Liberty Lobby,  
27 Inc., 477 U.S. 242, 248 (1986).

28 Where the moving party does not bear the burden of proof on

1 an issue at trial, the moving party may discharge its burden of  
2 production by either of two methods:

3 The moving party may produce evidence negating an  
4 essential element of the nonmoving party's case, or,  
5 after suitable discovery, the moving party may show  
6 that the nonmoving party does not have enough evidence  
7 of an essential element of its claim or defense to  
8 carry its ultimate burden of persuasion at trial.

9 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc.,  
10 210 F.3d 1099, 1106 (9th Cir. 2000).

11 If the moving party discharges its burden by showing an  
12 absence of evidence to support an essential element of a claim or  
13 defense, it is not required to produce evidence showing the  
14 absence of a material fact on such issues, or to support its  
15 motion with evidence negating the non-moving party's claim. Id.;  
16 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);  
17 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991).

18 If the moving party shows an absence of evidence to support the  
19 non-moving party's case, the burden then shifts to the non-moving  
20 party to produce "specific evidence, through affidavits or  
21 admissible discovery material, to show that the dispute exists."  
22 Bhan, 929 F.2d at 1409.

23 If the moving party discharges its burden by negating an  
24 essential element of the non-moving party's claim or defense, it  
25 must produce affirmative evidence of such negation. Nissan,  
26 210 F.3d at 1105. If the moving party produces such evidence,  
27 the burden then shifts to the non-moving party to produce  
28 specific evidence to show that a dispute of material fact exists.  
Id.

If the moving party does not meet its initial burden of



1 production by either method, the non-moving party is under no  
2 obligation to offer any evidence in support of its opposition.  
3 Id. This is true even though the non-moving party bears the  
4 ultimate burden of persuasion at trial. Id. at 1107.

5 DISCUSSION

6 I. Res Judicata and Collateral Estoppel

7 Defendants argue that all of Plaintiffs' claims are  
8 foreclosed under the doctrines of res judicata, or claim  
9 preclusion, and collateral estoppel, or issue preclusion, by the  
10 decisions of the Ninth Circuit and this Court in O'Bannon.  
11 802 F.3d 1049; 7 F. Supp. 3d 955. The purpose of these doctrines  
12 is to "relieve parties of the cost and vexation of multiple  
13 lawsuits, conserve judicial resources, and, by preventing  
14 inconsistent decisions, encourage reliance on adjudication."  
15 Allen v. McCurry, 449 U.S. 90, 94 (1980). The burden of proving  
16 the elements of either res judicata or collateral estoppel is on  
17 the party asserting it. Kendall v. Visa U.S.A., Inc., 518 F.3d  
18 1042, 1050-51 (9th Cir. 2008) (collateral estoppel); Karim-Panahi  
19 v. Los Angeles Police Dep't, 839 F.2d 621, 627 n.4 (9th Cir.  
20 1988) (res judicata).

21 Res judicata prohibits the re-litigation of any claims that  
22 were raised or could have been raised in a prior action. Tahoe-  
23 Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 322 F.3d  
24 1064, 1077-78 (9th Cir. 2003). Three elements must be present in  
25 order for res judicata to apply: (1) an identity of claims;  
26 (2) a final judgment on the merits; and (3) the same parties or  
27 their privies. Id. at 1077.

28 Collateral estoppel "prevents a party from relitigating an

1 issue decided in a previous action if four requirements are met:  
2 '(1) there was a full and fair opportunity to litigate the issue  
3 in the previous action; (2) the issue was actually litigated in  
4 that action; (3) the issue was lost as a result of a final  
5 judgment in that action; and (4) the person against whom  
6 collateral estoppel is asserted in the present action was a party  
7 or in privity with a party in the previous action.'" Kendall,  
8 518 F.3d at 1050 (quoting United States Internal Revenue Serv. v.  
9 Palmer, 207 F.3d 566, 568 (9th Cir. 2000)).

10 The application of either res judicata or collateral  
11 estoppel here would require that any Plaintiff not present in  
12 O'Bannon have been in privity with the parties in that case. Two  
13 primary categories of Plaintiffs here were not part of the  
14 O'Bannon class: male student-athletes who were recruited after  
15 O'Bannon and female student-athletes.<sup>4</sup>

16 Defendants contend that privity nonetheless exists here  
17 because, in O'Bannon, the interests of nonparty student-athletes  
18 were represented adequately by the plaintiffs there with the same  
19 interests and the Court took special care to protect the  
20 interests of future student-athletes. In "certain limited  
21 circumstances, a nonparty may be bound by a judgment because she  
22 was adequately represented by someone with the same interests who  
23 was a party to the suit. Representative suits with preclusive  
24 effect on nonparties include properly conducted class actions."

25 \_\_\_\_\_  
26 <sup>4</sup> The parties have not briefed whether there are any class  
27 members in this case who were not class members in O'Bannon  
28 because their NIL have not been, and will not be, included in  
athlete's participation in intercollegiate athletics. See  
O'Bannon, 7 F. Supp. 3d at 965 (quoting class definition).

1 Taylor v. Sturgell, 553 U.S. 880, 894 (2008) (internal  
2 alteration, citation and quotation marks omitted). The Supreme  
3 Court held,

4 A party's representation of a nonparty is "adequate"  
5 for preclusion purposes only if, at a minimum: (1) The  
6 interests of the nonparty and her representative are  
7 aligned, and (2) either the party understood herself to  
8 be acting in a representative capacity or the original  
9 court took care to protect the interests of the  
10 nonparty. In addition, adequate representation  
11 sometimes requires (3) notice of the original suit to  
12 the persons alleged to have been represented.

13 Taylor, 553 U.S. at 900 (citations omitted). The Supreme Court  
14 further explained that, in the federal class action context, the  
15 limitations on nonparty representation "are implemented by the  
16 procedural safeguards contained in Federal Rule of Civil  
17 Procedure 23." Id. at 900-01. In other words, the definition of  
18 the O'Bannon class under Rule 23 limits the persons who are  
19 subject to the preclusive effect of the judgment. Under Taylor,  
20 then, the effect of res judicata does not extend to individuals  
21 who were not part of the O'Bannon class. Furthermore, Defendants  
22 cannot satisfy the Taylor factors for individuals who were not  
23 class members in that case. The Court and the parties in  
24 O'Bannon focused their analysis on the claims of class members,  
25 the named plaintiffs represented only class members, and only  
26 class members were on notice that they were represented.

27 None of the current Plaintiffs' claims are precluded for an  
28 additional reason, regardless of whether those Plaintiffs were  
29 O'Bannon class members. The general rule is that "'the  
30 continuation of conduct under attack in a prior antitrust suit'"  
31 gives rise to a new action. Harkins Amusement Enters., Inc. v.  
32 Harry Nace Co., 890 F.2d 181, 183 (9th Cir. 1989) (quoting

1 2 P. Areeda & D. Turner, Antitrust Laws § 323c (1978)) ("Failure  
2 to gain relief for one period of time does not mean that the  
3 plaintiffs will necessarily fail for a different period of  
4 time."); see also Frank v. United Airlines, Inc., 216 F.3d 845,  
5 851 (9th Cir. 2000) ("A claim arising after the date of an  
6 earlier judgment is not barred, even if it arises out of a  
7 continuing course of conduct that provided the basis for the  
8 earlier claim."). Only where no distinct conduct is alleged can  
9 res judicata be applied to bar claims arising from a different  
10 time period. See In re Dual-Deck Video Cassette Recorder  
11 Antitrust Litig., 11 F.3d 1460, 1464 (9th Cir. 1993) (applying  
12 res judicata where nothing new was "alleged--no new conspiracy,  
13 no new kinds of monopolization, no new acts").

14 The Court must consider the "conduct of parties since the  
15 first judgment" and other factual matters in the new cause of  
16 action. Harkins, 890 F.2d at 183 (quoting California v. Chevron  
17 Corp., 872 F.2d 1410, 1415 (9th Cir. 1989)). It is not enough  
18 that "both suits involved essentially the same course of wrongful  
19 conduct" or that injunctive relief was sought in the first  
20 action, especially "in view of the public interest in vigilant  
21 enforcement of the antitrust laws through the instrumentality of  
22 the private treble-damage action." Lawlor v. Nat'l Screen Serv.  
23 Corp., 349 U.S. 322, 327, 329 (1955) (internal quotation marks  
24 omitted).

25 The NCAA Bylaws were changed after, and in part because of,  
26 O'Bannon, and now permit student-athletes to receive financial  
27 aid, based on athletics ability, up to their cost of attendance,  
28 or more than that in the case of a Pell grant. See Pls. Ex. 15

1 at 182 (Bylaws 15.1, 15.1.1). In this case, Plaintiffs do not  
2 challenge the bar on distributing NIL licensing revenue to  
3 student-athletes or the former grant-in-aid limitation. Rather,  
4 the challenged restraints are the current, interconnected set of  
5 NCAA rules that generally limit financial aid to the cost of  
6 attendance yet also fix the prices of numerous and varied  
7 exceptions--additional benefits that have a financial value above  
8 the cost of attendance. See Pls. Opp. to Defs. MSJ, App'x A  
9 (Challenged Rules and Operative Language).

10 Some of these rules regulate payment for additional benefits  
11 that do appear to be tethered to education, such as the rule  
12 limiting the availability of academic tutoring. See Defs. Ex. 1  
13 at 102 (Bylaw 13.2.1.1(k), prohibiting tutoring to assist in  
14 initial eligibility, transfer eligibility, or waiver requests).  
15 The rules also restrict schools' ability to reimburse student-  
16 athletes for computers, science equipment, musical instruments  
17 and other items not currently included in the cost of attendance  
18 calculation but nonetheless related to the pursuit of various  
19 academic studies. See NCAA (Kevin C. Lennon) Depo. at 212:11-19.  
20 Plaintiffs also challenge various additional restrictions on  
21 benefits related to educational expenses, such as providing  
22 guaranteed post-eligibility scholarships. Id. at 195:5-199:17.  
23 Currently, schools may provide guaranteed post-eligibility  
24 scholarships for undergraduate or graduate study and tutoring  
25 costs only at their own institution, but not at other  
26 institutions. Id.

27 Defendants also allow, but fix the amount of, benefits that  
28 a school may provide that are incidental to athletic

1 participation, such as travel expenses and prizes. See id. at  
2 58:20-59:16 ("There are items that schools can provide outside of  
3 educational expenses, which, again, are tethered to cost of  
4 attendance, that I would kind of capture as incidental to  
5 participation."). Some of the additional benefits limited by the  
6 rules at issue in this case were provided to student-athletes at  
7 the time of the O'Bannon trial, but neither this Court nor the  
8 Court of Appeals addressed them in that case and their scope has  
9 expanded since that time. For example, student-athletes could  
10 previously receive meals incidental to participation in  
11 athletics, see O'Bannon Ex. 2340-233 (then-applicable Bylaws),  
12 but may now receive unlimited meals and snacks, see Pls. Ex. 15  
13 at 183 (Bylaw 15.2.2.1.6 regarding meals incidental to  
14 participation); Mishkin Reply Decl. Ex. 1 at 207 (Bylaw  
15 16.5.2(d), (e) regarding meals and snacks). Witnesses in  
16 O'Bannon testified that the Student Assistance Fund (SAF)<sup>5</sup> could  
17 then be used to purchase a "special insurance policy" or  
18 "catastrophic injury insurance," O'Bannon Tr. 2147:14-23,  
19 2152:7-17, but student-athletes now may borrow against future  
20 earnings to purchase loss-of-value insurance, Pls. Ex. 15 at 58  
21 (Bylaw 12.1.2.4.4). Student-athletes now may receive athletic  
22 performance bonuses from international organizations related to  
23 Olympic participation. See Pls. Ex. 15 at 57 (Bylaw  
24 12.1.2.1.5.2, adopted January 17, 2015 and effective August 1,  
25

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26 <sup>5</sup> The SAF is a fund that the NCAA provides to member schools  
27 to distribute to student-athletes for a variety of uses, some of  
28 which are in addition to full cost-of-attendance financial aid.  
See NCAA (Lennon) Depo. at 152:19-153:19; Pls. Ex. 24 at  
NCAAGIA03316052 (reporting on SAF uses).

1 2015). There has been an increase in permissible reimbursement  
2 for family travel expenses, which permits schools to pay limited  
3 expenses of a student-athlete's spouse and children to attend  
4 games, although still not those of parents or siblings. Eugene  
5 DuBuis Smith Depo. at 51:24-57:18; see also NCAA (Lennon) Depo.  
6 at 71:7-73:2, 186:1-16 (discussing Bylaw 16.6.1.1); Mishkin Reply  
7 Decl. Ex. 1 at 303 (Bylaw 18.7.5).

8 Because Plaintiffs raise new antitrust challenges to  
9 conduct, in a different time period, relating to rules that are  
10 not the same as those challenged in O'Bannon, res judicata and  
11 collateral estoppel do not preclude the claims even of those  
12 Plaintiffs who were O'Bannon class members.

13 II. Section 1 of the Sherman Act

14 The Court next turns to the remaining issues in the parties'  
15 cross-motions. Plaintiffs move for summary judgment of their  
16 claims under Section 1 of the Sherman Act. 15 U.S.C. § 1. In  
17 order to establish a Section 1 claim, Plaintiffs must  
18 demonstrate: "(1) that there was a contract, combination, or  
19 conspiracy; (2) that the agreement unreasonably restrained trade  
20 under either a per se rule of illegality or a rule of reason  
21 analysis; and (3) that the restraint affected interstate  
22 commerce." Tanaka v. Univ. of S. California, 252 F.3d 1059, 1062  
23 (9th Cir. 2001) (internal quotation marks omitted). The  
24 existence of a contract, combination or conspiracy that affects  
25 interstate commerce is undisputed in this case. NCAA regulations  
26 are subject to antitrust scrutiny under the Sherman Act and must  
27 be tested using a rule-of-reason analysis. O'Bannon, 802 F.3d at  
28 1079. Under that analysis, Plaintiffs bear the initial burden of

1 showing that the challenged restraints produce significant  
2 anticompetitive effects within a relevant market. If Plaintiffs  
3 meet this burden, Defendants must come forward with evidence of  
4 the restraints' procompetitive effects. Plaintiffs must then  
5 show that any legitimate objectives can be achieved in a  
6 substantially less restrictive manner. Tanaka, 252 F.3d at 1063.

7 Plaintiffs contend that the undisputed evidence supports  
8 their claim that the challenged restraints cause anticompetitive  
9 effects in the relevant market, and that Defendants cannot meet  
10 their burden to prove that the restraints have procompetitive  
11 benefits. They request that the Court grant summary judgment on  
12 this basis, obviating the need to reach the question of whether  
13 there are any less restrictive alternatives to any legitimate  
14 objectives. Plaintiffs do not seek summary judgment on the  
15 existence of less restrictive alternatives.

16 Defendants cross-move for summary judgment on the basis that  
17 the decisions of this Court and the Ninth Circuit in O'Bannon bar  
18 all of Plaintiffs' claims, under the doctrine of stare decisis.  
19 "If a court must decide an issue governed by a prior opinion that  
20 constitutes binding authority, the later court is bound to reach  
21 the same result, even if it considers the rule unwise or  
22 incorrect. Binding authority must be followed unless and until  
23 overruled by a body competent to do so." Hart v. Massanari,  
24 266 F.3d 1155, 1170 (9th Cir. 2001). Stare decisis applies when  
25 "there are neither new factual circumstances nor a new legal  
26 landscape." Ore. Natural Desert Ass'n v. U.S. Forest Serv.,  
27 550 F.3d 778, 786 (9th Cir. 2008). A court is required to reach  
28 the same legal consequence from the same "detailed set of facts."



1 In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996). "Insofar as  
2 there may be factual differences between the current case and the  
3 earlier one, the court must determine whether those differences  
4 are material to the application of the rule or allow the  
5 precedent to be distinguished on a principled basis." Hart,  
6 266 F.3d at 1172; see also Miranda v. Selig, 860 F.3d 1237, 1242  
7 (9th Cir. 2017) (stare decisis required where circumstances of  
8 new case are not "separate and distinct in a meaningful way for  
9 the purposes of the Sherman Act"). The doctrine encompasses  
10 issues actually decided in a prior case even if those issues were  
11 not, in a technical sense, necessary, but only if they were  
12 germane to the eventual resolution of the case and expressly  
13 resolved after reasoned consideration. Alcoa, Inc. v. Bonneville  
14 Power Admin., 698 F.3d 774, 804 n.4 (9th Cir. 2012); Barapind v.  
15 Enomoto, 400 F.3d 744, 751 (9th Cir. 2005) (en banc).

16 In the area of antitrust law, however, another interest  
17 competes with the doctrine of stare decisis. That is an interest  
18 "in recognizing and adapting to changed circumstances and the  
19 lessons of accumulated experience." State Oil Co. v. Khan,  
20 522 U.S. 3, 20 (1997). Rule-of-reason analysis "evolves with new  
21 circumstances and new wisdom." Id. at 21 (quoting Bus. Elecs.  
22 Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731-32 (1988)). "The  
23 rule of reason requires an evaluation of each challenged  
24 restraint in light of the special circumstances involved. That  
25 the analysis will differ from case to case is the essence of the  
26 rule." Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1449 (9th  
27 Cir. 1988) (citation omitted).

28

1 A. Anticompetitive Effects in the Relevant Market

2 1. Market Definition

3 In a rule-of-reason analysis, the Court must first define  
4 the relevant market within which the challenged restraint may  
5 produce significant anticompetitive effects. Both sides here  
6 request that the Court adopt the market definition applied in  
7 O'Bannon, which was not challenged in the appeal of that case.  
8 802 F.3d at 1070. Plaintiffs argue that the evidence supports  
9 the same education or labor market for student-athletes in FBS  
10 football and Division I basketball. Defendants contend that  
11 stare decisis controls the outcome of this case, including the  
12 market definition.<sup>6</sup> Defendants also agreed at the January 21,  
13 2018 hearing that the market definition, as well as other rulings  
14 in O'Bannon, would apply equally to the women's basketball  
15 Plaintiffs in this action. Tr. at 7-8.

16 In the absence of any material factual dispute, the Court  
17 will grant both parties' summary judgment motions on the issue of  
18 market definition and adopt the market definition from O'Bannon,  
19 the market for a college education combined with athletics or  
20 alternatively the market for the student-athletes' athletic  
21 services.

22 2. The Challenged Restraints and Significant  
23 Anticompetitive Effects

24 The next element of the rule-of-reason analysis is whether  
25 the challenged restraints produce significant anticompetitive

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26 <sup>6</sup> Defendants' expert Dr. Kenneth G. Elzinga posits that the  
27 market should be viewed more broadly as a multi-sided one for the  
28 educational services of colleges and universities, but  
Defendants, having taken the position that O'Bannon is  
controlling, do not rely on this theory.

1 effects within the relevant market. Plaintiffs have produced  
2 undisputed evidence that greater compensation and benefits would  
3 be offered in the recruitment of student-athletes absent the  
4 challenged rules, meeting their burden for summary adjudication  
5 on this question. Defendants' position is that O'Bannon is  
6 binding on this point under the doctrine of stare decisis. See  
7 802 F.3d at 1070-72; 7 F. Supp. 3d at 971-73, 988-93. They have  
8 not meaningfully disputed Plaintiffs' showing that the challenged  
9 restraints produce significant anticompetitive effects within the  
10 relevant market. Because Plaintiffs have met their burden and  
11 Defendants have not created a factual dispute, the Court will  
12 grant the parties' cross-motions for summary adjudication of this  
13 element and find that the challenged restraints produce  
14 significant anticompetitive effects in the relevant market.

15 B. Procompetitive Benefits of the Restraints

16 The next factor is whether Defendants have come forward with  
17 evidence of procompetitive effects of the challenged restraints.  
18 Defendants claim that O'Bannon established as a matter of law  
19 that the NCAA's rules serve the procompetitive purposes of  
20 "integrating academics with athletics, and 'preserving the  
21 popularity of the NCAA's product by promoting its current  
22 understanding of amateurism.'" 802 F.3d at 1073 (quoting 7 F.  
23 Supp. 3d at 1005). They further argue that the record in this  
24 case contains ample evidence of these procompetitive  
25 justifications as well as of other possible procompetitive  
26 justifications not found in O'Bannon. Plaintiffs respond that  
27 O'Bannon does not require the Court to uphold Defendants'  
28 procompetitive justifications in this case because Plaintiffs

1 have developed a record of factual circumstances that have  
2 changed after the close of the record in O'Bannon.

3 Plaintiffs first point to the change caused by O'Bannon:  
4 student-athletes now may receive scholarships above the former  
5 grant-in-aid limit, up to the cost of attendance. This change,  
6 however, does not distinguish the present case from O'Bannon  
7 because it was the very issue adjudicated in that case. The  
8 change that was made was required and approved by the Court.  
9 802 F.3d at 1075-76.

10 Next, Plaintiffs identify the NCAA rule changes discussed  
11 above, which have generally increased but continue to fix various  
12 benefits related to athletic participation that a member school  
13 may provide for its student-athletes or permit them to receive  
14 from outside sources. See Section I above. They also identify  
15 new concessions by Defendants that benefits and gifts that are  
16 related to athletic participation but are above the cost of  
17 attendance are connected neither to education nor to their  
18 understanding of amateurism. See, e.g., Big 12 (Robert A.  
19 Bowlsby, II) Depo. at 162:10-14 (not sure how valuable gifts  
20 could be tethered to education); Michael Slive Depo. at 218:4-10  
21 (gift card "not really" connected to educational experience);  
22 NCAA (Lennon) Depo. at 119:20-122:22, 287:6-19 (gifts not  
23 related to amateurism). Plaintiffs contend that because  
24 Defendants permit student-athletes to be paid money that does not  
25 go "to cover legitimate educational expenses," they are not  
26 amateurs. O'Bannon, 802 F.3d at 1075. Plaintiffs also identify  
27 a number of expenses that they contend are tethered to education  
28 but are still disallowed. See Pls. MSJ, App'x B (citing NCAA

1 (Lennon) Depo. at 195:5-215:14); see also Section I above.

2 While the restraints challenged in this case overlap with  
3 those in O'Bannon, the specific rules at issue are not the same.  
4 Challenges to the NCAA's rules must be assessed on a case-by-case  
5 basis under the rule of reason, and O'Bannon's holding that there  
6 were procompetitive justifications for the rules challenged in  
7 that case would not necessarily require the Court to find that  
8 different rules, challenged in this case, also have the same  
9 procompetitive effects. 802 F.3d at 1063 (citing NCAA v. Bd. of  
10 Regents of the Univ. of Okla., 468 U.S. 85 (1984)) ("we are not  
11 bound by Board of Regents to conclude that every NCAA rule that  
12 somehow relates to amateurism is automatically valid"). The  
13 Court rejects Defendants' contention that merely because all of  
14 the then-existing NCAA Bylaws were part of the record in  
15 O'Bannon, the Court necessarily adjudicated in Defendants' favor  
16 all possible challenges to any of those rules. The reasoning of  
17 O'Bannon will be very relevant in assessing whether the rules in  
18 this case have procompetitive effects. However, like the NIL  
19 rules in O'Bannon, the validity of the specific rules challenged  
20 in this case "must be proved, not presumed." Id. at 1064.

21 Plaintiffs further contend that Defendants have failed to  
22 provide material evidence that their current rules create  
23 procompetitive effects. Therefore, Plaintiffs argue, the Court  
24 should enter summary judgment against Defendants without  
25 balancing the competitive effects of the restraints or reaching  
26 the question of less restrictive alternatives. However,  
27 Defendants have presented sufficient evidence in support of the  
28 two procompetitive effects found in O'Bannon to create a factual

1 issue for trial. This includes a survey of consumer preferences,  
2 which led Defendants' expert Dr. Bruce Isaacson to conclude that  
3 fans are drawn to college football and basketball in part due to  
4 their perception of amateurism. See Isaacson Depo. at 48:4-17;  
5 Isaacson Rep. ¶¶ 151 & Table 7, 155. Plaintiffs identify various  
6 defects in Defendants' survey evidence, including the fact that  
7 it reflects consumers' stated preferences rather than how  
8 consumers would actually behave if the NCAA's restrictions on  
9 student-athlete compensation were modified or lifted. However,  
10 the weight of Dr. Isaacson's testimony is a question for trial  
11 rather than summary judgment.

12 Defendants also present evidence that paying student-  
13 athletes would detract from the integration of academics and  
14 athletics in the campus community. For example, Professor James  
15 T. Heckman testified that paying student-athletes would likely  
16 lead them to dedicate even more effort and possibly more time to  
17 their sports, potentially diverting them "away from actually  
18 being students and towards just being athletes." Heckman Depo.  
19 at 315:5-316:18.

20 Accordingly, the Court will deny the parties' cross-motions  
21 for summary adjudication of the question of whether the  
22 challenged NCAA rules serve Defendants' asserted procompetitive  
23 purposes of integrating academics with athletics and preserving  
24 the popularity of the NCAA's product by promoting its current  
25 understanding of amateurism. See 802 F.3d at 1073 (quoting 7 F.  
26 Supp. 3d at 1005).

27 Plaintiffs also move for summary judgment that Defendants  
28 have abandoned seven additional procompetitive justifications

1 that they identified in response to an interrogatory. See Defs.  
2 Ex. 8 (NCAA Amended Responses to Pls. Second Set of  
3 Interrogatories) at 9-14. Plaintiffs contend that Defendants  
4 developed no record to support any of them.

5 Defendants first respond to this argument by contending that  
6 Plaintiffs' summary judgment motion inadequately demonstrates an  
7 absence of evidence on these procompetitive justifications, and  
8 should be denied due to Plaintiffs' failure to meet their burden  
9 as the moving party. However, "the Celotex 'showing' can be made  
10 by 'pointing out through argument'" the "'absence of evidence to  
11 support plaintiff's claim.'" Devereaux v. Abbey, 263 F.3d 1070,  
12 1076 (9th Cir. 2001) (quoting Fairbank v. Wunderman Cato Johnson,  
13 212 F.3d 528, 532 (9th Cir. 2000)). Although not lengthy,  
14 Plaintiffs' argument that Defendants have not developed evidence  
15 to support additional procompetitive justifications, identified  
16 in their interrogatory responses, is sufficient to shift the  
17 burden to Defendants to produce "specific evidence, through  
18 affidavits or admissible discovery material, to show that the  
19 dispute exists." Bhan, 929 F.2d at 1409. For six of their  
20 asserted procompetitive justifications, Defendants have not  
21 attempted to meet this burden at all, only quoting their  
22 interrogatory response identifying those justifications in a  
23 footnote but producing no evidence to support them.<sup>7</sup> See Defs.

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24  
25 <sup>7</sup> Except to the extent that they are included in the  
26 interrogatory response, Defendants do not request that the Court  
27 reconsider the procompetitive justifications of increased output  
28 and competitive balance rejected in O'Bannon. See 7 F. Supp. 3d  
at 978-79, 981-82. The O'Bannon defendants did not substantively  
defend the rejected procompetitive justifications on appeal,  
802 F.3d at 1072, and Defendants here do not proffer any evidence  
to support them.

1 Opp. to Pls. MSJ at 50 n.27. Accordingly, the Court will grant  
2 summary judgment on these six procompetitive justifications.

3 Defendants do attempt to meet their burden on one  
4 procompetitive justification, specifically, their contention  
5 that:

6 The challenged rules serve the procompetitive goals of  
7 expanding output in the college education market and  
8 improving the quality of the collegiate experience for  
9 student-athletes, other students, and alumni by  
10 maintaining the unique heritage and traditions of  
11 college athletics and preserving amateurism as a  
12 foundational principle, thereby distinguishing amateur  
13 college athletics from professional sports, allowing  
14 the former to exist as a distinct form of athletic  
15 rivalry and as an essential component of a  
16 comprehensive college education.

17 Defs. Ex. 8 (NCAA Amended Responses to Pls. Second Set of  
18 Interrogatories) at 11. This proffered justification does not  
19 coincide with the justification relating to expanding output that  
20 the Court rejected in O'Bannon. In that case, the defendants  
21 argued that the NCAA's rules enable it to increase the number of  
22 opportunities available for participation in FBS football and  
23 Division I basketball, increasing the number of games that can be  
24 played. 7 F. Supp. 3d at 981. Rather, this purportedly new  
25 justification seems largely to overlap with Defendants' two  
26 remaining O'Bannon justifications of integrating academics with  
27 athletics ("improving the quality of the collegiate experience  
28 for student-athletes") and preserving the popularity of college  
sports ("distinguishing amateur college athletics from  
professional sports"). Defs. Ex. 8 (NCAA Amended Responses to  
Pls. Second Set of Interrogatories) at 11.

In advancing this purportedly new and separate  
procompetitive justification, Defendants rely solely on the



1 testimony of two expert witnesses, their expert Dr. Elzinga and  
2 Plaintiffs' expert Dr. Edward P. Lazear. Dr. Elzinga's report  
3 focuses on issues relating to the relevant market. Elzinga Rep.  
4 at 4-10. In that context, he explains his theory that, because  
5 the relevant market is properly viewed as a multi-sided market  
6 for higher education, colleges must price participation in  
7 activities, including athletics, to provide an "optimal balance"  
8 for different constituents. Id. at 35; see also id. at 9, 27-29,  
9 32-33. Defendants contend that this view is supported by Dr.  
10 Lazear's testimony that the demand in the relevant college  
11 education market is derived from "some higher-level market, which  
12 might include alums, it might include viewers, it might include  
13 other students," who are direct participants in the market.  
14 Lazear Depo. at 217:19-218:24. Assuming the admissibility of  
15 these experts' testimony, taking it as true and drawing all  
16 reasonable inferences in favor of Defendants, however, it does  
17 not constitute evidence of a new or different procompetitive  
18 justification. Dr. Elzinga did not purport to opine on the  
19 impact of the challenged restraints on output or examine data  
20 that might support any such opinion. Elzinga Depo. at 29:14-  
21 30:18. Defendants' attempt to characterize Dr. Elzinga's  
22 opinions as supporting a procompetitive justification he did not  
23 directly consider is insufficient to raise a genuine issue of  
24 material fact, and the Court will grant summary judgment on this  
25 proposed procompetitive justification as well.

26 C. Less Restrictive Alternatives

27 The final step in the rule-of-reason analysis is whether  
28 Plaintiffs can "make a strong evidentiary showing" that any

1 legitimate objectives can be achieved in a substantially less  
2 restrictive manner. O'Bannon, 802 F.3d at 1074. Plaintiffs do  
3 not move for summary judgment on this issue, but seek to prove at  
4 trial their contention that the NCAA's rules are "patently and  
5 inexplicably stricter than is necessary to accomplish" the NCAA's  
6 procompetitive objectives. O'Bannon, 802 F.3d at 1075.  
7 Defendants, on the other hand, move for summary judgment that all  
8 less restrictive alternatives proposed in this case are  
9 foreclosed by O'Bannon. The Court finds that because Plaintiffs  
10 challenge different rules and propose different alternatives from  
11 those considered in O'Bannon, the Court is not precluded from  
12 considering this factor.

13 To be viable, an alternative "must be 'virtually as  
14 effective' in serving the procompetitive purposes of the NCAA's  
15 current rules, and 'without significantly increased cost.'" Id.  
16 at 1074 (quoting Cnty. Of Tuolumne v. Sonora Cmty. Hosp.,  
17 236 F.3d 1148, 1159 (9th Cir. 2001)). In addition, any less  
18 restrictive alternatives "should either be based on actual  
19 experience in analogous situations elsewhere or else be fairly  
20 obvious." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law  
21 ¶ 1913b (3d ed. 2006). In considering Plaintiffs' showing, the  
22 Court will afford the NCAA "ample latitude" to superintend  
23 college athletics. O'Bannon, 802 F.3d at 1074 (quoting Bd. of  
24 Regents, 468 U.S. at 120). The Court will not "use antitrust law  
25 to make marginal adjustments to broadly reasonable market  
26 restraints." Id. at 1075.

27 As discussed, Plaintiffs in this case do not challenge  
28 restrictions on distribution of licensing revenue derived from

1 NILs, as was the case in O'Bannon. Rather, they challenge NCAA  
2 rules relating to the benefits that schools may offer student-  
3 athletes to compete for their recruitment. The less restrictive  
4 alternatives that they propose in this case are different from  
5 those reviewed in O'Bannon. As the Ninth Circuit explained, to  
6 "say that the NCAA's amateurism rules are procompetitive, as  
7 Board of Regents did, is not to say that they are automatically  
8 lawful; a restraint that serves a procompetitive purpose can  
9 still be invalid under the Rule of Reason if a substantially less  
10 restrictive rule would further the same objectives equally well."  
11 O'Bannon, 802 F.3d at 1063-64 (citing Bd. of Regents, 468 U.S. at  
12 101 n.23); see also id. at 1063 ("we are not bound by Board of  
13 Regents to conclude that every NCAA rule that somehow relates to  
14 amateurism is automatically valid").

15 The first less restrictive alternative that Plaintiffs  
16 propose is allowing the Division I conferences, rather than the  
17 NCAA, to set the rules regulating education and athletic  
18 participation expenses that the member institutions may provide.  
19 Plaintiffs argue that this alternative would be substantially  
20 less restrictive because it would allow conferences to compete to  
21 implement rules that attract student-athletes while still  
22 maintaining the popularity of college sports and balancing the  
23 integration of academics and athletics. They contend that none  
24 of the conferences has market power and, thus, their rule-making  
25 would not be subject to an antitrust challenge.<sup>8</sup>

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26  
27 <sup>8</sup> Defendants argue that Plaintiffs' proposed less restrictive  
28 alternative of conference autonomy is inconsistent with  
Plaintiffs' challenge to conference-specific rules. See Pls.  
MSJ, App'x A (listing challenged rules). However, Plaintiffs

1 Plaintiffs contend that their proposed conference-autonomy  
2 system is based on actual experience in a closely analogous  
3 context. It could “operate like the college athletic system  
4 during the first half of the 20th Century, when each conference  
5 had its own compensation rules.” Roger Noll Rep. at 30. To  
6 support their argument that such autonomy is viable as a less  
7 restrictive alternative to NCAA regulations, Plaintiffs have  
8 identified new NCAA Bylaws, adopted on August 7, 2014 (after the  
9 O’Bannon trial), that grant the Power Five Conferences autonomy  
10 to adopt or amend rules on a variety of topics. See Defs. Ex. 1  
11 at 27-28 (Bylaw 5.3.2.1). The Bylaws now grant autonomy to the  
12 Power Five Conferences to legislate, for example, regarding “a  
13 student-athlete’s individual limit on athletically related  
14 financial aid, terms and conditions of awarding institutional  
15 financial aid, and the eligibility of former student-athletes to  
16 receive undergraduate financial aid”; pre-enrollment expenses and  
17 support; student-athletes securing loans to purchase loss-of-  
18 value and disability insurance; and awards, benefits and expenses  
19 for student-athletes and their family and friends. Id.; see also  
20 Daniel A. Rascher Rep. at 12-13 & n.21, 172-182 (discussing  
21 proposed less restrictive alternatives). The existence of these  
22 exceptions for the Power Five Conferences constitutes evidence  
23 sufficient to raise a factual question that allowing relevant  
24 areas of autonomy for all Division I conferences would be a less  
25 restrictive alternative to current NCAA rules.

26  
27  
28

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challenge only the portions of the conference rules that require compliance with challenged NCAA rules. See Pls. Reply, App’x A (listing challenged language of each rule).

1 Defendants argue that this proposal was considered and  
2 rejected in O'Bannon. The record in O'Bannon, however, does not  
3 support their contention. One of the plaintiffs' expert  
4 witnesses, Dr. Noll, testified briefly in O'Bannon about the  
5 alternative of allowing the individual conferences to set the  
6 rules. O'Bannon Tr. at 445:11-451:5. In closing argument, there  
7 was discussion of whether an injunction should allow conference-  
8 level decision-making on the topics of the challenged NCAA  
9 restraints. Id. at 3382:19-3383:2. Ultimately, however, the  
10 plaintiffs proposed to the Court only the three less restrictive  
11 alternatives, listed above, that were addressed in the Court's  
12 August 8, 2014 Findings of Fact and Conclusions of Law. See  
13 O'Bannon Plaintiffs' Opening Post-Trial Brief at 25 (No. 09-cv-  
14 03329-CW, Dkt. No. 275); O'Bannon Plaintiffs' Post-Trial Reply  
15 Brief at 14-15 (No. 09-cv-03329-CW, Dkt. No. 281). The O'Bannon  
16 plaintiffs proposed language for an injunction, asking the Court  
17 to enjoin the member institutions and conferences along with the  
18 NCAA. O'Bannon Plaintiffs' Proposed Order Granting Injunctive  
19 Relief (No. 09-cv-03329-CW, Dkt. No. 193-1); O'Bannon Plaintiffs'  
20 Alternative Proposed Form of Injunction (No. 09-cv-03329-CW, Dkt.  
21 No. 252). The permanent injunction entered by the Court enjoined  
22 the NCAA's member schools and conferences as well as the NCAA  
23 itself. O'Bannon Permanent Injunction (No. 09-cv-03329-CW, Dkt.  
24 No. 292). In O'Bannon, this Court did not rule on the less  
25 restrictive alternative of conference autonomy. No rule of law  
26 established in that case, or any other, precludes the Court from  
27 considering conference autonomy as a less restrictive alternative  
28 in this case. "A hypothetical that is unnecessary in any sense

1 to the resolution of the case, and is determined only tentatively  
2 . . . does not make precedential law.” Alcoa, 698 F.3d at 804  
3 n.4; see also Osborne, 76 F.3d at 309 (“the doctrine of stare  
4 decisis concerns the holdings of previous cases, not the  
5 rationales”). A hypothetical that is not determined at all, such  
6 as the question of conference autonomy in O’Bannon, is not  
7 binding under the doctrine of stare decisis.

8 Plaintiffs propose a second less restrictive alternative,  
9 requesting that the Court enjoin all national rules that prohibit  
10 or limit any payments or non-cash benefits that are tethered to  
11 educational expenses, or any payments or benefits that are  
12 incidental to athletic participation. See Rascher Rep. at 173-  
13 177. Their position is that because Defendants already permit  
14 some payments and benefits in these two categories above the cost  
15 of attendance, it would be virtually as effective in serving the  
16 NCAA’s procompetitive purposes to require the NCAA to allow all  
17 benefits in either category. Plaintiffs contend that this  
18 alternative could be applied with or without conference autonomy  
19 because abolishing the NCAA restraints would be a less  
20 restrictive alternative to the current system regardless of  
21 whether conference rules were permitted as a replacement.

22 In support of this contention, Plaintiffs first identify  
23 evidence that Defendants already allow schools to offer some  
24 benefits above the cost of attendance that are related to  
25 athletic participation but not tethered to education. See, e.g.,  
26 Noll Rep. at 17-18 (discussing categories of benefits); NCAA  
27 (Lennon) Depo. at 58:20-59:16 (same). For example, schools can  
28 pay the expenses for an athlete’s spouse and children to attend a

1   playoff game, because such expenses are incidental to athletic  
2   participation, but not the expenses of parents, grandparents, or  
3   siblings. NCAA (Lennon) Depo. at 186:1-16; see also id. at  
4   86:17-87:13 (schools may reimburse students' national  
5   championship, Olympic trials and national team tryout costs).

6           Plaintiffs contend that Defendants have conceded that the  
7   payment of currently-allowed benefits above the cost of  
8   attendance but tethered to education or incidental to athletic  
9   participation does not undermine their procompetitive purposes.  
10   The NCAA's Rule 30(b)(6) witness Kevin C. Lennon testified  
11   extensively on this topic. Id. at 63:21-64:1 (expenses  
12   incidental to athletic participation can be paid for athletes  
13   without offending collegiate model); 71:23-73:2 (NCAA  
14   membership's decision to pay expenses incidental to athletic  
15   participation does not violate principle of amateurism); 85:5-23  
16   (per diem during trips does not violate principle of amateurism);  
17   93:4-10 ("If the--the benefit provided is permitted within the  
18   legislation as either related to educational expenses or--or  
19   incidental to participation, then it would be not considered pay,  
20   and it would be permitted to be received."); 186:1-16 (schools'  
21   payment of costs for athlete's spouse and children to attend  
22   playoff game does not implicate principle of amateurism); 287:6-  
23   19 (NCAA membership is comfortable with "two buckets" of  
24   expenses, those tethered to education and those incidental to  
25   athletics participation). Plaintiffs also cite the conclusion of  
26   their survey expert Hal Poret that there would be no negative  
27   impact on consumer demand for college football and basketball if  
28   various forms of additional benefits were provided to student-

1 athletes. Poret Rep. at 19-21.

2 Defendants respond that Plaintiffs' suggestion cannot be  
3 squared with O'Bannon's holding that limiting payments to  
4 Plaintiffs' legitimate costs to attend school is consistent with  
5 antitrust law. See 802 F.3d at 1075 ("student-athletes remain  
6 amateurs as long as any money paid to them goes to cover  
7 legitimate educational expenses."). In O'Bannon, the Ninth  
8 Circuit concluded, "The Rule of Reason requires that the NCAA  
9 permit its schools to provide up to the cost of attendance to  
10 their student-athletes. It does not require more." 802 F.3d at  
11 1079. Defendants' position is that this means that stare decisis  
12 limits the less restrictive alternatives that the Court may  
13 consider in this case to the relief that was provided in  
14 O'Bannon. They argue that Plaintiffs' proposed less restrictive  
15 alternatives are no more than new arguments in support of the  
16 same challenge already adjudicated in O'Bannon. Relying on a  
17 district court case, they argue that stare decisis "would be  
18 largely meaningless if a lower court could change an appellate  
19 court's interpretation of the law based only on a new argument."  
20 Rambus Inc. v. Hynix Semiconductor Inc., 569 F. Supp. 2d 946, 972  
21 (N.D. Cal. 2008).

22 In Rambus, however, the district court held that the  
23 doctrine of stare decisis bound it to follow the Federal  
24 Circuit's previous construction of the same term at issue,  
25 "integrated circuit device." Id. at 963, 972 (citing Rambus Inc.  
26 v. Infineon Techs. AG, 318 F.3d 1081, 1089-95 (Fed. Cir. 2003)).  
27 The question for the court to decide was the same; only the  
28 arguments in support of the issue had changed. Here, in



1 contrast, the Court is presented with the new and unresolved  
2 issue of whether Plaintiffs have identified different less  
3 restrictive alternatives to all of the NCAA's rules that prohibit  
4 schools from competing to recruit student-athletes with offers of  
5 cash or various benefits tethered to educational expenses or  
6 incidental to athletic participation, including rules that have  
7 changed after O'Bannon.

8 As the Ninth Circuit explained in O'Bannon, "NCAA  
9 regulations are subject to antitrust scrutiny and must be tested  
10 in the crucible of the Rule of Reason." Id. at 1079. A ruling  
11 on less restrictive alternatives to certain NCAA rules in one  
12 case does not bar consideration of different less restrictive  
13 alternatives to a different, if overlapping, set of rules  
14 challenged in a different case. The Supreme Court suggested in  
15 Board of Regents that the NCAA's purpose of marketing "a  
16 particular band of football--college football" could be a  
17 procompetitive justification for rules designed to preserve the  
18 "character and quality" of this product, including compensation  
19 limitations. 468 U.S. at 101-02. This did not mean, however,  
20 that the rules challenged in O'Bannon were exempt from antitrust  
21 scrutiny, because "a restraint that serves a procompetitive  
22 purpose can still be invalid under the Rule of Reason if a  
23 substantially less restrictive rule would further the same  
24 objectives equally well." O'Bannon, 802 F.3d at 1063-64; see  
25 also Nat'l Basketball Ass'n v. SDC Basketball Club, Inc.,  
26 815 F.2d 562, 564, 567-68 (9th Cir. 1987) (prior decisions on  
27 similar franchise relocation rule in football context did not bar  
28 fact-specific rule-of-reason analysis in subsequent challenge in

1 basketball context). Likewise, here, the NCAA's revised rules  
2 and Plaintiffs' proposed less restrictive alternatives to those  
3 rules are "separate and distinct in a meaningful way for the  
4 purposes of the Sherman Act" from those presented in O'Bannon.  
5 Miranda, 860 F.3d at 1242.

6 To be clear, if Defendants prevail in demonstrating the same  
7 procompetitive justifications that the Court found in O'Bannon,  
8 the NCAA will still be able to prohibit its member schools from  
9 paying their student-athletes cash sums unrelated to educational  
10 expenses or athletic participation. O'Bannon, 802 F.3d at 1078-  
11 79. Under such circumstances, the Court will not consider any  
12 proposed less restrictive alternative by which Plaintiffs seek  
13 payment untethered to one of these two categories.

14 Plaintiffs have proffered evidence supporting two possible  
15 less restrictive alternatives not previously presented for  
16 decision or ruled upon, raising a genuine issue of material fact  
17 as to whether they can meet their evidentiary burden to show that  
18 such alternatives would be virtually as effective as the  
19 challenged restraints in advancing Defendants' procompetitive  
20 objectives. They do not seek summary judgment in their favor on  
21 this factor. Defendants have failed to show that these proposed  
22 less restrictive alternatives are foreclosed by O'Bannon.  
23 Accordingly, the Court will deny summary judgment on the question  
24 of less restrictive alternatives.

25 CONCLUSION

26 For the reasons set forth above, Plaintiffs' motion for  
27 summary judgment (Docket No. 657 in Case No. 14-md-02541 and  
28 Docket No. 301 in Case No. 14-cv-02758) is GRANTED IN PART AND

1 DENIED IN PART. Defendants' cross-motion for summary judgment  
2 (Docket No. 704 in Case No. 14-md-02541 and Docket No. 327 in  
3 Case No. 14-cv-02758) is GRANTED IN PART AND DENIED IN PART.

4 1. The Court holds that neither res judicata nor  
5 collateral estoppel bars Plaintiffs' claims, and denies  
6 Defendants' summary judgment motion on this point.

7 2. The Court grants both parties' summary judgment motions  
8 to find that Plaintiffs have met their initial burden of showing  
9 that Defendants' challenged restraints are agreements that  
10 produce significant anticompetitive effects, affecting interstate  
11 commerce, within the same relevant market as that in O'Bannon.

12 3. The Court denies Defendants' summary judgment motion,  
13 under the doctrine of stare decisis, to hold that the same two  
14 procompetitive benefits of Defendants' restraints found in  
15 O'Bannon apply in this case as a matter of law. The Court denies  
16 Plaintiffs' motion for summary adjudication that the  
17 procompetitive justifications found in O'Bannon do not apply, but  
18 grants Plaintiffs' motion for summary judgment regarding  
19 Defendants' other proffered procompetitive justifications.

20 4. The Court denies Defendants' motion for summary  
21 judgment that O'Bannon precludes consideration of the two less  
22 restrictive alternatives that Plaintiffs propose in this case.

23 The Court DENIES Defendants' Motion for Supplemental  
24 Briefing (Docket No. 797) and Plaintiffs' Motion to File  
25 Supplemental Evidence for the Summary Judgment Record (Docket No.  
26 800). The Court does not rule on whether Plaintiffs' proposed  
27 supplemental evidence will be admissible at trial.

28 A final pretrial conference will be held at 2:30 p.m. on

1 Tuesday, November 13, 2018 and a bench trial of no longer than  
2 ten days will commence at 8:30 a.m. on Monday, December 3, 2018.  
3 The parties shall comply with the Court's standing order for  
4 pretrial preparation. Direct expert testimony shall be presented  
5 in writing, with cross-examination and re-direct to take place in  
6 Court. The parties shall limit percipient witness testimony to  
7 that which is essential, attempt to reach stipulations regarding  
8 potentially cumulative evidence and focus their cases only on the  
9 issues remaining for trial.

10 IT IS SO ORDERED.

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12 Dated: March 28, 2018



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CLAUDIA WILKEN  
United States District Judge

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