Steve W. Berman (*Pro hac vice*)
Craig R. Spiegel (SBN 122000)
Ashley Bede (*Pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
craig@hbsslaw.com
ashleyb@hbsslaw.com

Bruce L. Simon (SBN 96241)
Benjamin E. Shiftan (SBN 265767)
PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
bshiftan@pswlaw.com

Class Counsel for Jenkins and Consolidated Action Plaintiffs

[Additional counsel listed on signature page]

Jeffrey L. Kessler (*Pro hac vice*)
David G. Feher (*Pro hac vice*)
David L. Greenspan (*Pro hac vice*)
Jennifer M. Stewart (*Pro hac vice*)
Joseph A. Litman (*Pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
jstewart@winston.com
jlitman@winston.com

Sean D. Meenan (SBN 260466)
Jeanifer E. Parsigian (SBN 289001)
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
smeenan@winston.com
jparsigian@winston.com

Class Counsel for Jenkins and Consolidated Action Plaintiffs

[Additional counsel listed on signature page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

THIS DOCUMENT RELATES TO:

ALL ACTIONS

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR EXCLUSION OF EXPERT TESTIMONY; AND MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE PROPOSED TESTIMONY OF JAMES HECKMAN

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

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I. INTRODUCTION

To borrow a phrase from Yogi Berra, "it's déjà vu all over again." Defendants' opposition to Plaintiffs' summary judgment motion, and their own motion for summary judgment (ECF No. 704) ("Defendants' Motion"), both rest on defiantly recycling their twice-rejected misstatements of *O'Bannon*, Plaintiffs' claims, and the relief Plaintiffs actually seek. As this Court has now held multiple times, *O'Bannon* is not an antitrust lifeline for Defendants against the different claims and different record presented here. At most, *O'Bannon* "simply forecloses one type of relief"—"cash compensation untethered to educational expenses"—and "does not provide a basis upon which judgment on the merits can be rendered." Order Denying Mot. for J. on the Pleadings 5 (Aug. 5, 2016) (ECF No. 459) ("12(c) Order"); *see also* Order Denying Mot. to Dismiss 1 (Oct. 10, 2014) (ECF No. 131) ("MTD Order").

Despite now lauding the "wisdom" of *O'Bannon*'s Cost of Attendance ("COA") injunction—an injunction that the NCAA *opposed* before this Court and the Ninth Circuit—Defendants *prohibit* countless forms of "education-related compensation," *non*-cash compensation and benefits, and cash sums *tethered* to educational expenses, all of which the *O'Bannon* court found to be consistent with any claimed principle of amateurism. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1078 (9th Cir. 2015). Thus, even if *O'Bannon*'s reasoning could apply to the different evidence and claims presented on this record, and even if the Court were to find that Defendants have proven *some* procompetitive benefit for the challenged restraints (it should not), the challenged restrictions would remain—indisputably—too overbroad and anticompetitive to survive scrutiny under the rule of reason.

That said, Plaintiffs contend—as they have throughout this action—that the fact-specific pronouncements of *O'Bannon* should not apply here at all. This record includes many undisputed facts that did not even exist when the *O'Bannon* record closed in August 2014. Since then, Defendants have changed their rules, changed their positions, and FBS football and Division I basketball (and consumers' perceptions thereof) have also changed in ways that make an antitrust difference in Plaintiffs' favor. Full COA has been implemented by various conferences and schools; new NCAA rules have been adopted; other rules have materially changed; and the evolving industries have yielded a vast new array of economic, survey, and other data and evidence that did not exist three years ago.

As a matter of law, antitrust courts must re-evaluate the competitive impact of restraints in relevant markets as they evolve, based on the facts before them.

This record offers undisputed evidence demonstrating in at least four independent ways that the challenged compensation restraints—supposedly based on principles of amateurism—are neither necessary nor even tied to what drives consumer demand, output and the massive economic success of Division I basketball and FBS football.

First, Defendants now freely admit that they already provide compensation and benefits as a *quid pro quo* in exchange for athletics participation, *in addition to and above COA*, "not related to the principle of amateurism," and without harming consumer demand or output. Pls.' Ex. 1, NCAA (Lennon) Tr. 58:20-59:1, 72:22-73:2. Defendants further admit that their caps for athletic participation benefits reflect nothing more than the arbitrary majority whim of the NCAA members—not any hard-and-fast principle or dividing line of "amateurism."

Second, the (multi-thousand-dollar) COA cash stipend itself—which varies substantially from school-to-school—indisputably can be, and is, used for expenses untethered to education, *i.e.*, the very "pay-for-play" "quantum leap" that Defendants claimed in *O'Bannon* would doom their business. Meanwhile, Defendants bar myriad forms of education-related compensation, further underscoring that there is no consumer-demand-oriented, procompetitive dividing "principle" between education-related compensation and cash compensation tethered to education to justify the challenged restraints.

Third, the empirical evidence supplied by experts on consumer demand and preference is one-sided. Defendants' rejoinder largely boils down to asserting that amateurism is justified because they say so (*e.g.*, Defendants' "evidence" on consumer demand consists of their own press releases and the inadmissible "opinions" and "senses" of their self-interested lay witnesses). This is insufficient to create a genuine factual dispute in support of *Defendants'* burden to prove that the challenged restraints are necessary to promote consumer demand for these sports.

Fourth, the record is replete with undisputed evidence that Defendants have not met their burden to prove their claim that the challenged rules are necessary to promote "academic integration." Putting aside the fact that the Court should decline, as a matter of law, to consider this type of social policy objective as a "procompetitive" justification for a private set of economic restraints, Defendants

again supply no competent evidence to support their argument. To the contrary, and to cite just one example, in recently letting the University of North Carolina off scot-free despite its role in an academic fraud scandal involving Division I basketball players, the NCAA has now publicly disavowed that its restraints are designed to ensure that Class Members actually receive an education. NCAA President Mark Emmert just publicly admitted that seventy-nine percent of people who took a recent NCAA poll "said big universities put money ahead of their student athletes"—confirming that consumer demand for these sports has nothing to do with Defendants' false claim that they make Class Members "students first, athletes second." Pls.' Ex. 119, Oct. 30, 2017 Knight Comm'n Public Session #1: A Conversation with Mark Emmert Tr. ("Knight Comm'n Tr.") 10:2-11. Nor can Defendants justify their challenged restraints in the name of preventing a "wedge" between athletes and other students. *Defendants* have *already* created the wedge by putting Class Members on TV broadcasts to national audiences at all times they can find, on the field in front of paying fans, in front of corporate logos, on press junkets, in special dorms, in separate study halls, and off campus for extended periods.

The foregoing categories of undisputed evidence—whether taken individually or together—establish that Defendants have not met their burden to prove *any* procompetitive basis for the challenged restraints. At a minimum, however, Defendants could not possibly prevail on their summary judgment motion because Plaintiffs have presented a number of new less restrictive alternatives—not considered or presented in *O'Bannon*—that would require a trial. Most significantly, there is at least a genuine fact dispute about whether Defendants could achieve any asserted procompetitive benefits of amateurism and/or integration by permitting individual conferences (as opposed to the NCAA's membership at large) to establish their own compensation rules. This way, like-minded institutions could pursue their own path together, with competition *between* the various conferences ensuring a procompetitive outcome. The NCAA has already started down this path by giving the so-called "Power Five" conferences limited autonomy, and Defendants offer no evidence or cogent response as to why conference autonomy could not be a less restrictive means of achieving any procompetitive objectives they claim to pursue. Plaintiffs have additionally presented numerous examples of education-related compensation and in-kind benefits—permissible

even under the most expansive interpretation of *O'Bannon*—that Defendants could permit as less restrictive alternatives to their current rules, without any harm to consumer demand.

As detailed below, Defendants persist in their relentless efforts to mischaracterize the relief Plaintiffs actually seek—which is not a world with no rules impacting Class Members. Plaintiffs will say it yet again: the Classes do *not* seek to require any specific benefits or compensation; do *not* seek to enjoin the individual Conference Defendants from adopting any restrictions they choose, so long as the Conference Defendants set those restrictions independently of each other and the NCAA; and do *not* seek even to enjoin the NCAA from adopting new Division I/FBS-wide rules for Class Members that pass muster under the rule of reason, as informed by the Court's summary judgment or trial ruling in this case. Plaintiffs merely seek a classic antitrust injunction to enjoin enforcement of the overbroad and unlawful restraints currently applicable to Class Members. Thereafter, individual schools or conferences could independently promulgate their own rules, or the NCAA could promulgate less restrictive rules, guided by the Court's application of the rule of reason to the labor markets at issue. To this end, the Court could order a sixty-day period before its permanent injunction took force, allowing time for Defendants to implement new rules, consistent with the Court's ruling, before an injunction against the current challenged restraints goes into effect. There thus would not be so much as a moment in time with no compensation rules at all unless Defendants and their members decide they do not want to adopt new rules.

Plaintiffs organize this Memorandum by first responding to Defendants' arguments about *O'Bannon* and thereafter in accordance with the structure of their moving brief (ECF No. 655) ("Plaintiffs' Motion"). Because arguments in support of Plaintiffs' motion and in opposition to Defendants' Motion operate in tandem, Plaintiffs have not divided this Memorandum into "for" and "against" sections. Lastly, Plaintiffs oppose Defendants' *Daubert*[1] motions against certain of Plaintiffs' experts and move to exclude the opinions offered by Dr. James Heckman.

[1] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

II. THE LEGAL RELEVANCE OF *O'BANNON*

A. Defendants' Interpretation of *O'Bannon* Is Erroneous and Neither Supports Their Motion for Summary Judgment nor Precludes Plaintiffs' Motion

1. Even Assuming, A*rguendo*, That *O'Bannon* Controls the Different Record Presented Here, the Court Has Twice Rejected Defendants' Claim That *O'Bannon* Compels Judgment in Their Favor

Defendants lead by recycling their familiar refrain that "Plaintiffs' claims were already litigated, and lost, in *O'Bannon*." Defs.' Mot. 1; *see also id.* 3. The Court has twice before rejected this argument. *See* 12(c) Order 5; MTD Order 1. *At most*, as the Court previously held, *O'Bannon* "simply forecloses one type of relief": "cash compensation untethered to educational expenses." 12(c) Order 5. It "does not provide a basis upon which a judgment on the merits can be rendered." *Id.*

Accordingly, even broadly interpreting the impact of *O'Bannon*, the Ninth Circuit expressly did *not* preclude claims challenging restraints on "education-related compensation," *non*-cash compensation and benefits, or cash sums *tethered* to educational expenses: "The difference between offering student-athletes *education-related compensation*," on the one hand, "and offering them cash sums untethered to educational expenses," on the other, "is not minor; it is a quantum leap." *O'Bannon*, 802 F.3d at 1078 (emphasis added). This Court has expressly recognized these distinctions made by the *O'Bannon* panel majority in holding that *O'Bannon* does not preclude the claims presented in this case: "as Plaintiffs point out, in this case, they also challenge rules prohibiting the provision of other 'benefits' and 'in-kind' compensation as well as cash compensation. . . . Accordingly . . . Defendants' motion for judgment on the pleadings is not well taken." 12(c) Order 5. Indeed, as reviewed below, the record evidence cited in support of Plaintiffs' Motion is replete with examples of "education-related compensation" endorsed by *O'Bannon* as consistent with any amateurism objective, yet still barred by Defendants' rules.

Nothing has changed to upend the Court's prior conclusions. On the contrary, with the benefit of a full evidentiary record, it is that much clearer that *O'Bannon* does not preclude Plaintiffs' claims. *See infra* § II.A.3. Defendants cannot credibly argue—and have not carried their burden to prove—that there is not at least a genuine issue of material fact that the challenged rules are more restrictive than necessary to achieve any purported procompetitive objective of their restraints when Defendants'

challenged restraints bar innumerable permutations of education-related compensation and in-kind benefits that the decision in *O'Bannon* found to be consistent with any purported principle of amateurism.

2. Defendants Again Misstate the Scope of the Relief Plaintiffs Actually Seek

Contrary to Defendants' claims, Plaintiffs ***do not*** seek to enjoin any and every imaginable compensation or benefit restraint. *See* Defs.' Mot. 15 ("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*") (emphasis added). Because individual Conference Defendants do not possess market power, they—independently (*i.e.*, on a conference-by-conference basis)—would be free to set whatever compensation and benefits restraints they prefer, subject only to the rule of reason as informed by this Court's rulings. And even the NCAA at large could continue to impose compensation and benefits restraints so long as they are consistent with this Court's application of the rule of reason to the labor markets in a decision following summary judgment or trial.[2] Further, as noted at the

[2] In this regard, Defendants' hysterical and ominous warnings that if individual conferences were free to adopt their own rules, they would permit an athlete's aid to fluctuate "depending on how he or she performed" (Defs.' Mot. 3); permit athletes to "take the field or court" "subject to the loss of their scholarships at any time" (*id.*); permit athletes' aid to fluctuate "per game or per win" (*id.* 15); or permit some athletes to "receive compensation above COA and others less" (*id.* 24) have no factual basis in this record. Individual conferences can be expected to respond to an injunction against the challenged restraints in a rational economic manner, and in the best interests of their schools and constituents. Defendants' presumption that competition among the conferences would be destructive is both an economic non-sequitur and an assault on the congressionally determined antitrust policy that competition yields better results for consumers and the marketplace. *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978) ("In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) ("Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies."). Further, Defendants' claims that the "sky will fall" are contradicted by their own sworn testimony, including by President Emmert, that even if the challenged restraints were lifted "the vast majority" of colleges and universities would not pay college athletes more than COA (Pls.' Ex. 12-A, Mark Emmert Tr. 80:12-82:12); [redacted]

outset, the Court could delay entry of its injunction for sixty days to give Defendants time to implement new rules, consistent with the Court's decision. This would foreclose Defendants' arguments that an injunction would require a world with no compensation rules at all.

Nor do Plaintiffs challenge or seek relief from the numerous NCAA Bylaws that set academic eligibility standards, prohibit payments to athletes from agents or other third parties, require that athletes be students at their institutions, prohibit athletes from exploiting their NIL rights, or the vast majority of rules in the NCAA's (and Conference Defendants') hundreds-of-pages-long rulebooks. The subject matter of Plaintiffs' antitrust challenge is limited to rules that impose *caps* (not floors) on *compensation/benefits* provided by the schools in exchange for *athletic services* for *Class Members*.

Moreover, insofar as Plaintiffs challenge "more than 80 NCAA rules" (Defs.' Mot. 14), they only do so because there are eighty-plus rules that to varying degrees—not necessarily in their entirety—prohibit compensation and benefits provided to Division I basketball and FBS football players in a manner far more restrictive than necessary to serve any arguable procompetitive objective recognized in *O'Bannon*. The volume of rules at issue is not a function of the breadth of Plaintiffs' claims, but of the over-reaching and byzantine nature of Defendants' restraints. And despite the fact that Plaintiffs' Motion lists—rule-by-rule—the challenged restraints, and clearly articulates the extent to which Plaintiffs challenge those restraints, Plaintiffs have created Appendix A to respond, again, to Defendants' frivolous argument that Plaintiffs do not "make any effort to explain how each of the identified rules . . . purportedly violate the antitrust laws in any way not previously adjudicated in *O'Bannon*" (Defs.' Mot. 21). *See infra* App'x A.

In a similar vein, there is no merit to Defendants' claim that "more than a third of the challenged rules define and preserve the regime that *O'Bannon* upheld." Defs.' Mot. 21. Even assuming that the reasoning of *O'Bannon* controls this very different factual record, Defendants are wrong, as a matter of law, to contend that *O'Bannon* found *any* procompetitive value in rules that limit "education-related compensation," *non*-cash compensation or benefits, or cash sums *tethered* to educational expenses. If anything, the "regime that *O'Bannon* upheld"—albeit on a different record,

[redacted]

in an industry that has since substantially changed—was one in which the NCAA may legally prohibit "cash sums" that are not permitted "education-related compensation." *O'Bannon*, 802 F.3d at 1078. And even so, *O'Bannon* addressed "nominally, if not analytically," the exchange of cash sums untethered to educational compensation in exchange for NIL rights—not athletic services. *See* Pls.' Ex. 122, Oct. 9, 2014 Hr'g Tr. 9:1-4 ("We have a claim for payment untethered to name, image and likeness, whereas the prior case was entirely tethered, at least nominally, if not analytically, to name, image and likeness."). Nonetheless, should the Court conclude that the fact-based findings of *O'Bannon* control, and apply with equal force to a *quid pro quo* for athletic services as a *quid pro quo* for NIL rights, the Court simply could state in its decision that, under *O'Bannon*'s application of the rule of reason, Defendants may still, even after the injunction here is entered, lawfully restrict "cash sums" that are not "education-related compensation."[3]

3. Neither *O'Bannon*'s Holding nor Its Dicta Control the Claims or Relief Presented by the Changed Industry and Different Evidentiary Record in This Case

As shown in § II.A.1 above, *O'Bannon*'s holding is consistent with the claims presented by Plaintiffs here against rules that prohibit or cap education-related compensation, non-cash compensation and benefits, or additional cash compensation tethered to educational expenses that go beyond COA. In addition, and critically, the factual foundation central to *O'Bannon*'s holding is inapposite to the new and very different evidentiary record amassed here, such that Plaintiffs may pursue even broader relief if the Court permits Plaintiffs to do so. This difference does not exist because *O'Bannon* "wasn't tried as [Plaintiffs here] might have tried it." Defs.' Mot. 17 (quoting Pls.' Ex. 123, Aug. 2, 2016 Hr'g Tr. 20:20-21). Rather, the differences flow from Defendants *changing* their rules, *changing* their positions, and a rapidly evolving post-*O'Bannon* Division I basketball and FBS football industry (to say nothing of different parties and different claims).

[3] If the Court were to reverse course and conclude that *O'Bannon* requires summary judgment for Defendants, Plaintiffs would ask the Court not to apply this ruling to the *Jenkins* action, and instead remand *Jenkins* back to the United States District Court for the District of New Jersey where *O'Bannon* does not control. *Lexecon Inc. v. Milberg Weiss Berhad Hynes & Lerach*, 523 U.S. 26, 40 (1998). At that point, there would no longer be any need for MDL coordination because the consolidated actions would have been dismissed.

This Court has explained that irrespective of legal labels, its charge is to "decide whether [*O'Bannon*] applies to the facts of this case." Aug. 2, 2016 Hr'g Tr. 22:8-9. It does not. *O'Bannon*'s findings were based on a specific factual record, at a specific moment in time, in support of two specific less restrictive alternatives not presented here.[4] Because "[t]he reasonableness of a restraint is a 'paradigm fact question,'" *O'Bannon*'s holding is inexorably tied to the facts in that record at the time of the decision in August 2014. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1401 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984) ("*Raiders I*") (quoting *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982)). Indeed, to the limited extent *O'Bannon* reversed one portion of this Court's injunction, it was because a divided Ninth Circuit panel found that the "court relied on threadbare evidence" in the record specifically concerning consumer demand—not because the panel made a legal determination that the NCAA was entitled to a timeless antitrust get-out-of-jail-free card, let alone an antitrust immunity for its future application of new or different player compensation restraints. *O'Bannon*, 802 F.3d at 1077.

Nor is there any basis for Defendants' renewed claims that *O'Bannon* bars this action under principles of *res judicata* or collateral estoppel. The Court rejected these same arguments when it denied Defendants' Rule 12(c) motion. *See* 12(c) Order 5. That Defendants now cite different cases for the same principles does not change the outcome. There remains neither an identity of claims nor privity between parties because the instant case involves different plaintiffs, asserting different claims, seeking different relief, against different defendants on a changed factual record. *See* Consolidated Pls.' and *Jenkins* Pls.' Mem. of P. & A. in Opp'n to Defs.' Mot. for J. on the Pleadings (May 31, 2016) (ECF No. 395). Further, in the antitrust context, the Supreme Court has held that, when considering the applicability of *res judicata*, the mere fact "[t]hat both suits involved essentially the same course of wrongful conduct [by defendants] is not decisive." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327 (1955) (internal quotation marks omitted). Notably, Defendants cite only one antitrust case in support of their arguments, *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), which

[4] *See, e.g., O'Bannon*, 802 F.3d at 1074 ("district court identified two substantially less restrictive alternatives": allowing full COA scholarships and permitting deferred cash compensation of no less than $5,000 for use of athletes' NIL rights).

rejected appellants' invocation of the rule. Defendants are no more successful here. Indeed, since the Court last rejected Defendants' *res judicata* and collateral estoppel arguments, the crucial factual distinctions between *O'Bannon* and the instant action have only grown.[5]

With discovery complete, the Court can now determine that the record evidence—and the Division I basketball and FBS football businesses themselves—has changed in significant ways post-*O'Bannon.* The Court should thus now evaluate Plaintiffs' claims on the record before it, as competition in the relevant markets stands today, including consideration of a host of less restrictive alternatives not presented or considered in *O'Bannon*, but expressly offered as part of the record in this case. *See, e.g.*, [redacted] Poret Rep. 8-9, 19-20.

a. *O'Bannon*'s Import as *Stare Decisis*, Like All Antitrust Precedent, Is Limited to Its Analytical Rule, and Does Not Extend Beyond Its Facts

(1) The Legal Limits of *Stare Decisis*

The Court previously identified *stare decisis* as the legal principle most fitting Defendants' argument that *O'Bannon* applies to this case. Even accepting the applicability of *stare decisis*, however, it "is important only for the decision, for the detailed legal consequence following a detailed set of facts." *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996). *Stare decisis* does not take hold where a prior "decision rests on different facts." *State of Cal. v. Anglim*, 129 F.2d 455, 460 (9th Cir. 1942). This principle is even more critical in antitrust jurisprudence, where it is the province of the courts to evaluate specific market effects—anticompetitive harms and procompetitive implications—based on the specific facts presented, including the challenged restraints, competitive forces, and consumer preferences that may change over time. The Supreme Court has held: "In the area of antitrust law, there is a competing interest [to *stare decisis*], well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). A single decision, particularly one based on the fact-intensive

[5] Defendants' interpretation of *O'Bannon* as indelibly prohibiting further consideration of their restraints would have the Ninth Circuit deciding questions beyond the scope of its purview in that case (*see, e.g., Dodd v. Hood River Cty.*, 59 F.3d 852, 863 (9th Cir. 1995) (court of appeals "does not consider an issue not passed upon below")) and contravening the maxim that a court rendering a judgment cannot predetermine its *res judicata* effects. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 747 (9th Cir. 2006); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

rule of reason inquiry, cannot permanently fix the legality or illegality of a restraint under the Sherman Act, which requires "continuing reexamination" of "agreements between separate entities" under new facts. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 1205c3 (3rd and 4th Editions 2010-2017) ("Areeda") ("[E]ven a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.")

Courts must—and do—subject the same industries and restraints to continuing rule of reason scrutiny with results that change in tandem with consequential changes to the market *status quo*. "That the analysis will differ from case to case is the essence of the rule." *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1449 (9th Cir. 1988). This principle has held true for nearly a hundred years: "each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 579 (1925).

Courts have held numerous times that factual changes in the relevant markets warrant a new antitrust analysis and possibly a new and different antitrust outcome. *See, e.g., United States v. Mercy Health Servs.*, 107 F.3d 632 (8th Cir. 1997) (declining to hear appeal regarding injunction of abandoned merger between two hospitals because "[i]t is beyond argument that a merger which would have been legal in the past may well be anticompetitive in the future. . . . A district court trying [a future challenge to the same merger] would then have to examine the factual circumstances extant at the time of this hypothetical future suit" to determine anticompetitive effects); *United States v. Motor Vehicle Mfrs. Ass'n*, 1982 WL 1934 (C.D. Cal. Oct. 28, 1982) (modifying consent decree in civil antitrust suit to terminate some restrictions in light of the changing circumstances in the market, noting that the restraints "should [not] be condemned in perpetuity without reference to the peculiar facts of each case"). This Court, in *O'Bannon*, recognized as much, rejecting the NCAA's invitation to treat *Board of Regents* as antitrust *carte blanche* because, among other things, "[p]laintiffs have also presented ample evidence here to show that the college sports industry has changed substantially in

the thirty years since *Board of Regents* was decided." 7 F. Supp. 3d at 999-1000. As chronicled in Plaintiffs' Motion and below, Division I basketball and FBS football "have changed substantially" in just the three-plus years since the record closed in *O'Bannon*. *Id.*

The Ninth Circuit has noted that "[i]t cannot be emphasized too strongly that the continuation of conduct under attack in a prior antitrust suit is generally held to give rise to a new cause of action." *Harkins Amusement Enters., Inc. v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989). Proceeding otherwise would impermissibly imbue Defendants' bylaws with "immunity in perpetuity from antitrust laws." *Id*. (citing *California v. Chevron Corp.*, 872 F.2d 1410, 1415 (9th Cir. 1989)). The "concerted rule making" of sports leagues, including the NCAA, is, in fact, a prime example of the sort of agreement between competing entities that "is always subject to antitrust supervision." Areeda ¶ 1205c4 n.40. In these contexts, prior antitrust cases operate as *stare decisis* by providing the analytical framework for antitrust analysis, rather than as decisions that immutably define the scope of anticompetitive or procompetitive conduct. *See id.* at ¶ 1511e2 ("the 'common law' nature of antitrust adjudication requires that *stare decisis* be applied in a flexible manner . . . . [T]he important thing is that a rule of *stare decisis* of this sort operates to stabilize a *method of analyzing* antitrust restraints.") (emphasis in original).

The Ninth Circuit has adhered to this approach, applying it specifically in the context of sports business rule-making. *See Nat'l Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th 1987). In *SDC Basketball*, the Ninth Circuit examined the import of its own precedent from the *Raiders* cases,[6] which affirmed that the NFL's franchise restriction rules were invalid under the Sherman Act, after a district court held that a substantially similar NBA rule was invalid as a matter of law. *Id.* at 566-67. The Ninth Circuit explained that the *Raiders* cases were tied to the underlying facts and jury verdict, and held only that "rule of reason analysis governed a professional sports league's efforts to restrict franchise movements [and] [m]ore narrowly . . . that a reasonable jury could have found that the NFL's application of its franchise movement rule was an unreasonable restraint of trade." *Id.* at 567. While *Raiders I* "did establish the law of this circuit in applying the rule of reason

[6] *Raiders I*; *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356 (9th Cir. 1986) ("*Raiders II*").

to a sports league's franchise relocation rule," the rule of law it established merely set out the elements that an antitrust plaintiff must prove. *Id.* *O'Bannon* does the same—supplying the method of antitrust analysis for scrutinizing the challenged restraints in the relevant markets here, rather than dictating an outcome for a different evidentiary record in a rapidly evolving industry.

(2) The Record Here Is Filled with New, Undisputed Evidence of Changed Economic and Other Factual Circumstances Following the Close of the Record in *O'Bannon*

Plaintiffs' Motion demonstrated that Defendants' restraints and economic activities in the relevant markets have continued to evolve in material, undisputed ways since the close of the *O'Bannon* record. For the first time, full COA has been implemented by various conferences and schools; new NCAA rules have been adopted, including granting some compensation rule-making autonomy to the Power Five conferences; other rules have been materially changed; and a vast new array of economic, survey, and other data and evidence that did not exist at the time the *O'Bannon* record closed in August 2014 has been created and presented based on the changing economic circumstances in the relevant markets. *See, e.g.*, *infra* App'x B; [redacted] Lazear Rep.; [redacted] Poret Rep.; [redacted]

It is only possible now, post-*O'Bannon*, to have the extant record of schools providing certain compensation and benefits in excess of full COA, including many untethered to educational expenses or purported principles of amateurism. For example, the NCAA has admitted in this case—for the first time, in binding Rule 30(b)(6) testimony—that member schools may provide significant benefits "incidental to athletic participation" that are: in addition to COA (Pls.' Ex. 1, NCAA (Lennon) Tr. 58:20-59:1); "not related to the principle of amateurism" (*id.* 72:22-73:2); and not tethered to educational expenses (*id.* 287:6-19). This reflects a radical departure from the NCAA's position in *O'Bannon* that the prior GIA cap was "necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote integration of

[7] Defendants would have the Court believe that Plaintiffs have failed to identify with specificity the restraints at issue and the antitrust harm they inflict on Class Members (Defs.' Mot. 20-21), but this could not be further from the truth. Plaintiffs have presented a wealth of evidence on these very points and have furnished interrogatories identifying all of the specific rules at issue. *See, e.g.*, [redacted] Lazear Rep. 3-4, 6-17; Poret Rep.; [redacted] Pls.' Mot., App'x. A, B.

academics and athletics, and increase the total output of its product." *O'Bannon*, 7 F. Supp. 3d at 973. These post-*O'Bannon* developments all directly contradict Defendants' central procompetitive justification that the NCAA's rules capping compensation at COA are necessary to promote consumer demand.

While Defendants argue that some of these benefits appear in the *O'Bannon* record, full COA obviously was not permitted at that time, and there are many additional new benefits (like permitting unlimited meals, free graduate school tuition at an athlete's current school, and uncapped international Olympic payments), and yet other pre-existing benefits that have increased substantially in value or changed in operation (like gift suites and insurance of professional earnings), creating a very different record of benefits in excess of COA here. *See infra* App'x B (identifying various compensation and benefits changes in Defendants' rules post-*O'Bannon*). And critically, because many schools started providing full COA scholarships after the *O'Bannon* record closed, even the benefits that Defendants characterize as "old" benefits now have new and different economic relevance in the context of this case. These benefits now push a college athlete's total compensation package above (or even further above) the COA cap that Defendants claim is the newly found Maginot line (retiring their old GIA formulation) that must be protected at all costs from being breached to preserve consumer demand. *See, e.g.*, Pls.' Mot. 10-14. For example, under a GIA scholarship, an athlete receiving a few thousand dollars in "gift suites" might still leave that athlete's total compensation package below COA. [redacted] Defendants willfully exceeding the new COA cap, without causing any harm to consumer demand, is nowhere analyzed (or even mentioned) in the Ninth Circuit's *O'Bannon* ruling for one simple reason: the conduct had yet to occur.

Notably, Defendants continue to feign amnesia about the fact that *they opposed full COA* as supposedly perilous to consumer demand in *O'Bannon*. *Compare* Pls.' Mot. 13, *and O'Bannon*, 7 F. Supp. 3d at 973 (NCAA claimed prior GIA cap "necessary to preserve its tradition of amateurism"), *with* Defs.' Mot. 25 (lauding the "wisdom" of the Ninth Circuit upholding the Court's COA injunction). But the post-*O'Bannon* natural experiment of full COA plus other benefits shows there

has been no adverse economic impact from permitting various compensation and benefits exceeding COA. *See* Pls.' Mot. 10-14; [redacted] *see also infra* § III.C.

Thus, unlike in *O'Bannon*, the Court has before it substantial new and undisputed evidence of schools providing compensation and benefits in excess of COA, unrelated to principles of amateurism, and without harming consumer demand or the collegiate model in any way. *See, e.g.*, Pls.' Ex. 1, NCAA (Lennon) Tr. 63:21-64:1; [redacted] This alone renders the fact-based rulings of *O'Bannon* inapplicable and permits the Court to determine whether the rule of reason now leads to different and broader injunctive relief. [redacted] Offering thousands of dollars in COA cash stipends, in amounts differing by school, has not hurt consumer demand even though those stipends undisputedly can be spent by the athletes on personal expenses or other items that have no relationship to education at all. *See* Pls.' Mot. 10-14; Pls.' Ex. 1, NCAA (Lennon) Tr. 37:2-38:24; Pls.' Ex. 21, THE NEW YORK TIMES, *Pets, Car Repairs and Mom*; [redacted]

And the survey Plaintiffs' expert Hal Poret conducted provides further post-*O'Bannon* evidence that consumer demand would not be adversely impacted if Division I basketball and FBS schools were permitted to provide myriad forms of additional education-related compensation on top of COA. Poret Rep. 19-20. Specifically, Poret surveyed consumers about whether they would view or attend fewer Division I college basketball or FBS football games in the event that Defendants were to permit schools to provide additional education-related benefits to Class Members, such as: (a) an incentive payment of up to $10,000 for each school year in which an athlete completes at least one-fifth of required degree units; (b) a one-time incentive payment of up to $10,000 for earning an undergraduate degree; (c) guaranteed undergraduate- and graduate-degree scholarships that an athlete could use at any school of his or her choice; (d) reimbursement for work-study payments that an athlete might qualify for but cannot pursue due to athletic time commitments; (e) meals, housing, and other off-season living expenses currently not permitted; (f) scholarships to participate in post-eligibility study abroad programs; and (g) healthcare funds to pay for future medical costs arising out of athletics participation. *Id.* 8-9. The survey results demonstrate "that there would be no negative impact on consumer demand" if such additional benefits to Class Members above COA were permitted. *Id.* 20.

In *O'Bannon*, the Ninth Circuit rejected the NIL stipend partially because of the absence of evidence indicating "whether paying" college athletes such amounts "would preserve amateurism and consumer demand." 802 F.3d at 1077. By contrast, the Court now has before it empirical expert evidence that additional education-related benefits could be provided to Class Members—in addition to COA—without harming (in other words, preserving) consumer demand. Pls.' Mot. 12-14. And while the NCAA in *O'Bannon* conducted a survey (purporting to) predict the impact of increased compensation (there, "salaries," not education-related compensation) on future consumer demand, Defendants present no such survey evidence here. *See* Pls.' Mot. 12-14. Unlike in *O'Bannon*, Defendants' survey evidence here makes no attempt to measure the impact of Plaintiffs' less restrictive alternatives on future demand and, in fact, confirms that the nebulous concept of amateurism is *not* important to most, if any, Division I basketball and FBS football consumers in terms of how this would impact their demand for these sports. Pls.' Ex. 103, Poret Rebuttal Report 11-12. This is yet another material factual difference in the two records demonstrating why the *O'Bannon* ruling should be viewed as providing nothing more than an analytical framework for the specific factual record in this case.

In sum, since *O'Bannon*, Defendants' rules have changed, the industry has continued to evolve, and, as a result, the undisputed evidentiary record presented here has changed in myriad ways that are consequential to a rule of reason analysis. There is thus no longer any factual basis to conclude, on this record, that Defendants' pursuit of amateurism is procompetitive at all, or that cash sums untethered to educational expenses would be a "quantum leap" beyond full COA. [redacted] Put differently, the *O'Bannon* court would have reached a different conclusion on the different record presented here.

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

Defendants do not challenge Plaintiffs' description of the summary judgment standards that apply in this matter. First, "plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'" *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). Plaintiffs have met that burden. With respect to Plaintiffs' motion for summary judgment, Defendants do not introduce any evidence (or argument) to rebut Plaintiffs' evidence that the NCAA's rules restraining benefits to student-athletes inflict anticompetitive harm to Class Members in relevant markets. And Defendants' own motion for summary judgment does not argue that Plaintiffs lack such evidence. Instead, as to both motions, Defendants argue only that Plaintiffs cannot meet their burden because *O'Bannon* bars their claims as a matter of law. But as shown above in § II.A, Defendants' wide-ranging *O'Bannon* argument is overstated and wrong.

As a result, Plaintiffs have shifted the burden to Defendants to "come forward with evidence of the restraint's procompetitive effects." *Tanaka*, 252 F.3d at 1063. To do so, Defendants must establish *with admissible evidence* that the challenged restraints increase demand or otherwise economically benefit college athletics in a procompetitive manner. *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003).[8] As shown below, Defendants have failed to meet their burden, either in opposing Plaintiffs' motion or in support of their own motion. And even if Defendants could present a genuine factual dispute that the challenged restraints offer some procompetitive benefit, there still could be no factual dispute on this record that Plaintiffs have established that any such "legitimate objectives can be achieved in a substantially less restrictive manner." *Tanaka*, 252 F.3d at 1063. Therefore, Plaintiffs' motion should be granted, and Defendants' motion should be denied.

B. Defendants Do Not Rebut Plaintiffs' Evidence of Agreements Inflicting Anticompetitive Harm in Relevant Markets

As stated above, in their motion for summary judgment, Plaintiffs met their initial burden of demonstrating that the restraints at issue produce significant anticompetitive effects within a relevant

[8] *See also Risk v. Kingdom of Norway*, 1991 U.S. Dist. LEXIS 7372, *8 (N.D. Cal. 1991) (observing that "materials that are now inadmissible and will remain inadmissible cannot be considered in opposition to a motion for summary judgment.")

market. *See* Pls.' Mot. 4-7. In opposition, Defendants do not introduce any evidence—or even argument—to rebut Plaintiffs' evidence that the NCAA's rules restraining benefits to student-athletes inflict anticompetitive harm to Class Members in relevant markets. Instead, as to Plaintiffs' initial burden, Defendants argue only that *O'Bannon* bars Plaintiffs' claims. Not only is this argument wrong (*supra* § II.A), *O'Bannon* itself found that caps on compensation for student-athletes inflict significant anticompetitive effects in virtually the same relevant markets presented here. 802 F.3d at 1072. Accordingly, the Court should find Plaintiffs have met their burden to demonstrate anticompetitive harm in the relevant markets.

C. The Undisputed Evidence Demonstrates That Defendants Cannot Meet Their Burden to Prove Their Restraints Have Any Procompetitive Justification

Despite persistent rhetoric by the NCAA that the so-called amateurism rules—in their various, evolving, arbitrary, and contradictory forms—are necessary to maintain consumer demand for Division I basketball and FBS football, the actual admissible evidence in this case proves otherwise. Defendants bear the burden to prove their position through admissible economic evidence, not by citing their own press releases and other self-serving *ipse dixit*. Indeed, "[e]ven if the NCAA's concept of amateurism had been perfectly consistent and coherent," which this Court previously found it has not been, "the NCAA would still need to show that amateurism brings about some procompetitive effect in order to justify it under the antitrust laws." *O'Bannon*, 802 F.3d at 1073; *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); *Nat'l. Soc'y. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). No such evidence of procompetitive effect is present in the record before the Court, compelling judgment in Plaintiffs' favor. Pls.' Mot. 10-14.

Defendants' dire warnings about crossing amateurism's COA bright line ring hollow—having similarly cried wolf about crossing the old GIA cap. The NCAA claimed in *White v. NCAA*, for example, that crossing the line from the GIA cap to full COA would constitute ruinous "pay for play"; maintaining the GIA cap was "necessary for the differentiation and quality" of college sports; and

"consumers would be harmed" without the GIA cap.[9] The sky, however, has not fallen after the *O'Bannon* injunction resulted in the change from GIA to COA, and crossing this line that the NCAA previously portended to be the end of consumer demand for these sports is now an outcome that the NCAA calls "wisdom." Defs.' Mot. 25.

Here we go again. Most significantly, the undisputed record evidence shows that post-*O'Bannon*, Defendants have permitted schools to cross the COA line without regard to any self-styled principles of amateurism and, again, without any adverse impact on consumer demand, which is what matters when it comes to applying antitrust law principles. Pls.' Mot. 12-14. On this record, Defendants cannot carry their burden to show that their challenged rules have any procompetitive benefit to justify their anticompetitive effects. Nor may the NCAA and Conference Defendants manufacture genuine factual disputes by ignoring and distorting Plaintiffs' clear evidentiary showing and relying on self-serving *ipse dixit* and other inadmissible evidence.

1. After *O'Bannon*, Defendants Admit They Provide "Participation" Benefits Exceeding COA and Not Related to Amateurism

Critically, and contrary to the record in *O'Bannon*, an NCAA 30(b)(6) designee has testified that the NCAA rules—as they exist now—permit members, at their individual discretion, to offer athletes substantial specified benefits as a *quid pro quo* "incidental to participation" in athletics that raise total benefits and compensation above Defendants' self-created COA Maginot line. Pls.' Ex. 1, NCAA (Lennon) Tr. 58:20-59:1. That admission, alone, invalidates Defendants' assertion that their restraints are necessary to maintain consumer demand for an antiquated, cynically romanticized fantasy of amateurism where the "rules permit[] schools to offer scholarships set at COA, but no higher." Defs.' Mot. 25. Indeed, in further defiance of their own illusory COA limit, Defendants also admit that these various incidental to participation benefits are "not related to the principle of amateurism" and "are not tethered to educational expenses." Pls.' Ex. 1, NCAA (Lennon) Tr. 72:22-73:2, 287:6-19. In other words, at the same time that Defendants insist that "any dollar amount [paid to athletes] above calculated cost of attendance would harm amateurism" "absolutely" (Pls.' Ex. 13,

[9] NCAA Mem. of Ps. and Auths. ISO Summ. J., *White v. NCAA*, Case No. 06-cv-999 (C.D. Cal. Oct. 22, 2007) (ECF No. 221); [redacted]

Aresco Tr. 247:7-12), they already permit designated benefits significantly in excess of COA, without harming consumer demand. Pls.' Mot. 10-14.

Defendants' effort to high-tail themselves away from the NCAA's Rule 30(b)(6) admissions is understandable, but legally untenable, given the force and repetition of the testimony:

- Q. So this isn't related to principles of amateurism; this is just related to what the members decide is what they're willing to permit or not permit? . . . A. No, it's related to incidental benefits to participation, and in that category, yes, it's subject to what the membership agrees to provide. This is not related to the principle of amateurism." Pls.' Ex. 1, NCAA (Lennon) Tr. 72:17-25;

- A. There are items that schools can provide outside of educational expenses, which, again, are tethered to cost of attendance, that I would kind of capture as incidental to participation. *Id.* 59:12-16;

- Q. But you agree that some expenses are -- what you call incidental to participation in sports, can be provided to athletes without offending the collegiate model, according to this rule [12.01.4] correct? A. Yes. *Id.* 63:21-64:1;

- A. If the -- the benefit provided is permitted within the legislation as either related to educational expenses or -- or incidental to participation, then it would not be considered pay, and it would be permitted to be received. *Id.* 93:5-10.[10]

The participation benefits that schools may now provide in excess of the COA cap include, for example, thousands of dollars in value in "gift suites" that Defendants admit are "not really" related to the educational experience (Pls.' Ex. 17, Michael Slive Tr. 218:4-10) and "could [not] be" tethered to education (Pls.' Ex. 16, Big 12 (Bowlsby) Tr. 162:10-14). Defendants characterize gift suites as

[10] Defendants' latest attempt to rehabilitate the 30(b)(6) witness who offered this testimony, NCAA Vice President of Division I Governance Kevin Lennon, contends that his statements as presented to the Court were taken out of context. Defs.' Mot. 33-34. This argument is unavailing. *First*, Lennon testified about benefits incidental to participation repeatedly, with ample opportunity to clarify his answers about amateurism. *Second*, Defendants conflate Lennon's testimony as an official NCAA 30(b)(6) designee with that offered in his individual capacity, and they cite the latter—his personal interpretation of NCAA rules—to clarify the former, which was offered on behalf of the NCAA and is legally binding under Ninth Circuit law. *See* Pls.' Mot. 22-23. *Third*, Defendants' citation to Lennon's individual deposition (Defs.' Ex. 35, Lennon Tr. 63:17-22) does not address Lennon's 30(b)(6) testimony on behalf of the NCAA that participation benefits are "not related to the principle of amateurism" (Pls.' Ex. 1, NCAA (Lennon) 30(b)(6) Tr. 72:17-25) and therefore would be disconnected. *Fourth*, Defendants once more resort to pure *ipse dixit* to affirm the "NCAA's commitment" to amateurism. An NCAA official professing that amateurism is "the bedrock of the collegiate model," or citing the NCAA's constitution as proof of it, is not probative evidence capable of raising a genuine issue of material fact.

mere merit badges—"modest, non-cash awards commemorating athletic participation." Defs.' Mot. 28. [redacted] Pls.' Ex. 14, SPORTSBUSINESS JOURNAL, *All about That Bass: Beats by Dre leads roster of tournament gifts*. Likewise, schools now exceed COA by paying for thousands of dollars in fees for loss-of-value insurance to protect selected Class Members against lost earning potential as professional athletes in the event of a college injury (Pls.' Ex. 1, NCAA (Lennon) Tr. 127:4-129:3); the costs of transportation and lodging for certain family members to attend championship events (*id.* 71:7-72:25); the costs of transportation and lodging for spouses and children to attend basketball and football games (*id.* 186:1-16); expense reimbursement for the costs associated with national championships, Olympic trials, and national team tryouts (*id.* 86:17-87:13); and *per diems* for away-game travel (*id.* 85:5-23). Defendants offer the circular and nonsensical rationale that their members may increase these benefits at their whim without "violating the principle of amateurism, because that is not related to the principle of amateurism, but an incidental expense." *Id.*; *see also* Pls.' Mot. 8-9.

To be sure, it is a good thing that college athletes are receiving more benefits—frequently above COA. The relevant economic takeaway for antitrust purposes, however, is that the growing suite of athletics participation benefits—increasing exponentially slower than the rate of Division I basketball and FBS football revenues—demonstrates that there is no COA nor amateurism bright line that is either necessary to preserve consumer demand or adhered to by Defendants. On the contrary, these athletics participation benefits are just the arbitrary result of cartel members compromising to determine the anticompetitive and artificial caps on the amounts and types of benefits they will permit. [redacted] Lazear Rep. 4-6. As a matter of fundamental antitrust economics and jurisprudence, Defendants' acts of jointly restraining the amount and type of these benefits that are doled out to college athletes, rather than competitive forces prevailing, are injurious to consumer welfare. Antitrust law does not allow horizontal competitors—such as the NCAA's

members—to act as central planners for the marketplace. *See, e.g.*, *Prof'l Engineers*, 435 U.S. at 692; *Socony-Vacuum Oil*, 310 U.S. at 220-21.

[redacted] If this had any basis in reality, then demand for Division I basketball and FBS football would have collapsed since schools began providing both a full COA scholarship and numerous additional economic benefits to Class Members several years ago. The actual economic evidence—[redacted] is that consumer demand and revenues have not suffered since Defendants made these changes. *See e.g.*, Pls.' Ex. 1, NCAA (Lennon) Tr. 63:21-64:1; [redacted] Dr. Elzinga's contrary opinions, resting on sheer *ipse dixit* from a few counsel-selected college administrators, may not contradict the NCAA's binding testimony, and is divorced from any study of the evidentiary record. It is therefore inadmissible. *See* Pls.' Mot. to Exclude, ECF No. 654 ("Mot. to Excl.").

Even Defendants' own consumer survey expert concurs that Defendants providing certain athletic participation benefits above COA does not hurt consumer demand. In fact, he testified that providing gift suites and reimbursement for transportation costs, for example, may actually "foster" consumer demand because many fans may approve of colleges offering greater benefits to Class Members. Pls.' Ex. 19, Isaacson Tr. 244:8-245:6.

[redacted] The undisputed evidence about permissible participation benefits above COA that are unrelated to principles of amateurism, standing alone, proves that a COA cap is not justifiable under the antitrust laws—which is just one reason why Plaintiffs are entitled to summary judgment and Defendants' motion should be rejected out of hand.

2. It Is Undisputed That Defendants Permit Certain Cash Payments Untethered to Educational Expenses While Prohibiting Other Education-Related Benefits

The undisputed evidence further shows that Defendants do not even adhere to the statement in *O'Bannon* upon which they purport to rest their defense—that cash sums untethered to educational expenses violate, and education-related benefits are consistent with, principles of amateurism. Defendants cannot, as a matter of law, justify their restraints as essential to a principle that they do not follow.

a. Defendants Already Permit Certain Cash Payments Untethered to Education

The current COA rules permit Defendants' schools to pay Class Members lump-sum cash stipends that vary in value between approximately $1,600 and $6,000. Pls.' Mot. 10. Defendants argue that it cannot be "reasonably dispute[d]" that these payments "represent legitimate costs to attend school" (Defs.' Mot. 26) and nothing more, but this assertion sidesteps the critical issue of how these funds are actually spent by the athletes. Even assuming that the amount of each stipend is *calculated* on the basis of educational expenses, athletes can and do *spend* the stipend anyway they choose. This is undisputed.

Defendants protest supposed harms that would result from creating a "wedge" through the payment of untethered cash sums. But take, for example, Class Members fortunate enough to already be able to independently cover their own educational expenses. For them, the COA cash stipend is just such an untethered cash payment, in exchange for athletic participation, that will not be used for school-related costs. And even for Class Members who do not have the financial support to independently cover their educational expenses, there is no requirement that the COA cash stipend they receive will actually be used for educational purposes.

The foregoing illustration eviscerates Defendants' opposition to Plaintiffs' many examples of education-related compensation that should not be prohibited by NCAA rules—like a graduation incentive stipend or subsidies for vocational school. Defendants claim that such education-related compensation payments need to be prohibited because they "are simply thinly disguised cash compensation to student-athletes for their continued participation in athletics." Defs.' Mot. 27-28. But this argument collapses in the face of COA cash stipends that Class Members can use for any

purpose at all—including spending that has nothing to do with education. There is no principled distinction between the unregulated COA cash stipends—which can be spent on literally anything—and a cash stipend to be spent on vocational training, which would actually be more, not less, consistent with the principles that the NCAA purports to follow.

Indeed, Defendants do not dispute that Class Members may use the existing COA cash stipends to pay for pet care, expenses incurred by their families, charitable contributions, or anything else they choose. Pls.' Mot. 10; NY TIMES, *Pets, Car Repairs and Mom*; Pls.' Ex. 1, NCAA 30(b)(6) (Lennon) 38:4-24.[11] Notably, *O'Bannon* did not require schools to pay up to COA. To the extent the amateurism concept truly was threatened by paying above GIA, any and all schools could have chosen not to offer COA. But hundreds of schools now do, demonstrating that market competition has determined that these cash payments, untethered to education, are not ruinous to "amateurism" or consumer demand. [redacted] *see also, e.g.*, [redacted] Pls.' Ex. 23, MAC_002447-48; [redacted] Defendants point to no evidence—and there is none—that schools' differentiation in the amount of COA payments they offer to Class Members has negatively impacted consumer demand (or athlete integration).

In similar fashion, athletes may currently receive distributions from the NCAA's Student Assistance Fund ("SAF") (Pls.' Ex. 15, NCAA Bylaw 15.01.6.1; Pls.' Ex. 1, NCAA (Lennon) Tr.

[11] "Q. Okay. So, the students can take that cash that they receive in their cost of attendance and use it for expenses that have nothing to do with their education, right? . . .

A. The NCAA doesn't dictate how a student spends the money it receives through its cost of attendance. . . .

Q. They can use it in any way they please, correct? . . .

A. Just as any young person in college would have the ability to make decisions on how they want to spend their money, in this instance, as long as it is contained within the cost of attendance total at the institution, students would have that ability, student athletes, just like regular students, to spend as they see appropriate."

152:19-153:19) that are paid out in addition to their full COA, and these SAF cash payments may also be used to cover expenses not tethered to education. Pls.' Mot. 10-11; Pls.' Ex. 24, NCAAGIA03316030 at 52 (permitted uses of SAF money include paying for professional-athlete-earnings insurance, clothing, and family expenses). This, too, is undisputed:

> Q. Are payments from the fund restricted to educational expenses?
>
> A. No.
>
> Q. Are they restricted to expenses connected in some way to education?
>
> A. No.

Pls.' Ex. 104, NCAA (McNeely) Tr. 61:22-62:2.

Accordingly, SAF money may be used to purchase a loss-of-value insurance policy requiring tens of thousands of dollars in annual premium payments. *See, e.g.*, [redacted] The SAF may be laudable, but the fact remains that it further belies any notion that COA constitutes a strict line that is essential to maintaining consumer demand.

Given the undisputed facts that SAF cash payments exceeding COA and COA cash stipends do not hurt consumer demand when they are used for non-education-related expenses, Defendants cannot genuinely dispute (with admissible evidence) that permitting additional education-related compensation—such as a cash incentive to graduate—would reduce consumer demand for Division I basketball or FBS football. Indeed, the Poret Study offers empirical proof of just the opposite. Pls.' Ex. 29, Poret Rep. 19-20.

Another example of Defendants permitting "cash sums untethered to educational expenses" in addition to COA is their rules permitting domestic and international sports federations to pay a college athlete for participating in the Olympics and other competitions without imperiling the athlete's "amateur" status, *e.g.*, [redacted] Defendants identify no unifying principle of amateurism or integration to harmonize these payments with their insistence that consumer demand is imperiled when athletes receive cash sums above COA that are untethered to educational

expenses, or that such payments would create a "wedge" between athletes and other students. Defendants' empty retort—that "it's the Olympic games and they're representing our country" (Pls.' Ex. 26, Swofford Tr. 112:9-113:4)—does nothing grounded in economics (or legal reason) to support their contention that permitting additional payments above COA would harm consumer demand. Indeed, Defendants did not enact their rule permitting *international* Olympic committee payments—which can be enormous sums—until after *O'Bannon*, and there is nothing in the *O'Bannon* record in the stratosphere of a college athlete permissibly receiving a [redacted]

b. Defendants Arbitrarily Prohibit Various Forms of Education-Related Compensation

The flip side of Defendants' non-adherence to their favorite passage from *O'Bannon* is their prohibition of countless forms of "education-related compensation." *O'Bannon*, 802 F.3d at 1078. Defendants' byzantine set of anticompetitive rules that, on the one hand, permits Class Members to receive $400 Best Buy shopping trips (*see, e.g.*, [redacted] *per diem* cash travel payments (Pls.' Ex. 1, NCAA (Lennon) Tr. 85:5-23), [redacted] thousands of dollars in professional insurance payments (*see supra* § III.C.1), [redacted] all above COA, while simultaneously forbidding subsidized tutoring to complete a college degree, post-eligibility graduate school scholarships to be used at an institution of an athlete's choice, reimbursement for vocational training, and incentive payments for academic achievements (Pls.' Mot., App'x B), has no logical connection to any of Defendants' purported tenets of amateurism. Nor have Defendants made a showing with admissible evidence that such benefits would reduce consumer demand. Defendants simply present no admissible evidence on this score.

Defendants instead identify as a "critical point . . . that institutions treat student-athletes the same as other students." Defs.' Mot. 27. But this assertion is also contrary to the undisputed facts. [redacted]

The incoherence of these rules—which are anathema to the very statement in *O'Bannon* that Defendants invoke as a defense—only reinforces that the challenged restraints cannot be shown to be reasonably necessary to maintain consumer demand or any other purported procompetitive objective. There simply is no way to reconcile—in economics or logic—Defendants' array of wildly inconsistent compensation rules, which serve only the whims of the NCAA voting majority, as opposed to any procompetitive objective recognized under the law.[12] Based on this record, Plaintiffs are entitled to summary judgment in their favor.

3. Defendants Fail to Offer Admissible Evidence That Their Anticompetitive Rules Are Necessary to Increase Consumer Demand

Defendants fail to offer admissible evidence that shows that consumer demand would suffer if the Court enjoined the NCAA's restraints that Plaintiffs have shown cause anticompetitive effects.

a. Defendants' Fail to Offer Relevant and Admissible Consumer Survey Evidence to Prove the Challenged Restraints Enhance Consumer Demand for Division I Basketball and FBS Football

The survey by Defendants' expert Dr. Isaacson provides no evidence that the challenged restraints on compensation and benefits promote consumer demand. This is because Dr. Isaacson's survey does not test if the challenged rules cause more people to watch college sports than if the challenged rules did not exist. Nor did Dr. Isaacson test the impact on consumer demand if individual conferences unilaterally enacted the same, similar, or very different rules concerning student-athlete compensation. Instead, Dr. Isaacson's survey suffers from some of the same conceptual defects that existed in the survey Dr. J. Michael Dennis submitted on behalf of the defendants in *O'Bannon*. Defendants here state that Dr. 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

[12] [redacted] It is thus absurd for Defendants to argue that their rules ensure that Class Members and non-Class Members are treated the same with respect to compensation rules.

unrestricted pay-for-play." Defs.' Mot. 40. But as Defendants acknowledge, "[i]nstead of asking college sports fans to predict their own future behavior and attempting to quantify the difference, Dr. Isaacson surveyed respondents about their current preferences." *Id*. 40-41. This Court found the same methodology to be inherently flawed in the antitrust context because it does not test the challenged rules' impact on consumer demand:

> The NCAA relies heavily on the fact that sixty-nine percent of respondents to Dr. Dennis's survey expressed opposition to paying student-athletes while only twenty-eight percent favored paying them. Trial Tr. 2604:21-2605:2; Ex. 4045 at 19. These responses, however, are not relevant to the specific issues raised here and say little about how consumers would actually behave if the NCAA's restrictions on student-athlete compensation were lifted.

O'Bannon, 7 F. Supp. 3d at 975.

Trying to transform what Dr. Isaacson actually tested into something he did not test, Defendants misleadingly argue that "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.'" Defs.' Mot. 40 (emphasis added) (citing Pls.' Ex. 28, Isaacson Rep. 64, 72). Untrue. No one was asked if they would stop watching college sports, or watch less, if players were provided additional benefits. Instead, Dr. Isaacson merely asked the following question: "Which of the following, if any, are reasons why you watch or attend [SPORT] games?" Isaacson Rep. 64. Dr. Isaacson then listed sixteen responses to choose from, with the first being: "I like the fact that college players are amateurs and/or are not paid." *Id*. (emphasis added). For starters, the top "reasons why [respondents] watch or attend" Division I basketball and FBS football are because respondents like when certain colleges win or lose and can watch or attend games with friends or family—nothing to do with amateurism. *See* Isaacson Rep. Table 7.

Moreover, in the Isaacson survey, respondents could and did choose multiple reasons for why they watch or attend college sports. Of those who selected that they liked that college athletes are "amateurs and/or not paid"—whatever "amateurs" "and/or" "not paid" are supposed to mean in that context—that choice was on average only 1 out of 4.4 different reasons selected. *See* Poret Rebuttal Rep. 12 n.9. Dr. Isaacson admitted at his deposition that [redacted]

[redacted]

[redacted] Clearly, a survey respondent selecting "amateur and/or not paid" as one of many reasons why she or he likes college sports does not remotely support Defendants' assertion that consumers would watch and attend fewer Division I basketball and FBS football games merely because college athletes received benefits above COA. Against this backdrop, Dr. Isaacson's admitted choice not to ask about future consumer demand in response to changes in NCAA rules—in stark contrast to portions of the survey that the NCAA submitted in *O'Bannon*—is quite telling.

Dr. Isaacson also tested several specific compensation scenarios. He did so by cherry-picking the three scenarios in Mr. Poret's survey that were the least popular among respondents and then edited the survey language to try to make the scenarios seem less desirable. *See* Poret Rebuttal Rep. 7-9. *Even then*, Dr. Isaacson's survey showed a low rate of general opposition to the concept of additional compensation to Class Members being permitted—over 60% of survey respondents *favored* at least one of the additional compensation scenarios and 77% did *not* oppose all of the additional compensation scenarios (and, again, even "opposition" does not provide any evidence that the respondent would attend or watch fewer games). *See id.* 2. And among those respondents who identified the jilted "amateur and/or not paid" option as one reason they watch college sports, 89% did *not* oppose each of the additional compensation scenarios posed by Dr. Isaacson's survey. So not only did Dr. Isaacson not test for the respondents' likely future behavior in response to a change in NCAA compensation rules, what he did test for fails to support any expert opinions or fact conclusions about the direction of future consumer demand for Division I basketball and FBS football if the challenged rules were enjoined.

Defendants further erroneously argue that "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." Defs.' Mot. 41. In fact, the Ninth Circuit has made clear that expert testimony that is admissible under *Daubert* nonetheless may be insufficient evidence to raise a genuine issue of material fact in support of a claim.

In *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998), the district court ruled that an expert's opinions were admissible under *Daubert*. Nonetheless, the Ninth Circuit held that the district court did not err by later ruling that the expert's opinions were legally insufficient to support a price discrimination claim. The Ninth Circuit explained that the test for admissibility "'is not the correctness of the expert's conclusions but the soundness of his methodology.'" *Id.* at 1097 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995)). So the "district court's conclusion at summary judgment that [the expert's] testimony was not legally sufficient evidence to create a question of material fact regarding whether ARCO priced its gasoline below its costs is not inconsistent with its conclusion following the *Daubert* hearing that [the expert's] methodology was sound. An expert witness may be qualified to testify even though the expert's conclusions are legally incorrect." *Rebel Oil*, 146 F.3d at 1097.[13]

Similarly, the other purported "studies" cited by Defendants as providing support for their impact on consumer demand arguments are either inadmissible, do not raise a genuine issue of fact in support of their consumer demand claims, or both. For example, Defendants rely on a study commissioned by the Pac-12 Conference in 2014 but provide no basis for its admissibility. Defs.' Mot. 42. The survey was conducted by a company called Penn Schoen Berland, but Defendants have not provided any foundation for the exhibit to establish its admissibility and reliability as expert testimony or otherwise. *See Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001) ("Treatment of surveys is a two-step process. First, is the survey admissible? That is, is there a proper foundation for admissibility, and is it relevant and conducted according to accepted principles? This threshold question may be determined by the judge."). [redacted]

[13] The cases cited by Defendants are inapposite. In *First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, 2017 WL 3593369, at *3 (N.D. Cal. Aug. 21, 2017), the court ruled that "FEG's attack on Cobb's testimony—at least inasmuch as it concerns the *admissibility* of Cobb's report rather than the weight to be assigned to it—is untimely." Here, Plaintiffs do not challenge the admissibility of Dr. Isaacson's opinions but nonetheless properly argue that those opinions are irrelevant or do not raise any genuine issue of fact in support of Defendants' impact on consumer demand claims. And in the other case cited by Defendants, the Ninth Circuit explained that in some cases, an expert's "analysis may be 'so incomplete as to be inadmissible as irrelevant.'" *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) (citation omitted). Here, as explained above, Dr. Isaacson's opinions are either irrelevant to Defendant's consumer demand claims or *support* Plaintiffs' contrary positions.

[redacted][14]

Defendants also rely on Big Ten "market research," but yet again provide no factual foundation for its admissibility. Defendants' Exhibit 72, for example, entitled "Exploratory Qualitative Research on Consumer Perceptions of Major College Conferences," explains that its results reflect only those opinions of a mere sample and is not indicative of the responses of a wider audience:

> Cautionary note: This study was conducted among a small sample and is not conclusive of the general opinions among the target audience. The results from this research are qualitative and therefore directional in nature and give an idea of the types of responses that might be obtained if a larger, geographically diverse group was surveyed quantitatively.

Defs.' Ex. 72, BIGTEN-GIA 124852. Defendants do not and cannot provide any foundation for the admissibility of such qualitative "market research."

Similarly, Defendants' citation to NCAA research fares no better. Defs.' Mot. 42 (citing Defs.' Ex. 83, NCAAGIA00791115 at -125). Simply attaching an "Executive Summary" of research as an exhibit to an attorney's declaration does not lay any foundation for its admissibility. And in any event, just as with Dr. Isaacson's survey, the percentage of respondents who allegedly believe that more college athletes play for love of the sport than professional athletes says "little about how consumers would actually behave if the NCAA's restrictions on student-athlete compensation were lifted."

[14] [redacted] In this respect, the survey is flawed for reasons similar to those explained by Mr. Poret in his rebuttal of the Isaacson survey. *See* Poret Rebuttal Rep. 14-16.

O'Bannon, 7 F. Supp. 3d at 975. Indeed, this survey indicates nothing about whether these respondents would still have this view if additional benefits could be paid to Class Members.[15]

Finally, Defendants cite to two inadmissible polls. Defs.' Mot. 42-43. With respect to the Washington Post-ABC News poll, Defendants do not even provide it (let alone any basis for its admissibility) but instead submit Exhibit 87, which is an email that purportedly sets forth a short story about the poll. Defs.' Ex. 87, NCAAGIA02824852. A one-page description of a poll, described by an email, is not an admissible substitute for a properly conducted consumer survey with a proper foundation. Similarly, Defendants refer to a Marist poll, but instead of submitting the survey, they submit an inadmissible story about it (Defs.' Ex. 89, PAC12GIA_00008636). Hearsay polls, surveys, or market research with no proper foundation regarding reliability and methods are clearly inadmissible as expert testimony or otherwise and cannot be used to support or defeat summary judgment in this case.

b. Defendants Offer Inadmissible Opinion Testimony of Lay Witnesses, Which, Regardless, Does Not Demonstrate the Challenged Restraints Increase Consumer Demand or Are Otherwise Procompetitive

Defendants' lay witness testimony about consumer demand is also inadmissible. Under Rule 701 of the Federal Rules of Evidence, testimony in the form of an opinion by a lay witness is limited to one that is: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." As the Ninth Circuit has explained, "a lay witness's testimony is rationally based within the meaning of Rule 701 where it is 'based upon personal observation and recollection of concrete facts.'" *United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005) (citation omitted). Moreover, "opinion testimony of lay witnesses must be predicated

[15] Like the Pac-12 survey cited by Defendants, this survey, too, has no probative value. The NCAA's survey was undertaken to compare the relative reputations of different sports entities (*e.g.*, NCAA sports vs. professional sports). It did not address compensating college athletes in any way. Further, Defendants contend that this survey shows that playing for the love of the game drives the appeal of college athletics. Defs.' Mot. 42 (citing Defs.' Ex. 83, NCAAGIA00791115 at -125). But only a little more than one-third of respondents said that athletes "play [college sports] for the love of the sport," so an overwhelming majority did not agree with this notion. Moreover, this single survey response does not indicate anything about respondents' views concerning levels of compensation for college athletes, and the survey did not address amateurism in any way.

upon concrete facts within their own observation and recollection—that is facts perceived from their own senses, as distinguished from their opinions or conclusions drawn from such facts." *U.S. v. Durham*, 464 F.3d 976, 982 (9th Cir. 2006).

One critical difference between expert and lay testimony is that an expert can rely on hearsay evidence to support an opinion, in some circumstances, but a lay witness cannot. In *United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007), the Ninth Circuit stated, "Once Shin stopped testifying as an expert and began providing lay testimony, he was no longer 'allowed . . . to testify based on hearsay information, and to couch his observations as generalized "opinions" rather than as firsthand knowledge'" (citation omitted). So "[i]f Shin relied upon or conveyed hearsay evidence when testifying as a lay witness or if Shin based his lay testimony on matters not within his personal knowledge, he exceeded the bounds of properly admissible testimony." *Id.*[16]

Under these fundamental standards applied to lay witness opinion testimony, all of Defendants' lay witness testimony concerning consumer demand is inadmissible. In short, Defendants cannot enter into evidence through the backdoor lay opinions that consumers would stop attending or watching college athletics because "people have told me so." This is simply a thinly masked disguise for rank hearsay (offered by interested witnesses who have helped design and perpetuate Defendants' cartel). For example, Defendants assert that some of their 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." Defs.' Mot. 43. Those assertions constitute opinions about how others would respond (as opposed to how the witness would respond) to different hypothetical scenarios, such as changes in rules concerning benefits provided to college athletes. These opinions are drawn from hearsay

[16] Based on these standards, courts routinely exclude lay witness opinions that are based on hearsay or that constitute opinions not drawn from concrete facts. *See Zoom Elec. Inc. v. Int'l Broth. of Electrical Workers*, 2013 WL 192515, at *4 (N.D. Cal. Jan. 27, 2013) (excluding lay opinion testimony "as to the reasons that [a third party] failed to act" because witness did "not lay any proper foundation for its admission as rationally based on his personal observation and recollection of concrete facts."); *Buckheit v. Dennis*, 2011 WL 835468, at *6 (N.D. Cal. Mar. 4, 2011) (declining to consider proffered lay opinion testimony because testimony was based upon hearsay and "not based on [the declarant's] perception"); *Stoebner Holdings, Inc. v. Automobili Lamborhini S.P.A.*, 2007 WL 4230824, at *2 (D. Haw. Nov. 30, 2007) ("Stoebner may not rely on hearsay as a lay witness offering opinion testimony.").

evidence and are plainly inadmissible—particularly in an antitrust case, in the context of analyzing procompetitive (economic) justifications for restraints of trade.

A representative example is Emmert's testimony that he believed that paying athletes compensation beyond cost of attendance would affect consumer demand. Defs.' Ex. 22, Emmert Tr. 111:7-8 ("I'm speculating, of course, but, yeah, I do believe that."). When asked the basis for his belief, he testified merely that it was based on his "personal experiences":

> Well, just my personal experiences and anecdotal evidence. I -- I can't -- again, I'm not a labor economist. I can't -- or an expert in media. I can't, you know, recite chapter and verse, but in -- in all of my interactions with alumni, with campuses, with college-based -- with the college fan base that I interact with, they -- they all, in conversation, constantly are in reference to the fact that these are students; they are not in professional sport.

Id. 111:17-112:2. Dr. Emmert thus recognized that it takes expertise to discern consumer demand and acknowledged that his lay opinion is simply a product of hearsay. He admits that he has no empirical basis for his opinion:

> Q. And in all of that experience, I appreciate you're saying you didn't have empirical --
>
> A. That's right.
>
> Q. -- support for your opinion, correct? Is that correct?
>
> A. That's correct.

Id. 113:9-15.

[redacted] Plainly, his opinions are based on hearsay, not concrete facts.

That Defendants' lay "evidence" about consumer demand is simply a package of gestalt feelings wrapped up in a hearsay bow is clearly captured by their citation to University of Kentucky Athletic Director Mitch Barnhart. Barnhart testified that it is "hard to speculate" how much attendance would decline if the pay restrictions were lifted:

> Q. Okay. If you look at that same page of the exhibit in front of you, toward the top there's a Subsection B.
>
> A. Yes, sir.
>
> Q. Which states: "If student-athletes were no longer amateurs but instead were paid whatever the market would bear, it's 'hard to speculate' how much attendance would decline." Do you remember saying that in the interview with Dr. Elzinga?
>
> A. Not specifically, but in general, yes.

Defs.' Ex. 18, Mitch Barnhart Tr. 19:15-20:1. Defendants' lay opinions about the restraints' impact on consumer demand is simply rank speculation, which at most is based on pure hearsay. It is thus inadmissible and not a basis to support or oppose summary judgment.

Defendants also fail to cite to admissible evidence in support of their assertion that "[w]itnesses 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." Defs.' Mot. 43. Defendants do not offer any such testimony *from media and sponsorship partners*—just their own hearsay accounts. For example, Defendants rely on the testimony of Mark Lewis, a former NCAA executive. *Id.* 43 (citing Defs.' Ex. 36, NCAA (Lewis) Tr. 27:21-33:1, 64:13-65:1, 268:8-269:20). [redacted][17] So his opinion is inadmissible.

[17] [redacted] 64:18-65:1 ("I've given you examples of conversations I've had with our corporate partners; I've given you examples of conversations I've had with our broadcast and media partners; I get letters from ticket buyers; I get letters and emails from the general public, because I'm the person that sells tickets to everybody that goes to college events."); [redacted]

Similarly, Defendants rely on inadmissible testimony when they state, "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.'" Defs.' Mot. 43-44 (citing Defs.' Ex. 36, NCAA (Lewis) Tr. 46:3-9). Lewis's "professional experience" is in restraining trade—not economics. And his view that "people would view it as professional sports" is unsupported and rests on inadmissible hearsay, even assuming it rests on anything other than his say-so. To the extent Lewis claims that the "economic reality of minor league sports" bears on consumer demand for college athletics (*see* Defs.' Mot. 44), he has no qualification to offer such opinions as a lay witness, and Defendants do not offer him as an expert. [redacted]

Defendants again rely solely on inadmissible lay witness opinion and hearsay testimony when they state: "Many witnesses testified that amateurism is one of the elements that makes college sports unique and differentiates them from professional sports." Defs.' Mot. 44. Even if admissible, such testimony would provide no evidence whatsoever that consumer demand would, in fact, decrease if the NCAA's compensation restraints were enjoined. For example, Defendants cite to Gregory Shaheen's testimony, where he offered the non sequitur about "a student athlete who lost both parents in a fire 40 days before the start of the tournament, and the way in which the team rallied around that student athlete . . . . For there to be any degradation of that would -- would make the property more like a general property and not as unique as it is . . . ." Defs.' Ex. 51, Gregory Shaheen Tr. 181:9-182:20 (cited by Defs.' Mot. 44). Defendants do not even try to explain why the team would not rally around a teammate if the teammate who lost his parents in a fire—and presumably was both emotionally and financially devastated—were permitted to receive additional compensation and benefits from his school.

Defendants further assert that the declaration of Michigan President Mary Sue Coleman explains "why paying student-athletes would change how fans view college sports and reduce

consumer demand." Defs.' Mot. 44. But a review of that declaration shows that her opinion is based on pure inadmissible hearsay: "my countless conversations with and observations of Michigan fans." Defs.' Ex. 69 at BIGTEN-GIA 070090. And Defendants yet again rely solely on inadmissible lay witness opinion testimony when they assert that other witnesses "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." Defs.' Mot. 44. For example, when asked whether the receipt of additional funds beyond the cost of attendance would impact consumer demand, Mid-American Conference Commissioner Jon Steinbrecher merely said, "I don't completely know the answer, but I think we're nibbling at the edges here . . . . I think there's a line there somewhere; and when we cross that line, I think that will change the perception." Pls.' Ex. 31-A, Jon Steinbrecher Tr. 44:21-45:6. Such amorphous, unsubstantiated, conclusory lay witness opinion testimony about an unidentified line is inadmissible. And like other Defendant lay witnesses questioned on this point, Steinbrecher admitted that he is not aware of any studies or empirical analysis of consumer demand if student-athletes were paid more than COA. *Id.* 45:21-46:2.

Similarly, Defendants argue that "[o]ther witnesses testified that amateur sports draw on a different fan base than professional sports, in part because they are amateur." Defs.' Mot. 44-45. But in an antitrust case, cross-elasticity of demand is the very stuff of expert testimony concerning substitutability of products or services—not a proper subject for lay opinions and speculation. For example, lay witness Craig Thompson, Commissioner of the Mountain West Conference, was asked, "Would you say that amateurism is one of the defining characteristics in consumers' eyes in the Mountain West Conference?" He answered, "It could be." Pls.' Ex. 107, Mountain West (Thompson) Tr. 191:10-15. He then stated, "I -- I know what -- what I would label or deem, define, amateur athletics, as. I don't know -- it could be different in other eyes." *Id.* at 192:9-13. This is not admissible lay opinion testimony. [redacted]

Defendants also contend that other lay witnesses "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." Defs.' Mot. 45. But the cited lay witnesses provide no factual basis for their unsupported opinions that "fans" view such a restriction as "attractive," let alone that consumer demand would diminish if those restrictions were enjoined. Simply put, none of these lay opinions are admissible and none of them provide any basis to support or oppose summary judgment in this case. *See, e.g.*, Defs.' Ex. 20, Rebecca Blank Tr. 126:9-11 (testimony that her opinion is based on "my speculation, not based on any hard evidence . . . ."); Pls.' Ex. 106, Kevin Lennon Tr. 34:21-36:4 (testimony that his personal opinions are not based on any study); Defs.' Ex. 52, Michael Slive Tr. 193:15-195:8 (personal opinion about paying more than COA not supported by any identified factual foundation).

Defendants similarly offer no admissible evidence when they claim that they "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." Defs.' Mot. 45. In support, Defendants rely on the testimony of Pac-12 Chief Marketing Officer Danette Leighton, who testified that the Pac-12 simply promotes its teams:

> We promote Pac-12 football games–we promote our Pac-12 Football Championship Game, and that can incorporate using mascots, using cheerleaders, using the band, using images of the institution, using images of the students in the classroom. We use a significant amount of imagery to showcase the college experience.

Pac-12 (Leighton) Tr. 32:24-33:5 (cited by Defs.' Mot. 45). What that testimony has to do with a supposed athletic/academic balance is anyone's guess. Defendants also rely on the testimony of Southeastern Conference ("SEC") Commissioner Greg Sankey, who stated merely that he "believe[s]" that fans associate college sports with amateurism, but then admitted that he is unaware of any study that "looked into whether the brand of the SEC was affected by the notion of amateurism," "looked into whether the brand of the SEC was affected by competitive balance," "looked into whether the brand of the SEC was affect by integration of college athletes on campus," "focuses on the effect of amateurism on the SEC brand," "focuses on the relationship of competitive balance to the SEC's brand," or "focuses on the relationship of integration of college athletes into campus life on the SEC's

brand." Pls.' Ex 108, SEC (Sankey) Tr. 48:5-20, 49:12-50:15. The lack of admissible support for the avalanche of lay opinions offered by Defendants is pervasive. Conference USA Commissioner Judy MacLeod, for example, offered her opinion that amateurism "is implied by that is what college athletics is," while admitting that Conference USA has not "studied the potential impact on its fan base if schools could offer more to athletes than cost of attendance." Pls.' Ex. 34, Conference USA (MacLeod) Tr. 127:8-12, 129:19-22.

Finally, Defendants argue that consumer demand would decrease because "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." Defs.' Mot. 45. Defendants do not even try to explain to the Court how that campaign shows in the slightest that consumer demand would decrease if the challenged compensation restrictions were enjoined—indeed, the campaign itself has nothing to with Class Members' compensation.

At bottom, Defendants' proffered evidence regarding consumer demand amounts to nothing more than a mantra, often repeated but never accompanied by any admissible foundation. Such unsupported, speculative slogans are neither admissible evidence nor capable of supporting or opposing summary judgment in this case, and wither away in the face of Plaintiffs' admissible and persuasive expert testimony to the contrary on these very points.

4. Defendants' Undisputed Actions Contradict Their Unsupported Rhetoric That the Challenged Rules Promote the Goal That Athletes Are "Students First, Athletes Second"

Defendants erroneously claim that in *O'Bannon*, this Court "considered and rejected" Plaintiffs' contention that the NCAA "does not ensure that 'Class Members are students first, athletes second.'" Defs.' Mot. 34. In *O'Bannon*, neither this Court nor the Ninth Circuit even mentioned "students first, athletes second," let alone rejected Plaintiffs' argument that Defendants regularly prioritize revenue over enforcing a supposed "students first" principle. In fact, this Court stated that "the restraints on student-athlete compensation challenged in this case generally do not serve to enhance academic outcomes for student-athletes." 7 F. Supp. 3d at 981. Even so, as detailed above, *see supra* § II.A.3, any discussion of this point in *O'Bannon* does not control the very different factual record presented here.

Defendants once again respond to Plaintiffs' showing that Defendants prioritize maximizing revenue over enforcing their purported "academics first" principle (Pls.' Mot. 14-16) with rhetoric rather than admissible evidence. They euphemistically concede that "television broadcast contracts reflect intense consumer demand for college sports" (Defs.' Mot. 36)—so much so that Class Members regularly are required to compete, practice, and travel during the school week, late at night, while their peers are able to immerse themselves in academics and campus life. Defendants then argue that "conferences advertise the academic success of their student-athletes because they believe in the importance of student-athletes being students." *Id.* 36-37. But this is an utter non sequitur. Defendants do not even try to explain how such advertising somehow proves that they do not regularly subordinate Class Members' academics to dollars.

Defendants next contend that "[i]t follows, then, that Defendants take academics into account when creating game schedules—rather than having 'surrender[ed] control over scheduling games to broadcasters.'" *Id.* 36 (quoting Pls.' Mot. 15). As Plaintiffs demonstrated in their moving papers, however, conferences have delegated to ESPN and other television networks the power to schedule night games during the school week and set game start times at their discretion; guaranteed to the TV networks that a certain number of games, at a minimum, will be available for these optimal broadcast windows; committed athletes to games that must be held on certain dates, including during holidays and study periods; and added new travel and schedule demands in the process, all with only minor restrictions. *See* Pls.' Mot., App'x C. Defendants do not even address their own unambiguous contractual provisions and instead cite to deposition testimony that there "are also strict limits on broadcasters' input into schedules." Defs.' Mot. 37. The purported "authority" for this assertion is former NCAA executive David Berst, who merely testified that "I think it is appropriate for the conferences to enter into those [broadcast agreements] in a manner that's as least disruptive as possible to the academic pursuits to the student athletes, and I would expect that to be the case with the PAC 12 or any other group." Defs.' Ex. 19, David Berst Tr. 150:24-151:5. What Berst may "expect" or think "appropriate" is certainly not evidence, and his speculative thoughts are clearly contrary to what the evidence cited by Plaintiffs show that Defendants actually do. Indeed, [redacted]

[redacted]

Defendants' above-all-else pursuit of the almighty dollar with respect to FBS football and Division I basketball is the worst-kept secret in college sports. According to the NCAA itself, 79% of people who took a recent NCAA poll "said big universities put money ahead of student athletes."[18] and President Emmert addressed a bribery scandal in college basketball by admitting that there is a question about "our ability to manage our own affairs; not just in college sport, but in higher education." *Id.* Ohio State University football coach Urban Meyer very recently made a similar admission against Defendants' interest: "I understand TV contracts are kind of ruling, but when you start talking about student-athletes, they shouldn't have to play four night games on the road . . . . I talked to [Ohio State Athletic Director] Gene Smith about it and I'm going to bring it up to [Big Ten] commissioner, [Jim Delany]. We'll find out if we really do care about getting home at four o'clock in the morning four times. You don't do that."[19] He continued: "In my opinion, very strong opinion, when I start thinking about players and what's expected of them during the week, if you can't recover, you don't get those hours back . . . . I'm talking about academically, I'm talking about just your body, and the student-athlete welfare. They should not play four night games on the road."[20]

University of Washington football coach Chris Petersen was equally direct about the open secret that money drives Defendants' decision-making. Petersen said that late kickoffs have been "painful for our team," but notwithstanding, "so much of this and what we do comes down to money . . . TV contracts are big. *They tell us when to play*."[21] Far from arguing to the contrary or claiming

[18] Knight Comm'n Tr. 10:2-25.

[19] Matt Bonesteel, "Kirk Herbstreit Dismissed Chris Petersen Over Night Games. He Won't Be Able to Dismiss Urban Meyer," WASH. POST, Oct. 13, 2017, https://www.washingtonpost.com/news/early-lead/wp/2017/10/13/kirk-herbstreit-dismissed-chris-petersen-over-night-games-he-wont-be-able-to-dismiss-urban-meyer/?utm_term=.cc741ee3ccf7.

[20] *Id.*

[21] Adam Jude, "Frustrated by the Pac-12's Late, Late Kickoffs? You're Not the Only One," SEATTLE TIMES, Oct. 2, 2017, https://www.seattletimes.com/sports/uw-husky-football/frustrated-by-the-pac-12s-late-late-kickoffs-youre-not-the-only-one (emphasis added).

that schedules are meant to be minimally disruptive, Pac-12 Commissioner Larry Scott told ESPN during a live broadcast a few weeks ago that while "late night games are . . . tough on student athletes, . . . there's no doubt that playing late at night . . . ha[s] been beneficial for the Pac-12."[22] The interview continued:

> ROD GILMORE [ESPN]: So this is a new window that was created in the new TV contract. Is your view then that that window has really worked the way you envisioned . . . ?
>
> LARRY SCOTT: Yeah, our broadcast partners at ESPN and Fox came to us and said we can create new value, we think there's demand for more football to extend the day, and PAC12 is the perfect property . . . You know, our ratings for our games are 12 percent higher.[23]

Defendants erroneously assert that "Plaintiffs' proposed alteration to the current regime would reduce rather than enhance the incentives to maintain a balance between academics and athletics." Defs.' Mot. 38. They ignore the crucial and undisputed fact that in order to stay eligible to play and receive benefits, the athletes would have to maintain their academic standing—rules not challenged by this litigation. In fact, if Defendants have a genuine concern about the impact that increased compensation could have on the balance between academics and athletics (even though there is *no evidence* to warrant such a concern), they could simultaneously implement more rigorous academic requirements or implement meaningful regulation of game and practice schedules to give Class Members more time to study and go to classes.

And make no mistake, despite its "amateurism" mantra that Class Members are students first and athletes second, the undisputed evidence demonstrates that the NCAA abdicates all responsibility for academic welfare. As the NCAA recently concluded with respect to the academic fraud scandal at the University of North Carolina, where the institution "covered up . . . cheating" using "curricular soft-spots" intended "to keep [university] athletes eligible to play their sports" (Pls.' Ex. 117, Mary Willingham Tr. 67:8-68:1):

> A Division I Committee on Infractions hearing panel could not conclude that the University of North Carolina violated NCAA academic rules when it made available deficient Department of African and Afro-American

[22] Pls.' Ex. 118, Oct. 20, 2017 Larry Scott Interview Tr. 2:12-18.

[23] *Id.* at 2:24-3:12.

> Studies "paper courses" to the general student body, including student-athletes.
>
> …
>
> "While student-athletes likely benefited from the so-called 'paper courses' offered by North Carolina, the information available in the record did not establish that the courses were solely created, offered and maintained as an orchestrated effort to benefit student-athletes," said Greg Sankey, the panel's chief hearing officer and commissioner of the Southeastern Conference. "The panel is troubled by the university's shifting positions about whether academic fraud occurred on its campus and the credibility of the Cadwalader report, which it distanced itself from after initially supporting the findings. However, NCAA policy is clear. The NCAA defers to its member schools to determine whether academic fraud occurred and, ultimately, the panel is bound to making decisions within the rules set by the membership."[24]

As a matter of law, the NCAA and Conference Defendants cannot try to justify their restraints on trade in the name of protecting the academic welfare of Class Members when, in fact, they take no responsibility for insuring that Class Members obtain a proper education at all.

Finally, Defendants miss the point of Dr. Lazear's deposition testimony when they state that he "repeatedly testified that student-athletes would put more effort into athletics if pay were offered." Defs.' Mot. 38. As Dr. Lazear testified, "When 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." Defs.' Ex. 32, Dr. Edward Lazear Tr. 224:11-13. But more "effort" towards athletics is neither synonymous with more *time* towards athletics or less time and *effort* towards academics (both of which Defendants could regulate without challenge in this case).

In short, Defendants' antiquated and fanciful portrayal of how their compensation rules are somehow designed to limit Class Members' athletic commitments in favor of academics is divorced from reality and the record evidence in this case. However benevolent the slogan of "students first, athletes second" may be, that saying has no relation to the compensation rules challenged here or how Defendants treat Class Members, who are expected to devote so much time to Division I basketball

[24] "Infractions Panel Could Not Conclude Academic Violations in North Carolina Case," NCAA.COM, Oct. 13, 2017, http://www.ncaa.org/about/resources/media-center/news/infractions-panel-could-not-conclude-academic-violations-north-carolina-case.

and FBS football that they have significantly compromised and reduced time left to devote to their academic requirements. The big multi-billion-dollar sports businesses run by Defendants dictate the requirements that Class Members must fulfill, not student welfare. *See* Pls.' Mot. 14-16; *id.* 15 n.30.

D. Defendants' "Academic Integration" Justification Does Not Present a Material or Genuine Factual Dispute to Prevent Summary Judgment for Plaintiffs

Despite giving it scant attention to date in this litigation, in opposing summary judgment, Defendants try to rehabilitate their "academic integration" justification from *O'Bannon.* For starters, Defendants are wrong to assert that they can rely on *O'Bannon* to support a finding, on *this* record, that their "'compensation rules serve the . . . procompetitive purpose[] [of] integrating academics with athletics.'" Defs.' Mot. 46 (quoting *O'Bannon*, 802 F.3d at 1073) (alterations in original). Procompetitive benefits must be proven, not presumed. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100-101 (1984). Far from decreeing indelibly that integration is a procompetitive feature of the challenged restraints (which have in any event changed significantly since *O'Bannon*), the Ninth Circuit hardly considered the issue because the NCAA "focuse[d] its arguments to [that] court entirely on the first proffered justification—the promotion of amateurism." *O'Bannon*, 802 F.3d at 1072. The Ninth Circuit merely "accept[ed] the district court's factual findings" based on the trial record in *O'Bannon*. *Id.* And that finding merely was that compensation restraints "*might* facilitate the integration of academics and athletics . . . by preventing student-athletes from being cut off from the broader campus community." *O'Bannon*, 7 F. Supp. 3d at 1003 (emphasis added).

Based on the factual record presented here, Defendants' academic integration justification should be rejected as a matter of law because, however ostensibly laudable, it is not an *economic* justification. As Plaintiffs have already shown, the law is clear that it is pro- and anticompetitive effects on competition that matter—not social ideals, however desirable. *See, e.g.*, Pls.' Mot. 21-22; *supra* § III.C. Defendants make a half-hearted (one-paragraph) effort to argue that academic integration somehow promotes consumer demand, but this is factually unsupported and makes no logical sense, and there is no discussion in *O'Bannon* about any *procompetitive* effect of integration. Defendants' non sequitur—"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"—is just a rehash of their amateurism justification arguments. Defs.' Mot. 49 (quoting NCAA witness testimony). Defendants already *do* pay college athletes above COA with no reduction in consumer demand, and there is no evidence in this case or plausible connection between academic integration and consumer demand for Division I basketball and FBS football.[25] This proffered justification should therefore be rejected as a matter of law.

Regardless, on this factual record, there can no longer be any genuine dispute that Defendants' compensation caps do not serve even a limited role in integrating athletes. As explained above (*supra* § III.C.4), Defendants routinely subordinate academics to athletics for the sake of growing athletic revenues, so there is no basis for them to argue that integration *is* an objective, much less a procompetitive one. Class Members compete in games televised during primetime television hours for national audiences; they play in front of tens or hundreds of thousands of fans paying professional-sports-like sums to attend these games; they constantly travel off campus for away games; they serve as walking billboards for corporate sponsors;[26] they participate in media days with throngs of press; they practice in locker rooms that have water walls and barbershops and flat screen televisions for each locker; they study in athlete-only academic halls; and they live with teammates in specialized dorms with private chefs.[27] It is nothing short of delusional for Defendants or anyone else to believe that Division I basketball and FBS football players have "normal" collegiate experiences. Put another way, there *already is a* "wedge" between Class Members and non-athletes as a result of Defendants'

[25] If anything, Defendants appear to argue that eliminating the challenged restraints might *improve* the quality of Defendants' athletics products because, supposedly, "payments for athletic performance would incentivize student-athletes to spend even more time on athletics." Defs.' Mot. 46.

[26] Athletes are such profitable endorsers for the corporate partners embraced by Defendants and their members that certain sneaker and apparel companies are under investigation by the FBI for paying bribes to coaches and athletes so that the most talented players will be seen in certain branded equipment, as permitted by Defendants' rules. *See, e.g.*, Knight Comm'n Tr. 14:18-15:19.

[27] *See, e.g.*, *supra* § II.C.4; Pls.' Mot. 14-16; [redacted] Pls.' Ex. 3, Eugene Smith Tr. 132:2-14 (Ohio State University charged a record $195 per ticket for its 2016 football game against the University of Michigan).

conduct under the current system, and depriving Class Members of additional benefits does nothing to make them more or less integrated into campus life. "[S]tudent-athletes are always looked at a bit differently." Pls.' Ex. 67-A, Luck Tr. 106:7-13; Pls.' Mot. 14-15 (Class Members report that they are athletes before students with lives that revolve around their athletic commitments and status as athletes). This wedge is the direct result of the NCAA and Conference Defendants operating and promoting Division I basketball and FBS football as big-time, multi-billion-dollar athletics entertainment products. There can be no genuine factual dispute that the challenged restraints are not necessary to prevent a wedge that indisputably exists, and Defendants have offered no evidence to show that allowing Class Members to receive additional benefits or compensation would make them any less integrated with other students (many of whom already have much greater economic resources than many Class Members and are able to earn substantial sums for their endeavors without any restrictions, unlike Class Members). *See, e.g.*, [redacted]

Indeed, Defendants' purported concerns about treating Class Members differently than other students go out the window when it comes to regulating Defendants' revenue-generating endeavors. College practices, game scheduling, travel, and academics are hardly regulated at all by the NCAA and Conference Defendants (or, if so, enforced).[28] *Supra* § III.C.4. When it comes to *compensating* Class Members, however, then Defendants' feigned imperative about preventing a wedge comes into being. But there is no admissible evidence that the challenged restraints actually prevent a wedge or promote integration—even if this were a valid procompetitive justification (which it is not).

One stark example is that, since *O'Bannon*, Defendants now permit college athletes to accept uncapped payments from international Olympic federations. [redacted]

[28] For example, Defendants disclaim responsibility for ensuring the academic integrity of athletes' college experiences. *See supra* § II.A.4.

On the flip side, colleges do *not* regulate how non-athletes may earn money out of fear that they will cease to integrate. [redacted] *supra* n.12. [redacted] Defendants make the unsupported assertion that students earning money can harm their participation in campus life and make campuses "less welcoming" to them. Defs.' Mot. 49. But colleges do nothing to limit any student, except NCAA-regulated athletes, from receiving additional benefits and compensation and they have not produced any evidence that a wedge has cut off non-athletes who receive additional compensation or benefits from their college campuses. On the contrary, Defendants and university personnel admit that the absence of regulations governing non-athletes' compensation has not posed any integration problem. *See, e.g.*, Pls.' Ex. 67-A, Luck Tr. 121:17-127:13 (confirming that failure to regulate non-athletes' NIL rights such that talented students, like actors, could make their own agreements for NIL use while in school had never caused a problem at West Virginia University); Pls.' Ex. 3-A, Smith Tr. 155:5-157:13 (Ohio State University Athletic Director Gene Smith has never heard of any integration problems for non-athlete students who come from wealthier backgrounds or earn money while in school).[29] In fact, on several occasions, [redacted] For the avoidance of doubt, Plaintiffs are not asserting any claims concerning Class Members' NIL

[29] Unlike Class Members, [redacted]

rights or ability to earn money from third parties; the point is that Defendants' stated concerns about integration and a wedge are sheer fiction.[30]

[redacted] These efforts have yielded circumstances at colleges nationwide where Class Members live in dorms designed to segregate them from most other students and spend most of their time in athletics buildings that serve to "cut [them] off from the broader campus communit[ies]" (*O'Bannon*, 7 F. Supp. 3d at 1003) [redacted]

Defendants assert that expert testimony "confirms that paying" athletes more "would change their incentives" and cause them to "dedicate even more effort and possibly more time to their sports." Defs.' Mot. 47. But they say nothing about what that would mean for integrating athletes on college campuses. *See supra* § III.D. One of their experts, Dr. Heckman, states that athletes would be diverted away from academics were they to receive more compensation (Defs.' Mot. 47), but even if Dr. Heckman's opinion were admissible here (it is not, *see infra* § V), it stands only for the unremarkable

[30] Defendants are likewise content to allow for an actual wedge to exist between Class Members and all other students in the classroom; it is the price of operating their businesses. Despite touting that their "combination of rules and incentives" have allowed college athletes to "achieve[] significant academic success," Defendants' arguments and evidence are, indeed, "just for show." Defs.' Mot. 13. Defendants rely on NCAAGIA02690846 (Defs.' Ex. 85) to argue that "the federal graduation rate for Division I student-athletes" are 'higher than their counterparts in the student body.'" Defs.' Mot. 13. But the same document shows that far from setting Class Members on par with others, the graduation rates for men's basketball, women's basketball, and FBS football athletes lag behind those of the general student body by up to 15%. Defs.' Ex. 85, NCAAGIA02690846 at -865. The record is filled with this kind of academic smoke and mirrors, such as the testimony offered about fraud by a former academic advisor at the University of North Carolina (Pls.' Ex. 117, Willingham Tr. 67:4-68:1) and Big 12 Commissioner Bowlsby's inability to account for the fact that despite a reported graduation rate of 75%, the actual graduation rate for Iowa State University men's basketball players was 6% (Pls.' Ex. 68-A, Bowlsby Tr. 29:6-17) (discussing a discrepancy between the NCAA's preferred Graduation Success Rate measure of academic progress and the federal rate used for all other students).

proposition that attending college is generally beneficial, and it carries no probative value with respect to whether the challenged compensation restraints help to promote athlete integration. *See, e.g.*, [redacted]

In fact, Dr. Heckman's work here did not study at all what impact compensation restraints have on student integration or academic performance. Instead, his report is largely indistinguishable from his work in *O'Bannon*, where the Court ruled that "none of th[e] data nor any of Dr. Heckman's observations suggests that student-athletes benefit specifically from the restrictions on student-athlete compensation that are challenged in this case." *O'Bannon*, 7 F. Supp. 3d at 979-981. Dr. Heckman has not submitted any new analyses establishing a causal relationship between the compensation restraints Plaintiffs challenge and the purported benefits of education. *See infra* § V.

The lay-witness evidence upon which Defendants rely to support their academic integration argument is equally inadmissible and flawed. Defendants anchor their argument in interested-witness lay opinion testimony unsupported by any factual foundation.[31] For example, Lennon testified that providing Class Members with additional compensation would "change the motivation of some of our students" and would "reorient the student's perspective in terms of why they are in college." Defs.' Ex. 35, Lennon Tr. 33:11-34:5 (cited in Defs.' Mot. 48). But Lennon also admitted that the NCAA has not conducted "any kind of study . . . to determine how many athletes would be affected" with respect to integration were athlete compensation increased. Pls.' Ex. 106, Lennon Tr. 34:24-35:3. As another example, former SEC Commissioner Slive could not coherently explain why an athlete could not be paid for her talents, but a violin player could, without injuring the latter's connection to the student body: the violinist is "not playing in front of a hundred thousand people . . . he's not under anybody's microscope." Pls.' Ex. 17-A, Slive Tr. 190:18-191:7; *see also* [redacted]

[31] The same problem infected the "scores of documents identified in response to interrogatories" that Defendants claim Plaintiffs wrongly disregard. Defs.' Mot. 39. The documents identified by Defendants as supporting their claimed student integration justifications were largely promotional materials and self-serving statements, without any factual support, prepared for Defendants, and documents created by Defendants to impose the challenged restraints (*e.g.*, NCAA manuals, conference constitutions, etc.). None of them provide any evidence to support the Defendant's procompetitive justification claims.

[redacted] As discussed above, *see* § III.C.3.b *supra*, none of this lay opinion testimony is admissible and none of it can therefore be used to support or oppose summary judgment.

In sum, the Court should reject Defendants' academic integration justification as a matter of law because it is not a procompetitive justification recognized by the rule of reason. Alternatively, the Court should find that the undisputed evidence shows that the challenged restraints cannot be justified on the basis of preventing a wedge that already exists and that would not be furthered if the challenged compensation restraints were held unlawful and enjoined.

E. Defendants Have No Other Viable Procompetitive Justifications

Refusing to concede that they have hung their hat exclusively on their amateurism and, nominally, academic integration defenses, Defendants stitch together a few paragraphs arguing that they have other procompetitive justifications for their price fixing. This is false.

Defendants first offer the procedural argument that Plaintiffs have not met their "burden to demonstrate an absence of evidence sufficient for summary judgment" with respect to each of their boilerplate justifications listed in their interrogatory responses. Defs.' Mot. 51. Defendants misstate the summary judgment framework within the rule of reason. Again, once Plaintiffs show that the challenged restraints cause anticompetitive effects in a relevant market, it is *Defendants* that bear the burden of proving that the challenged restraint "actually promotes competition in a relevant market." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1150 (N.D. Cal. 2014). As such, Plaintiffs—as the moving party requesting summary judgment—need only "point[] out to the district court [] that there is an absence of evidence" to support Defendants' other defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Defendants suggest that Plaintiffs can only meet this requirement by offering "record evidence" that each of Defendants' procompetitive justifications lack merit. Defs.' Mot. 51. But this is simply not what the case law requires of moving parties (like Plaintiffs here), who do not have the burden of proof on an issue.[32] In fact, Ninth Circuit law on this point is quite clear—Plaintiffs can

[32] *See Huck v. Pfizer, Inc.*, 2011 WL 3176432, at *9 (S.D. Cal. July 25, 2011) ("Plaintiff initially argues that Defendant did not meet its burden as the moving party on summary judgment because

meet their obligations under Rule 56 by "'pointing out *through argument* [] the absence of evidence to support [Defendants'] claim.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (emphasis added) (quoting *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000)). Defendants' contention that Plaintiffs bear the burden to prove a negative on an issue for which Defendants have the burden of proof makes no sense.[33] Defendants' district court authorities are inapposite to their burden to come forward with admissible evidence of procompetitive justifications in a rule of reason antitrust case and do not compel a contrary conclusion.[34]

Plaintiffs satisfied their obligation by pointing out how Defendants simply listed a group of boilerplate procompetitive justifications in an interrogatory response but then came forward with no witnesses, expert testimony, or documents to support them. *See* Pls.' Mot. 25. To give a specific example, Defendants listed "promoting competitive balance" as a procompetitive justification in their interrogatories, but, unlike in *O'Bannon*, none of their economists even mention that subject in their expert reports, and many of Defendants' own witnesses debunked competitive balance as a myth. *See, e.g.*, Pls.' Ex. 68-A, Robert Bowlsby Tr. 38:17-39:13 (confirming statement that "competitive equity is largely a mirage").

Defendant's evidence was insufficient to show that there is no genuine issue of material fact. Plaintiff misconstrues Defendant's burden with respect to this claim.") (citation omitted).

[33] *Blue Lake Rancheria v. Lanier*, 106 F. Supp. 3d 1134, 1139 (E.D. Cal. 2015) (granting summary judgment to a plaintiff and stating, "Defendants essentially complain that Plaintiff has not done enough to prove a negative—that the Tribe did not waive immunity . . . . *But the law does not require Plaintiff to disprove every possible means of waiver*; rather, Plaintiff may meet its burden by 'pointing out through argument [ ] the absence of evidence' to support other party's case.") (emphasis added) (citations omitted).

[34] *See Morton & Bassett, LLC v. Organic Spices, Inc.*, 2017 WL 1425908, at *7 (N.D. Cal. Apr. 21, 2017) (defendant in a trade dress infringement case was not entitled to summary judgment when "it fail[ed] to actually analyze any of the factors" of "distinctiveness" under trade dress law, and where non-moving party testimony showed such "distinctiveness"); *Caldera v. Am. Med. Collection Agency*, 2017 WL 2423793, at *2-3 (C.D. Cal. Mar. 15, 2017) (defendant not entitled to summary judgment on plaintiffs' TCPA claim when defendant itself acknowledged that it hired third parties to place debt collection calls on its behalf, thereby opening defendant up to potential vicarious liability); *Molieri v. Cty. of Marin*, 2012 WL 1309172, at *5 (N.D. Cal. Apr. 16, 2012) (the defendant was not entitled to complete summary judgment on a vague cause of action because it was conceivably possible that there was some "other alleged deprivation" by the police department that could have evidentiary support); *Diodem, LLC v. Lumenis Inc.*, 2005 WL 6220667, at *21 (C.D. Cal. Jan. 10, 2005) (summary judgment denied where moving party offered "single conclusory sentence" of argument and non-moving party—unlike Defendants here—actually "designated specific facts that raise a genuine issue").

More fundamentally, however, Defendants' argument wholly ignores the fact that the entirety of Plaintiffs' Motion concerns how the undisputed evidence shows there is *no* procompetitive justification for Defendants' restraints. So the summary judgment record before the Court is a far cry from cases where a plaintiff tried to discharge its burden with the type of bald, "no-evidence" motion to which Defendants refer. *See* Defs.' Mot. 51.

Upon meeting their burden, Plaintiffs swung the pendulum to Defendants to "provide affidavits or other sources of evidence that 'set forth *specific facts* showing that there is a genuine issue for trial'" regarding their defenses. *Devereaux*, 263 F.3d at 1076 (emphasis added) (quoting Fed. R. Civ. P. 56(e)). In other words, Defendants needed to offer up "significant probative evidence" on their purported justifications other than amateurism and integration if Defendants want to pursue them. *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *see also In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) ("This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence.").

Instead, apart from amateurism and to a minor extent academic integration, Defendants do little more than bury a list of seven claimed procompetitive justifications in a footnote. Defs.' Mot. 50 n.27. The only additional argument Defendants present is a brief discussion of why the rules are purportedly necessary to increase output. But even putting aside that Defendants contend that *O'Bannon* controls and, there, the Ninth Circuit "accept[ed] the district court's factual findings that the compensation rules . . . do not increase output," Defendants' argument that an unsubstantiated "output" justification should stave off summary judgment falls flat. *O'Bannon*, 802 F.3d at 1072.

For starters, it is absurd for Defendants to suggest that Dr. Elzinga's opinions support their output justification, citing to a few pages of his opening expert report. Defs.' Mot. 52. [redacted]

[redacted][35]

[35] [redacted]

[redacted] He thus can provide no help to Defendants on the output issue. Citing "'empty rhetoric'" from an expert, without any record support, is both inadmissible and insufficient to withstand summary judgment. *Espritt v. Saesee*, 2015 WL 5173166, at *5 (E.D. Cal. Sept. 3, 2015) (quoting *Rogan v. City of Boston*, 267 F.3d 24, 27 (1st Cir. 2001)).

At a bare minimum, Plaintiffs' motion for summary judgment should be granted as to all procompetitive justifications identified in Defendants' footnote 27 so that the Court does not have to devote any more resources or time to considering these wholly unsupported claims in this case.

F. Defendants' Motion for Summary Judgment Is also Precluded by Factual Disputes Regarding Plaintiffs' Proffered Less Restrictive Alternatives

Even if Defendants could establish that *O'Bannon* controls *and* that they have come forward with admissible evidence to present a genuine factual dispute that the challenged restraints may serve some procompetitive purpose based on amateurism or academic integration, they could not possibly demonstrate that summary judgment should be entered in their favor. This is because there are genuine, material, and disputed facts as to whether Plaintiffs' proposed less restrictive alternatives—not presented or considered in *O'Bannon*—would achieve Defendants' purported procompetitive goals without imposing as much anticompetitive harm. Although the Court need not consider less restrictive alternatives in connection with Plaintiffs' summary judgment motion—because Plaintiffs demonstrate that Defendants have failed to show that the challenged restraints serve *any* procompetitive purposes, which ends the rule of reason analysis—the same cannot be said for Defendants' summary judgment motion. To prevail, Defendants must not merely show that they have

[redacted]

come forward with evidence to raise a genuine issue that their restraints have procompetitive attributes that outweigh their anticompetitive effects; they must further establish that Plaintiffs have not come forward with evidence to raise a genuine issue that any such procompetitive objectives could not be achieved through less restrictive (anticompetitive) means. *See Tanaka*, 252 F.3d at 1063. But Defendants largely ignore this issue, which precludes them from arguing for summary judgment in their favor.

Here, Plaintiffs offer a number of less restrictive alternatives supported by the factual record that would achieve Defendants' proffered goals of protecting amateurism and ensuring athlete integration. *See, e.g.*, [redacted]

This less restrictive alternative would permit any conference to organize itself around like-minded schools, and if those schools believe that principles of amateurism require certain compensation restraints, the schools would be free to enact them. On the other hand, those schools that desire to join conferences with a different set of compensation rules, permitting greater compensation and benefits to Class Members, would also be permitted. The NCAA and Conference Defendants have already demonstrated that such conference autonomy is possible by permitting the Power Five conferences to decide for themselves whether to provide Class Members and other athletes with certain additional benefits above full COA. *See, e.g.*, [redacted]

[redacted][36][redacted] Moreover, NCAA President Emmert himself has publicly acknowledged that the NCAA member institutions already self-govern in evaluating the quality of their academic programs.[37] There is no reason that giving even greater autonomy to the conferences would not permit the achievement of any procompetitive objectives that are valid, as shown by Plaintiffs' expert testimony on this point. Defendants have not introduced any evidence to respond to this less restrictive alternative showing. [redacted] Poret Rep. 8-9, 19-20.

Nor have Defendants credibly responded to the other less restrictive alternatives that Plaintiffs have presented in this record. [redacted] *see also supra* § III.C.1-2.

Defendants' response to Dr. Rascher's expert opinion testimony is simply to claim that it was "mischaracterized," and that Plaintiffs haven't *proved* that these proposed less restrictive alternatives will actually accomplish the same procompetitive benefits that the existing rules do. *See* Defs.' Ex. 12, Elzinga Rebuttal Report 28-31, 54. But Defendants cannot ignore the NCAA's binding 30(b)(6)

[36] The Ivy League, which does not permit members to provide athletic scholarships, and the United States service academies, which pay military salaries to their students, compete in either Division I basketball or FBS football or both. *See, e.g.*, http://www.ncaa.com/rankings/basketball-men/d1/ncaa-mens-basketball-rpi. Likewise, certain conferences whose members compete in these sports do not offer full COA scholarships. *See, e.g.*, [redacted] These examples further demonstrate that there are already varying levels of compensation among Class Members, and that this variety has not harmed Division I basketball and FBS football.

[37] *See* Knight Comm'n Tr. 5:25-7:5 ("Universities and colleges themselves hold themselves [sic] responsible for academic integrity. . . . Universities and colleges set up their own accrediting bodies and pass judgment on each other . . .").

testimony and other evidence, including the Poret survey evidence, establishing that these less restrictive alternatives would be just as effective in protecting amateurism as the challenged restraints. *See, e.g.*, Pls.' Ex. 1-A, NCAA (Lennon) Tr. 72-73, 92, 174-175, 287-309; Poret Rep. 8-9, 19-20; Pls.' Ex. 111, Roy Williams Tr. 72:16-76:13; [redacted] Nor can Defendants ignore that the record is replete with evidence showing that Defendants are *already* permitting substantial compensation and benefits above COA that are unrelated to amateurism and untethered to educational expenses (*see, e.g.*, [redacted] *supra* §§ III.C.1-2), effectively establishing that the types of compensation and benefits that would be permitted by Plaintiffs' proposed less restrictive alternatives cannot and do not harm Defendants' purported procompetitive goals. Thus, at a minimum, these proffered less restrictive alternatives present disputed genuine issues of material fact precluding summary judgment in Defendants' favor.

IV. PLAINTIFFS' EXPERT TESTIMONY SHOULD NOT BE EXCLUDED

A. The Opinions of Plaintiffs' Experts Are Consistent with *O'Bannon*

Defendants incorrectly contend that Plaintiffs' three economics experts "all proffer opinions that contradict the Ninth Circuit's" *O'Bannon* decision. Defs.' Mot. at 53-54. For all of the reasons set forth above (*supra* § II), *O'Bannon* does not preclude Plaintiffs' claims or the expert opinions offered in support of those claims in any respect.[38] Moreover, Drs. Lazear, Noll, and Rascher are offering economic—not legal—opinions.

Further, a number of Defendants' objections distort the opinions disclosed by Plaintiffs' experts with their answers to deposition questions that went beyond the scope of their reports or the testimony they are offering in this case. For example, Defendants assert that the Court should reject Dr. Noll's "opinion" that he disagrees with the Ninth Circuit's *O'Bannon* decision that the NCAA's amateurism rules have procompetitive benefits. *See* Defs.' Mot. at 54. [redacted]

[38] The principal case cited by defendants is inapposite, because the issues and facts did not change after the court had ruled that a patent was invalid. *See King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2015 WL 6750899, at *9 (E.D. Pa. Nov. 5, 2015). And in the other inapposite case cited by defendants, *A&M Records, Inc. v. Napster, Inc.*, 2000 WL 1170106, at *10 (N.D. Cal. Aug. 10, 2000), the court ruled that "[l]ay persons may not offer expert testimony about the content of the law." Here, plaintiffs' experts are not offering any legal opinions at all.

[redacted]

Moreover, Defendants' *Daubert* challenge on the basis of *O'Bannon* is misplaced, because it attacks the experts' conclusions, rather than their methodology. In *Wendell v. GlaxoSmithKline LLC*, the Ninth Circuit reiterated that the "focus of the district court's analysis 'must be solely on principles and methodology, not on the conclusions that they generate.'" 858 F.3d 1227, 1232 (9th Cir. 2017) (citing *Daubert*, 509 U.S. at 595). The challenged opinions plainly fit the facts of the case and would assist the fact finder, such that Defendants' *Daubert* challenge should be rejected.

B. Plaintiffs' Experts Are Qualified to Offer Their Opinions

Defendants argue that "[n]either 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." Defs.' Mot. at 56. It is an ironic argument considering that their economist, Dr. Elzinga, is so remarkably unversed in basic elements of college sports or the economic record in this case. Pls.' Mot. to Excl. There is more irony, still, because Dr. Noll's testimony was admitted in *O'Bannon*, and Dr. Noll is the foremost expert in the world on the intersection of antitrust and sports industries, including college sports. But Defendants' argument is also just flat wrong as a matter of law.

They supply no explanation for why Drs. Lazear and Noll must be experts in college athletics, or in the laws, rules, and regulations that govern them, or even what that would mean. As Rule 703 of the Federal Rules of Evidence provides, "If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." Defendants bear the burden to demonstrate that Drs. Noll and Lazear cannot reasonably rely on facts or data concerning college athletics in reaching their opinions on economic issues, but Defendants do not even try to make that showing.

Courts routinely hold that an expert need not have expertise in every facet of the subject matter in order to testify about it. For example, in *Thompson v. Whirlpool Corp.*, 2008 WL 2063549, at *4 (W.D. Wash. May 13, 2008), the court explained:

> Generally, an expert need not be officially credentialed in the specific matter under dispute, *see United States v. Garcia*, 7 F.3d 885, 889-90 (9th Cir. 1993); it is enough that the witness has qualified training or experience in a general field related to the subject matter of the issue in question, and that the resultant specialized knowledge is sufficiently related to the issues and evidence that the proposed testimony will be of assistance to the trier of fact . . . . An expert's lack of particularized expertise goes to the weight accorded his testimony, not to the admissibility of his opinion as an expert. *Id.* at 890 (citing *United States v. Little*, 753 F.2d 1420, 1445 (9th Cir. 1984)).[39]

Defendants' cases for their contrary position are inapposite. In *United States v. Santini*, 656 F.3d 1075 (9th Cir. 2011) (*per curiam*), the government proffered a psychiatry expert who based his opinion in part on the defendant's rap sheet to argue that the defendant had extensive prior contacts with law enforcement. The Ninth Circuit held that the expert's testimony should have been excluded because he "admitted on cross-examination that he found the rap sheet hard to understand, and his report relaying the information contained in the 'rap sheet' did not distinguish among arrests, convictions, or other 'contacts' with law enforcement." *Id*. at 1078. As the Court stated, an "expert

[39] *See also, e.g.*, *Regal Cinemas, Inc. v. W & M Props.*, 90 F. App'x 824, 833 (6th Cir. 2004) (witness who was "a certified public accountant, a certified business appraiser, a shareholder and director of litigation support group of an accounting firm, and [who] has offered testimony in at least fifty court cases," could testify on lost profits of a movie theater, even though he did not have any experience in the movie theater industry); *ECD Investor Group v. Credit Suisse Int'l*, 2017 WL 3841872, at *12 (S.D.N.Y. Sept. 1, 2017) ("DeRosa's long history of both academic and professional experience with capital markets renders him qualified to offer opinions in this case, including on the key issue of the appropriateness of the hedging strategies facilitated by Credit Suisse. Any lack of direct experience with convertible securities, share lending agreements, or the specific transactions at issue here would go to the weight, and not the admissibility, of his opinions."); *Int'l Cards Co. v. MasterCard Int'l, Inc.*, 2016 WL 7009016, at *9 (S.D.N.Y. Sept. 11, 2016) ("ICC argues that Creamer is unqualified because he has no expertise in the markets in Jordan. Creamer's analysis is not based on any claimed expertise in Jordan. ICC has not explained how Creamer's analysis and opinions are rendered categorically inapplicable because the company at issue operates in Jordan."); *In re Apollo Group Inc. Sec. Litig.*, 527 F. Supp. 2d 957, 963 (D. Ariz. 2007) ("Defendants argue that Dr. Ingraham lacks expertise on human capital models, and they take issue with his choice of variables, especially the use of an enrollments-squared variable. Defendants also claim that his conclusions are not supported by the data generated by his regression. Nevertheless, the Court is satisfied that Dr. Ingraham's published work and expertise in general econometrics meets the requirements of admissibility under *Daubert I* and its progeny.")

in one field ([the expert at issue] was a psychiatrist) cannot express an opinion relying on data that requires expertise in another field (here, a rap sheet that would require interpretation by an expert in law enforcement record-keeping)." *Id*. at 1078-79. In contrast, Defendants here do not even try to explain how Drs. Lazear and Noll—economists with expertise in industry and labor markets—improperly rely on data that would require interpretation by an expert in another field.[40]

In addition to their unsupported argument that Plaintiffs' experts must show expertise in college athletics, Defendants pluck quotations from the Noll and Lazear depositions to argue that the answers they provided must be struck as constituting legal opinions. *See* Defs.' Mot. 57. Again, however, Defendants do not cite anything from Dr. Noll's or Dr. Lazear's respective expert reports. Rather, Defendants challenge Dr. Lazear's deposition testimony about "what he referred to as 'an unambiguous societal judgment'" and Dr. Noll's deposition testimony that "the federal statutes and regulations 'are not written' for the 'purpose' of reflecting 'the direct cost of education.'" *Id.* An expert's deposition answers, as opposed to opinions offered in the expert's report, do not constitute opinions that provide a basis for sustaining a *Daubert* motion.

Moreover, to the extent Defendants argue that experts cannot provide legal opinions, specific and purported legal opinions can and should be addressed if and when offered at trial, particularly in a bench trial. For example, in *Ellis v. Pa. Higher Educ. Assistance Agency*, 2008 WL 5458997, *6 (C.D. Cal. Oct. 3, 2008), the defendant sought to preclude a plaintiff's witness from testifying to legal opinions. The plaintiff agreed that the witness would not testify to legal opinions, but the court nonetheless ruled that "it will be more appropriate for these issues to be challenged should they come up in a specific context so that the Court can decide, for example, whether the issue falls under F.R.E.

[40] The two other cases cited by defendants are similarly inapposite because (unlike here) there was a factual showing in those cases that expertise was needed in another field. *See In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 996 (C.D. Cal. 2012) ("the 'industry information' upon which Dr. Phillips purports to rely failed to provide the specific information that he needed, forcing Dr. Phillips to engage in further non-economic analysis in order to categorize the artists at issue"); *United States v. Diaz*, 2006 WL 2699042, at*4 (N.D. Cal. Sept. 19, 2006) (allowing an expert to interpret "gang jargon," except for one phrase, because the expert "failed to establish a reliable basis for his understanding" of the phrase since "prior to the investigation [the expert] was unfamiliar with the phrase.").

704(a), whether it is a legal opinion, or something else."[41] Similarly here, Plaintiffs agree that their experts will not offer legal opinions, but any ruling on this issue should be made at any trial if Defendants believe that the experts are indeed offering legal opinions.

C. Plaintiffs' Experts' Opinions Are Based on Accepted Methodologies

Defendants erroneously argue that 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." Defs.' Mot. 58. Defendants are wrong.

For example, Dr. Rascher extensively analyzed the economic theory and empirical data that demonstrate the challenged rules cause inefficient allocation of surplus—in this case monopoly rents. [redacted] That is, due to the restraints on compensation to student-athletes, schools divert resources (money and benefits) to "next best" expenditures, such as coaches' salaries, dormitories, and entertainment facilities, and art installments in athletic buildings. [redacted] Dr. Rascher addresses the economics underlying this concept both by citing to peer-reviewed research as well as showing

[41] The two cases cited by Defendants are inapposite, because the experts in those cases affirmatively offered legal conclusions at the summary judgment stage. *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 322 (6th Cir. 2014) (disallowing opinion offered in opposition to summary judgment motion that an antitrust conspiracy existed); *A & M Records*, 2000 WL 1170106, at *10 (disallowing opinion offered in opposition to motion for summary judgment that "Napster qualifies for the safe harbor in 17 U.S.C. section 512(a)").

empirical (data driven) analysis.[42] Relying on accepted economic theory, supported by empirical evidence, falls within the heartland of appropriate economic methodologies accepted by courts.[43]

Defendants also erroneously argue that Dr. Lazear's opinion that the NCAA rules have created an underutilization of labor and possible overuse of capital must be rejected because he has not done an empirical analysis of those issues in this litigation. [redacted][44] Defendants do not so much as acknowledge that testimony, let alone provide any authority for the proposition that an expert economist cannot testify based on economic principles but rather must *always* conduct a new empirical analysis pertaining to economic principles on each and every subject addressed.

V. THE COURT SHOULD EXCLUDE THE TESTIMONY OF DR. HECKMAN

In contrast to the baseless objections to the expert testimony presented by Plaintiffs, there are four fatal flaws in Dr. Heckman's proposed expert testimony that render it inadmissible. *First*, Dr. Heckman's econometric analysis is not relevant. Like his testimony in *O'Bannon*, Dr. Heckman's

[42] [redacted]

[43] *See, e.g.*, *Tafilis v. Allergan, Inc.*, 2017 WL 3084275, at *5 (C.D. Cal. June 26, 2017) (denying *Daubert* challenge because expert's "damages methodology is based on actual Botox price data obtained from Allergan as well as Allergan's own planning documents. He explains his methodology, the principles upon which it is based, and how he has applied that methodology in his expert report.").

[44] [redacted]

opinions here—on the purported benefits that college athletes enjoy—have no connection to the restraints at issue in this litigation. *Second*, Dr. Heckman's econometric analysis is not reliable. Dr. Heckman does not control for scholarship amounts, he is unable to ascertain which members of the data sets are basketball or football players, and his data is decades-old (such that not a single Class Member appears in the data sets). *Third*, the entirely new theories in Dr. Heckman's reply report—regarding whether Defendants constitute a monopsony and the potential equilibrium effects from the proposed rule changes—should be stricken, as they were not presented in his initial proposed testimony at all. *Fourth*, even if the Court were to review these brand new reply opinions, the Court should exclude them as unreliable speculation.

After Dr. Heckman testified at trial in *O'Bannon*, this Court held that "none of th[e] data nor any of Dr. Heckman's observations suggests that student-athletes benefit specifically from the restrictions on student-athlete compensation that are challenged in this case." *O'Bannon*, 7 F. Supp. 3d at 979–981. [redacted] Rather, the Court should exclude all of Dr. Heckman's opinions.

A. Summary of Dr. Heckman's Reports

On March 21, 2017, Defendants served Dr. Heckman's opening merits expert report, which summarized certain regressions and included four "main findings:" (1) "[p]articipation in athletics increases the probability of graduating from high school"; (2) "[p]articipation in athletics significantly improves the probability of attending college"; (3) "intercollegiate varsity athletes are as likely or more likely to earn at least a Bachelor's degree relative to comparable non-athletes"; and (4) there are "positive effects of athletics on initial (mid-20's) wages and no adverse effects on these wages due to participation in intercollegiate athletics." Defs.' Ex. 10, Expert Report of Professor James Heckman Rep. 6-7; *id.* Tables 1-7. Notably, Dr. Heckman's opening report lacks a single opinion regarding (1) any causal relationship between the challenged restraints and the purported benefits of education; and (2) whether those benefits would decrease if Plaintiffs were to prevail in striking down the restraints. Boiled down, the expert opinion offered in Dr. Heckman's opening report is simply that college has

benefits. This point is not in dispute in this action and is not relevant to Defendants' burden to demonstrate that the challenged restraints serve any procompetitive purpose.

On May 16, 2017, Plaintiffs served Dr. Noll's rebuttal report, the vast majority of which responded to *Dr. Elzinga's* opening merits report. [redacted] The reason for the short-shrift given to Dr. Heckman's opinion is precisely because they are irrelevant.

Dr. Heckman responded with a thirty-six-page reply report, the bulk of which presents two entirely new "opinions." *See* Defs.' Ex. 11, Heckman Reply Rep. 6-28 (setting forth new opinions).

First, Dr. Heckman opined for the first time that the university labor market is *not* a monopsony—a subject matter nowhere found in his opening report. To support this brand new point, Dr. Heckman ventured new, far-flung, and wholly unsupported opinions on:

- Whether Class Members "are 'compensated' currently at a lower 'wage' than in a non-monopsony counterfactual world." *Id.* 4; *see also id.* 17-18.
- How "differences between minor league professional and intercollege sports" and "the complex process of matching between students . . . and universities across many dimensions" somehow support his view regarding the university labor market. *Id.* 4, 11-12.

Second, Dr. Heckman opined regarding the parade of horribles that he believes *may* result if Plaintiffs were to prevail in this case, including speculative theories on how the proposed rule changes:

[45] [redacted]

[46] [redacted]

- "*May* damage current students' identification with their teams, resulting in harm to the social well-being of fans and impact donations." *Id.* 20-21 (emphasis added).

- "Would be particularly welfare damaging *if* such rule changes resulted in fewer athletic scholarships in Division I football and basketball." *Id.* 22 (emphasis added).

- "*May* foster intra-team, inter-team, and intra-university conflict and resentment." *Id.* 27 (emphasis added).[47]

B. Dr. Heckman's Econometric Analysis Should be Excluded Because It Is Not Relevant to This Case and Is Not Reliable

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

"These criteria can be distilled to two overarching considerations": *relevance* and *reliability*. *Villalpando v. Exel Direct Inc.*, 2016 WL 1598663, at *7 (N.D. Cal. Apr. 21, 2016) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)). The "relevance" inquiry examines whether "'the evidence will assist the trier of fact to understand or determine a fact in issue.'" *In re Lidoderm Antitrust Litig.*, 2017 WL 679367, at *27 (N.D. Cal. Feb. 21, 2017) (citation omitted). As such, courts must examine whether the proffered expert evidence "'fits' the issues to be decided." *Kamakahi v. Am. Soc'y for Reprod. Med.*, 305 F.R.D. 164, 176 (N.D. Cal. 2015) (citation omitted). The "reliability" consideration requires the Court to exclude evidence that "'suffer[s] from serious methodological flaws.'" *Tesoro Ref. & Mktg. Co. LLC v. Pac. Gas & Elec. Co.*, 2016 WL 158874, at *3 (N.D. Cal. Jan. 14, 2016) (quoting *Obrey v. Johnson*, 400 F.3d 691, 696 (9th Cir. 2005)). Accordingly, expert opinions are excluded where "there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Moreover,

[47] Notably, Dr. Heckman nowhere addresses why, if these outcomes are likely and so perilous, schools could not avoid such problems simply by choosing unilaterally not to raise compensation.

"speculative testimony is inherently unreliable." *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014); *see also Daubert*, 509 U.S. at 590.

Defendants bear the burden of proving that Dr. Heckman's opinions are reliable and relevant. *See United States v. 87.98 Acres of Land More or Less in the Cty. of Merced*, 530 F.3d 899, 904 (9th Cir. 2008). As explained below, Defendants cannot meet this burden.

1. Dr. Heckman's Econometric Analysis Is Not Relevant Because the Analysis Does Not Even Relate to the Challenged Compensation Restraints

[redacted]

Even if Dr. Heckman's regressions were reliable to prove his point about the benefits of education (as explained in the next section, they are not), the regressions are still irrelevant because they simply do not pertain to the challenged restraints of trade. Dr. Heckman's opening report never even tried to demonstrate that any of the purported educational benefits were caused by, aided by, or correlated in any way with the level of compensation restraints imposed by Defendants. Nor did his opening report ever suggest that these educational benefits would decrease if the current restraints were eliminated.

This is essentially the same problem that plagued Dr. Heckman's analysis in *O'Bannon*:

> For support, the NCAA relies on evidence showing that student-athletes receive both short-term and long-term benefits from being student-athletes. One of its experts, Dr. James Heckman, testified that participation in intercollegiate athletics leads to better academic and labor market outcomes for many student-athletes as compared to other members of their socioeconomic groups. . . . *However, none of this data nor any of Dr. Heckman's observations suggests that student-athletes benefit specifically from the restrictions on student-athlete compensation that are challenged in this case*.
>
> . . .
>
> [T]he restraints on student-athlete compensation challenged in this case generally do not serve to enhance academic outcomes for student-athletes.

O'Bannon, 7 F. Supp. 3d at 979-81 (emphasis added). [redacted]

[redacted]

Courts must exclude expert testimony "unless they are convinced that it speaks clearly and directly to an issue in dispute in the case.'" *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995). Dr. Heckman's econometric opinions do not come close to meeting this standard and should be excluded.

[redacted]

2. Dr. Heckman's Econometric Opinions Are Not Reliable for at Least Three Reasons

Expert opinions that suffer from "serious methodological flaws" should be excluded. *Obrey*, 400 F.3d at 696. In exercising its "gatekeeping" authority, courts focus on the "'reliability[] of the principles that underlie a proposed submission.'" *Id.* at 696 (quoting *Daubert*, 509 U.S. at 594-95). As explained below, Dr. Heckman's econometric opinions suffer from at least three problems.

a. Dr. Heckman's Regressions Fail to Take into Account the Amount of Athletic Scholarship That Athletes Receive

Dr. Heckman set out to "examine the effect of participation in intercollegiate athletics on the human capital and economic outcomes for student-athletes attending post-secondary institutions relative to comparable students who did not participate in intercollegiate athletics." Heckman Rep. 4. And Dr. Heckman agrees that in order to "examine and isolate the role of participating in high school and intercollegiate athletics," a reliable econometric analysis must control for "individual and family background characteristics," such as family income. *Id.* 18-19 ("[F]ailing to control for the income level of the student's family when examining the effect of athletics on the likelihood of college graduation would erroneously lead one to attribute the effects of family income on the likelihood of graduating to the effect of participation in college athletics on graduating.").

In short, Dr. Heckman failed to follow his own rules. [redacted]

49 [redacted]

[redacted]

b. Dr. Heckman's Regressions Fail to Confirm That the Surveyed Individuals Even Played the Sports in Question (Division I Basketball and FBS Football)

Dr. Heckman also failed to ensure that the data sets were limited to Class Members, *i.e.*, Division I basketball and FBS football players. Of the seven regression tables in Dr. Heckman's opening report, three tables pertain to *high-school* athletes (Tables 1-3), two tables pertain to college basketball and football generally, but are not limited to *Division I* basketball and *FBS* football (Tables 4 and 5), and, with respect to the remaining two tables, Dr. Heckman failed to reliably identify which individuals in the data sets are Division I basketball or FBS football players (Tables 6 and 7).

With respect to the NELS data in Tables 6 and 7, Dr. Heckman defined an individual as a "College Varsity Basketball/Football Athlete" if he or she (1) played junior varsity or varsity basketball or football (or was a co-captain in such a sport) as a *high-school sophomore*; and then (2) played *any* varsity intercollegiate sport at a four-year not-for-profit university by 1994. *See* Heckman Rep., App'x C 5-6. This definition is wildly over-inclusive. Under Dr. Heckman's methodology, a student who played one year of junior varsity basketball as a sophomore in high school and then went on to run track in college would show up under the NELS data as a "College FB/Athlete" in Division I and FBS. *See id.*

The ELS data in Tables 6 and 7 is even less reliable, in that Dr. Heckman uses the term "College Varsity Basketball/Football Athlete[s]" to encompass both individuals who played college varsity athletics and those who may have only played other forms of "intercollegiate athletics"—[redacted] The ELS definition, like its NELS counterpart, could lead to scores of individuals showing up in the data set as college football or basketball players, despite never spending a day in college playing these sports. [redacted]

[redacted][50] [redacted]

[50] [redacted]

[redacted][51]

[redacted] Dr. Heckman offered an "alternative definition" of a "College Varsity Basketball/Football Athlete" in his second report ("Heckman II Definition"). In essence, the Heckman II Definition defines a "College Varsity Basketball/Football Athlete" as any athlete who (1) played *only* junior varsity or varsity basketball or football (or both sports) as a high-school sophomore, and then (2) once in college, played any varsity sport (in NELS) or any varsity *or* club sport (in ELS). *See* Heckman Reply Rep. 35 n.65. Thus, this "alternative definition" suffers from one of the same critical flaws as the original definition, as it does not limit the data sets to the *sports-at-issue*. And, regardless, Dr. Heckman does not even try to claim that using this more restrictive definition leads to an economically significant number of Division I basketball and FBS football players in the data sets.

c. Dr. Heckman's Data Is So Old That the Regressions Fail to Include a Single Class Member

The NELS data and ELS data include, respectively, individuals who were college athletes in the mid-1990s, and the mid- to late-2000s. *See* Heckman Rep. 14-15, App'x C 5-6, 8. Dr. Heckman concluded that the statistically significant results from the mid-1990s (in NELS) were no longer statistically significant ten years later, by the mid- to late-2000s (in ELS). In fact, for every instance in which there was a statistically significant result in NELS for Division I basketball or FBS football players, that result lost its statistical significance by the time of the ELS. *Compare* Heckman Rep. Table 6 *with* Heckman Rep. Table 7. This suggests that whatever was causing the results Dr. Heckman identified in the 1990s was likely *not* a scholarship cap,[52] which was identical under both data sets (the former GIA cap).

Despite Dr. Heckman's finding—that a model which claims to show benefits that Division I basketball and FBS football athletes received in one decade did *not* identify similar benefits to that

[51] [redacted]

[52] As explained above in § V.B.2.A, because Dr. Heckman did not control for the scholarship money, he has zero basis to credibly opine on the impact scholarship money has on results.

which college athletes received ten years later—Dr. Heckman relied exclusively on the NELS and ELS data to try to prove a point about the benefits that the Class Members in this case (who attended college decades later) receive as a result of their college athletic participation. Given that data from the mid-1990s (NELS data) could not prove that student-athletes received similar benefits in the mid- to late-2000s (ELS data), how could this same data possibly be reliable to prove the benefits that athletes are receiving in 2017?[53] Dr. Heckman has never answered this question.

There have been enormous changes to the world of college sports since the individuals in Dr. Heckman's data were in college. For example, since 2010 (shortly after the ELS data was accumulated), there has been massive conference realignment (with increased travel demands). [redacted][54]

Given how much has changed in college sports in the past two decades in Division I basketball and FBS football—and the fact that Dr. Heckman's own conclusions show that old data cannot reliably

[53] The injunctive classes include only athletes who have played FBS football or Division I basketball since March 5, 2014. Order Granting Class Cert., ECF No. 305 5, 31. Therefore, not a single Class Member was in the NELS or ELS data sets.

[54] [redacted]

show the benefits that athletes receive ten years later—Dr. Heckman's data is stale to the point of unreliability. *See Gen. Elec. Co.*, 522 U.S. at 146 ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). In the ever-evolving world of Division I basketball and FBS football, data about benefits that a college athlete purportedly received in the 1990s or 2000s are not reliable to prove what is happening in 2017.

C. Dr. Heckman's New Opinions in the Reply Report Should Be Stricken Because They Were Not Disclosed in His Opening Report

A party's initial expert witness must disclose in its opening report "a complete statement of *all opinions* the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). Reply expert witness testimony is permitted so long as "it is 'intended solely to contradict or rebut evidence on the same subject matter identified' by an initial expert witness." *Van Alfen v. Toyota Motor Sales, U.S.A., Inc.*, 2012 WL 12930456, at *2 (C.D. Cal. Nov. 9, 2012) (quoting Fed. R. Civ. P. 26(a)(2)(D)(ii)). However, "a supplemental expert report that states additional opinions . . . is beyond the scope of proper supplementation and subject to exclusion . . . ." *Id.* *2 (citing *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010)); *see also Avila v. Willits Envtl. Remediation Tr.*, 2009 WL 2972513, at *1 (N.D. Cal. July 9, 2009) ("The Court has reviewed the new reports and compared them with the experts' previous reports, and agrees that the new reports of Drs. Levin and Remy contain entirely new opinions on medical causation and should be stricken in their entirety.")

The reason for excluding opinions that first appear in a supplemental expert report is clear—Defendants must "not be allowed to 'sandbag' [Plaintiffs] with new analysis that should have been included at the very least in [their] opening merits report." *In re High-Tech Employee Antitrust Litig.*., 2014 WL 1351040, at *12 (N.D. Cal. Apr. 4, 2014); *see also Oracle Am., Inc. v. Google Inc.*, 2011 WL 5572835, at *3 (N.D. Cal. Nov. 15, 2011) (granting motion to strike reply reports and noting that the expert report schedule issued by Court "was designed to forestall 'sandbagging' by a party with the burden of proof who wishes to save its best points for reply, when it will have the last word, a common litigation tactic.").

Yet, this is precisely what Defendants seek to do in this case. Dr. Heckman's opening report was confined to an econometric analysis that, as explained in § V.B.1 above, concerns education

benefits that simply are not relevant to the economic questions surrounding the challenged restraints.[55] His reply report, however, contains first-ever economic "opinions" that are nowhere to be found in the opening report, including opinions pertaining to two new subjects: (1) whether the university labor market is a monopsony; and (2) the equilibrium effects that would result from Plaintiffs' proposed rule changes. *See generally* Heckman Reply Rep. 6-28.

[redacted]

Dr. Heckman cannot use his reply report to make up for the irrelevance of his opening report. Although Dr. Heckman could have used his reply report to try to highlight relevant opinions that he offered in his opening report, he cannot use the reply report to first offer such opinions. *See In re*

[55] Because of this irrelevance, as explained above in § V.A, all Dr. Noll needed to do in his rebuttal report was (1) briefly explain the irrelevance of Dr. Heckman's analysis, and (2) specify the various flaws in Dr. Heckman's regressions.

Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 501 (N.D. Cal. 2008) ("Slipping these new arguments into a rebuttal report was a clear-cut form of sandbagging and was simply unfair."). Given that expert discovery is now over and all expert reports are submitted, permitting such tactics leaves Plaintiffs' rebuttal expert, Dr. Noll, unable to respond to Dr. Heckman's new "opinions." This is not acceptable. The Court should exclude Dr. Heckman's opinions about (1) whether the university labor market is a monopsony, and (2) the equilibrium effects of Plaintiffs' proposed rule changes.

D. Even if the Court Were to Entertain Dr. Heckman's New Opinions in His Reply Report, Those Opinions Should Be Excluded as Unreliable and Speculative

As explained above, "speculative testimony is inherently unreliable." *Ollier*, 768 F.3d at 861. As such, experts that offer only unsupported theories about what "could," "might," or "may" happen do not clear the *Daubert* hurdle. *See California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1181 n.4 (9th Cir. 2010), *on reh'g en banc sub nom. California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (citation omitted). Dr. Heckman's two new "opinions" in the reply report are nothing more than unsupported speculation and should be excluded.

1. Dr. Heckman's Theory That the University Labor Market Is Not a Monopsony Should Be Excluded as Unreliable, Speculative Testimony

In his reply report, Dr. Heckman states that he was not convinced that the university labor market is a monopsony, (*see, e.g.*, Heckman Reply Rep. 4-5), [redacted]

For example, in his reply report, Dr. Heckman suggested that he is not convinced that "the 'price' paid to student-athletes is lower than the 'price' that would be observed under the Plaintiffs' proposed rule changes." *Id.* 17. [redacted]

[redacted]

For example, in his reply report, Dr. Heckman attempted to support his opinion regarding the university labor market with an out-in-left-field reference to minor league sports, which, according to the reply report, have not "generated comparable interest and do not provide the same benefits to the athlete and the general public as university-sponsored athletics." Heckman Reply Rep. 12. [redacted]

[56] [redacted]

Similarly, Dr. Heckman asserted that "the complex process of matching between students (both for student-athletes and non-athletes) and universities across many dimensions" supports his view that the university labor market is not a monopsony. Heckman Reply Rep. 4. [redacted]

In sum, Dr. Heckman's opinions on whether the university labor market is a monopsony are pulled from thin air.[58] Because Dr. Heckman has no basis to offer expert testimony on the relevant market, his opinions on whether it constitutes a monopsony must be excluded. *Gbarabe v. Chevron Corp.*, 2017 WL 956628, at *17 (N.D. Cal. Mar. 13, 2017) (excluding expert report's causation opinion as "speculative" when expert, at deposition, could muster only "maybe it did, maybe it didn't" regarding whether a rig explosion caused pollution).

2. Dr. Heckman's Theories about the Equilibrium Effects of Plaintiffs' Proposed Rule Changes Should Be Excluded as Unreliable, Speculative Testimony

Dr. Heckman's opinions about the negative equilibrium effects that he argues could result from an injunction are also pure conjecture. To be clear, it is not merely that Dr. Heckman declines to

[58] [redacted]

measure the changes; he is not even sure what if any changes would occur. Take these qualified statements from his (improper) reply report:

- "Changes to the amateur character of intercollegiate athletics *may* damage the identification of alumni with their alma maters, and *may* damage current students' identification with their teams, resulting in harm to the social well-being of fans and impact donations." Heckman Reply Rep. 20-21 (emphasis added).

- "Plaintiffs' proposed rule changes would be particularly welfare damaging *if* such rule changes resulted in fewer athletic scholarships in Division I football and basketball." *Id.* 22 (emphasis added).

- "Benefits accrued by student athletes according to athletic ability and/or their individual contribution to school revenues (however measured) *may* foster intra-team, inter-team, and intra-university conflict and resentment." *Id.* 27 (emphasis added).

[redacted]

[redacted][59]

[redacted] Such opinions have no place in an expert report. *See Lopez*

[59] [redacted]

[60] [redacted]

v. I-Flow Inc., 2011 WL 1897548, at *10-11 (D. Ariz. Jan. 26, 2011) (excluding expert report where expert offered "speculative" opinions, and presented "no analysis whatsoever to support her opinions.").

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment, grant Plaintiffs' motion for summary judgment, deny Defendants' motion to exclude the testimony of Drs. Rascher, Noll, and Lazear, and grant Plaintiffs' motion to exclude the testimony of Dr. James Heckman.

Dated: November 7, 2017

Respectfully submitted,

By */s/ Steve W. Berman*
Steve W. Berman (*Pro hac vice*)
Craig Spiegel (SBN122000)
Ashley Bede (*Pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
craigs@hbsslaw.com
ashleyb@hbsslaw.com

Jeff D. Friedman (SBN 173886)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com

By */s/ Bruce Simon*
Bruce L. Simon (SBN 96241)
Benjamin E. Shiftan (SBN 265767)
PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com

By */s/ Jeffrey L. Kessler*
Jeffrey L. Kessler (*Pro hac vice*)
David G. Feher (*Pro hac vice*)
David L. Greenspan (*Pro hac vice*)
Jennifer M. Stewart (*Pro hac vice*)
Joseph A. Litman (*Pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
jstewart@winston.com
jlitman@winston.com

Sean D. Meenan (SBN 260466)
Jeanifer E. Parsigian (SBN 289001)
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
smeenan@winston.com
jparsigian@winston.com

Class Counsel for Jenkins and Consolidated Action Plaintiffs

bshiftan@pswlaw.com

Class Counsel for Jenkins and Consolidated Action Plaintiffs

By */s/ Elizabeth C. Pritzker*
Elizabeth C. Pritzker (SBN 146267)
Jonathan K. Levine (SBN 220289)
Bethany L. Caracuzzo (SBN 190687)
Shiho Yamamoto (SBN 264741)
PRITZKER LEVINE LLP
180 Grand Avenue, Suite 1390
Oakland, California 94612
Telephone: (415) 692-0772
Facsimile: (415) 366-6110

Additional Class Counsel

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

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

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

APPENDIX A:
CHALLENGED RULES AND OPERATIVE LANGUAGE

Challenged Rule	Bylaw Number	2016-17 Language
Eligibility Requirements for Student-Athletes	NCAA Bylaw 3.1.2.4[61]	Participating student-athletes shall meet all eligibility requirements of the member institution(s), the athletics conference(s) involved and the NCAA. [*Eligibility premised upon compliance with compensation limits.*]
Compliance with Association Rules	NCAA Bylaw 3.2.1.2	The institution shall administer its athletics programs in accordance with the constitution, bylaws and other legislation of the Association. [*Requires compliance with compensation limits.*]
Discipline of Members	NCAA Bylaw 3.2.4.10	[M]embers shall refrain from athletics competition with designated institutions as required under the provisions of the Association's infractions process[.] [*Forbids athletics competition against institutions that do not comply with compensation limits.*]
Loss of Active Membership	NCAA Bylaw 3.2.5 et seq.	The membership of any active member failing to maintain the academic or athletics standards required for such membership or failing to meet the conditions and obligations of membership may be suspended, terminated or otherwise disciplined by a vote of two-thirds of the delegates present and voting at an annual Convention. [*Provides for punishment of institution that does not comply with compensation limits.*]
Discipline of Active Members	NCAA Bylaw 3.2.6 et seq.	Disciplinary or corrective actions other than suspension or termination of membership may be effected during the period between annual Conventions for violation of NCAA rules. [*Provides for punishment of institution that does not comply with compensation limits.*]
Loss of Member—Conference Status	NCAA Bylaw 3.3.5 et seq.	The membership of any member conference failing to maintain the academic or athletics standards required for membership or failing to meet the conditions and obligations of membership may be suspended or terminated or the member conference otherwise disciplined by a vote of two-thirds of the delegates present and voting at an annual Convention. [*Provides for punishment of institution that does not comply with compensation limits.*]
Discipline of Member Conferences	NCAA Bylaw 3.3.6 et seq.	Disciplinary or corrective actions other than suspension or termination of membership may be effected during the period between annual Conventions for violation of NCAA rules. [*Provides for punishment of institution that does not comply with compensation limits.*]

[61] All NCAA rules citations are to Pls.' Ex. 15, 2016-17 NCAA Division I Manual.

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Challenged Rule	Bylaw Number	2016-17 Language
Areas of Autonomy: Pre-enrollment Expenses and Support	NCAA Bylaw 5.3.2.1.2(e) (as pertaining to pre-enrollment expenses and other monetary remuneration)	The Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference and Southeastern Conference and their member institutions are granted autonomy in the following areas to permit the use of resources to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being: … Legislation related to expenses and support provided in the recruiting process and the transition to college enrollment, including assistance to families to visit campus, medical expenses and academic support during the summer prior to enrollment, and transportation to enroll.
Areas of Autonomy: Financial Aid	NCAA Bylaw 5.3.2.1.2(f)	The Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference and Southeastern Conference and their member institutions are granted autonomy in the following areas to permit the use of resources to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being: … Legislation related to a student-athlete's individual limit on athletically related financial aid, terms and conditions of awarding institutional financial aid, and the eligibility of former student-athletes to receive undergraduate financial aid.
Areas of Autonomy: Awards, Benefits and Expenses	NCAA Bylaw 5.3.2.1.2(g)	The Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference and Southeastern Conference and their member institutions are granted autonomy in the following areas to permit the use of resources to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being: … Legislation related to awards, benefits and expenses for enrolled student-athletes and their families and friends.
Eligibility for Intercollegiate Athletics	NCAA Bylaw 12.01.1	Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport. [*Status as "amateur" premised upon compliance with compensation limits.*]
Permissible Grant-in-Aid	NCAA Bylaw 12.01.4	A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership.
Pay	NCAA Bylaw 12.02.9	Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.
Amateur Status	NCAA Bylaw 12.1.2	An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics

Challenged Rule	Bylaw Number	2016-17 Language
		participation … (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations[.]
Prohibited Forms of Pay	NCAA Bylaw 12.1.2.1	Any direct or indirect salary, gratuity or comparable compensation … Any division or split of surplus (bonuses, game receipts, etc.) … Educational expenses not permitted by the governing legislation of this Association (see Bylaw 15 regarding permissible financial aid to enrolled student-athletes) … Educational expenses provided to an individual after initial collegiate enrollment by an outside sports team or organization that are based on any degree on the recipient's athletics ability … Cash, or the equivalent thereof (e.g., trust fund), as an award for participation in competition at any time, even if such an award is permitted under the rules governing an amateur, noncollegiate event in which the individual is participating … Any payment conditioned on the individual's or team's place finish or performance or given on an incentive basis that exceeds actual and necessary expenses, or receipt of expenses in excess of the same reasonable amount for permissible expenses given to all individuals or team members involved in the competition … Preferential treatment, benefits or services because of the individual's athletics reputation or skill or pay-back potential as a professional athlete, unless such treatment, benefits or services are specifically permitted under NCAA legislation … Receipt of a prize for participation (involving the use of athletics ability) in a member institution's promotional activity that is inconsistent with the provisions of Bylaw 12.5 or approved official interpretations[.]
General Regulation	NCAA Bylaw 13.2.1 (as pertaining to monetary remuneration)	An institution's staff member or any representative of its athletics interests shall not be involved, directly or indirectly, in making arrangements for or giving or offering to give any financial aid or other benefits to a prospective student-athlete or his or her relatives or friends, other than expressly permitted by NCAA regulations.
Specific Prohibitions	NCAA Bylaw 13.2.1.1 (as pertaining to monetary remuneration)	Specifically prohibited financial aid, benefits and arrangements include, but are not limited to, the following: … (b) Gift of clothing or equipment … ; (e) Cash or like items; (f) Any tangible items, including merchandise; (g) Free or reduced-cost services, rentals or purchases of any type; (h) Free or reduced-cost housing … (k) Expenses for academic services (e.g., tutoring, test preparation) to assist in the completion of initial-eligibility or transfer-eligibility requirements or improvement of the prospective student-athlete's academic profile in conjunction with a waiver request.

Challenged Rule	Bylaw Number	2016-17 Language
Improper Financial Aid	NCAA Bylaw 15.01.2	Any student-athlete who receives financial aid other than that permitted by the Association shall not be eligible for intercollegiate athletics.
Cost of Attendance	NCAA Bylaw 15.02.2	The "cost of attendance" is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.
Calculation of Cost of Attendance	NCAA Bylaw 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.
Full Grant-in-Aid	NCAA Bylaw 15.02.5	A full grant-in-aid is financial aid that consists of tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance established pursuant to Bylaws 15.02.2 and 15.02.2.1.
Maximum Limit on Financial Aid—Individual	NCAA Bylaw 15.1	A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2.
Types of Aid Included in Limit	NCAA Bylaw 15.1.2	In determining whether a student-athlete's financial aid exceeds the cost of attendance, all institutional financial aid … and all funds received from the following and similar sources shall be included … Government grants for educational purposes, except for those listed in Bylaw 15.2.5 … Other outside scholarships or grants-in-aid … The value of gifts given to a student-athlete following completion of eligibility in appreciation for or recognition of the student-athlete's athletics accomplishments … Any bonus or salary (no matter when received or contracted for) from a professional sports organization … Any other income (no matter when received or contracted for) from participation in an athletics event (except funds that are administered by the U.S. Olympic Committee pursuant to its Operation Gold Grant Program) unless eligibility has been exhausted in that sport … Loans, except legitimate loans that are based upon a regular repayment schedule, available to all students and administered on the same basis for all students.
Reduction When Excess Aid Is Awarded	NCAA Bylaw 15.1.3	In the event that a student-athlete's financial aid from the sources listed in Bylaw 15.1.2, which includes institutional financial aid, will exceed the cost of attendance for the balance of the academic year, the institution shall reduce institutional financial aid so as not to exceed the cost of attendance.
Other Expenses Related to Attendance	NCAA Bylaw 15.2.4	An institution may provide a student-athlete financial aid that covers other expenses related to attendance in combination with other permissible elements of financial aid … up to the cost of attendance[.]

Challenged Rule	Bylaw Number	2016-17 Language
Government Grants	NCAA Bylaw 15.2.5	Government grants for educational purposes shall be included when determining the permissible amount of the cost of attendance for a student-athlete, except for those listed in Bylaw 15.2.5.1.
Extra Benefit	NCAA Bylaw 16.02.3	An extra benefit is any special arrangement by an institutional employee or representative of the institution's athletics interests to provide a student-athlete or the student-athlete family member or friend a benefit not expressly authorized by NCAA legislation.
Types of Awards, Awarding Agencies, Maximum Value and Numbers of Awards	NCAA Bylaw 16.1.4 et seq.	Athletics awards given to individual student-athletes shall be limited to those approved or administered by the member institution, its conference or an approved agency as specified in the following subsections and shall be limited in value and number as specified in this section[.]
Nonpermissible	NCAA Bylaw 16.11.2.1	The student-athlete shall not receive any extra benefit.
Accountability	NCAA Bylaw 19.01.2	The infractions program shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels. [*Provides for punishment of institution or individual that does not comply with compensation limits.*]
Penalty Structure	NCAA Bylaw 19.01.4	The infractions program shall address the varying levels of infractions and, for the most serious infractions, include guidelines for a range of penalties, which the Committee on Infractions may prescribe, subject to review by the Infractions Appeals Committee. [*Provides for punishment of institution or individual that does not comply with compensation limits.*]
Authority and Duties of Committee	NCAA Bylaw 19.3.6	The Committee on Infractions shall: … (c) Upon concluding that one or more violations occurred, prescribe an appropriate penalty consistent with the provisions of this article[.] [*Provides for punishment of institution or individual that does not comply with compensation limits.*]
Obligations of Member Institutions	NCAA Constitution Article 1.3.2	Legislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting. Member institutions shall be obligated to apply and enforce this legislation, and the infractions process of the Association shall be applied to an institution when it fails to fulfill this obligation. [*Provides for punishment of institution that does not comply with compensation limits.*]
Penalty for Noncompliance	NCAA Constitution Article 2.8.3	An institution found to have violated the Association's rules shall be subject to such disciplinary and corrective actions as may be determined by the Association. [*Provides for punishment of institution that does not comply with compensation limits.*]

Challenged Rule	Bylaw Number	2016-17 Language
Conditions and Obligations of Membership: General	NCAA Constitution Article 3.2.4.1	The active members of this Association agree to administer their athletics programs in accordance with the constitution, bylaws and other legislation of the Association. [*Provides for punishment of institution that does not comply with compensation limits.*]
Basis of Legislation	NCAA Constitution Article 5.01.1	All legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership[.] [*Requires compliance with compensation limits.*]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

62 [redacted]
63
64

Challenged Rule	Bylaw Number	2016-17 Language
[redacted]	[redacted]	[redacted]
Adherence to NCAA Rules	Big 12 Bylaw 1.3.2[65]	[T]he conduct of Members shall be fully committed to compliance with the rules and regulations of the NCAA and of the Conference.
Minimum Amount	Big 12 Bylaw 1.3.3.1	Member institutions shall award athletically related financial aid based on the maximum amount permitted by NCAA Bylaws.
Eligibility Rules	Big 12 Rule 6.1	A student-athlete must comply with appropriate minimum requirements of the NCAA and the Conference in order to be eligible for athletically-related aid, practice, and/or competition in any intercollegiate sport.
Financial Aid Reports	Big 12 Rule 6.5.3	Each institution shall comply with all financial aid legislation of the NCAA and the Conference.
Recruiting Code of Ethics	Big 12 Rule 6.6(a) (as pertaining to monetary remuneration)	All individuals engaged in the recruitment of prospective student-athletes shall be knowledgeable of and conform to all NCAA and Conference Rules governing recruiting[.]
[redacted]	[redacted]	[redacted]
Purpose	MAC Constitution Article II(B)[67]	The members of the Mid-American Athletic Conference ascribe to: … B. Compliance with and vigilant enforcement of Conference and NCAA rules.
Recruitment of Prospective Student-Athletes	MAC Bylaw 3.03 (as pertaining to monetary remuneration)	Coaches, administrators and staff shall observe and promote Conference, NCAA and institutional regulations[.]
Mid-American Conference Eligibility	MAC Bylaw 5.01	Eligibility to participate in intercollegiate athletics competition, practice and receive athletically related financial aid shall be determined by the requirements set forth in the NCAA Manual[.]

[65] All Big 12 Conference rules citations are to Pls.' Ex. 5, 2015-16 Big 12 Conference Handbook.

[66] [redacted]

[67] All Mid-American Conference ("MAC") rules citations are to Pls.' Ex. 7, 2015-16 MAC Handbook.

Challenged Rule	Bylaw Number	2016-17 Language
NCAA 14.01.3 – Compliance with Other NCAA and Conference Legislation	MAC Bylaw 5.05	To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be in compliance with all applicable provisions of the constitution and bylaws of the Association[.]
NCAA Student Assistance Fund Administrative Procedures	MAC Bylaws, App'x 284-285	Pursuant to NCAA Bylaw 15.01.6.1, member institutions and conferences shall not use monies received from the fund for the following: … 4. Stipends.
[redacted]	[redacted]	[redacted]
Application of NCAA Legislation	Pac-12 Bylaw 4.2[69]	[A]ll member institutions are bound by NCAA rules and regulations unless Conference rules are more demanding.
Recruiting	Pac-12 Executive Regulation 2-1 (as pertaining to monetary remuneration)	The rules of the National Collegiate Athletic Association shall govern the recruiting of prospective student-athletes by Conference member institutions.
NCAA Rules	Pac-12 Executive Regulation 3-1	The rules of the National Collegiate Athletic Association shall govern all matters concerning financial aid to student-athletes except to the extent that the CEO Group modifies such rules to be applied on a conference-wide basis.

[68] [redacted]

[69] All Pacific 12 Conference ("Pac-12") rules citations are to Pls.' Ex. 76, 2015-16 Pac-12 Handbook.

Challenged Rule	Bylaw Number	2016-17 Language
NCAA Rules	Pac-12 Executive Regulation 4-1	The rules of the National Collegiate Athletic Association shall govern all matters of student-athlete eligibility except to the extent that such rules are modified for practice and competition in Conference sports by regulations adopted by the CEO Group.
Governance	SEC Constitution, Article 5.01.1[70]	The Conference shall be governed by the Constitution, Bylaws, and other rules, regulations, and legislation of the Conference and the NCAA.
Compliance with Other NCAA and Conference Legislation	SEC Bylaws, Article 14.01.1	Each student-athlete of each member institution who competes in, or is on the roster of a team that competes in, intercollegiate varsity or junior varsity athletic competition must comply with the Constitution, Bylaws, and other rules, regulations, and legislation of the Conference and the NCAA applicable to his/her sport in order to be eligible for athletically-related aid, for practice, and for competition.
Institutional Financial Aid Permitted	SEC Bylaws, Article 15.01.1	Any scholarship or financial aid to a student-athlete must be awarded in accordance with all NCAA and SEC regulations.
[redacted]	[redacted]	[redacted]

[70] All Southeastern Conference ("SEC") rules citations are to Pls.' Ex. 77, 2015-16 SEC Constitution and Bylaws.

[71] [redacted]

Challenged Rule	Bylaw Number	2016-17 Language
[redacted]	[redacted]	[redacted]

[72] All Western Athletic Conference ("WAC") rules citations are to Pls.' Ex. 79, 2015-16 WAC Code Book.

APPENDIX B:
NEW DEVELOPMENTS SINCE THE *O'BANNON* RECORD CLOSED

New Developments that Postdate the *O'Bannon* Trial (Held in June 2014)	**Brief Description**
College Athletes Begin to Receive COA Scholarships (NCAA Bylaw 15.02.5)[73] (*rule revised Jan. 2015; effective Aug. 2015*)	Following *O'Bannon*, the maximum value of a grant-in-aid was revised upward to permit athletes to receive full cost of attendance: "A full grant-in-aid is financial aid that consists of tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance." Players began receiving these COA scholarships on August 1, 2015.
NCAA Admits that Schools Can Provide Benefits Above COA that Are Not Related to Amateurism *and* Are Not Tethered to Educational Expenses (*Jan. 2017*)	NCAA's corporate designee, Kevin Lennon, testified that the NCAA currently permits its member schools to choose whether to provide a category of substantial benefits in excess of COA that are "incidental to [athletic] participation." Pls.' Ex. 1, NCAA (Lennon) Tr. 58:20-59:1. These participation benefits are "not related to the principle of amateurism" (*id.* 72:22-73:2) and are not tethered to educational expenses (*id.* 287:6-19)—the benefits simply are whatever the NCAA's membership agrees to at a given point in time. *See also* Pls.' Mot. 8-14; *supra* § III.C.1.
Conference Autonomy Rules Adopted (NCAA Bylaw 5.3.2.1 et seq.) (*rules adopted Aug. 2014*)	Under the conference autonomy framework, the Power Five conferences are permitted to craft rules that allow new benefits in a number of areas.
New Areas of Autonomy:	(b) loss-of-value insurance for potential lost professional wages from athletics; (c) pre-enrollment expenses;

[73] All rules citations are to Pls.' Ex. 15, 2016-17 NCAA Division I Manual.

New Developments that Postdate the *O'Bannon* Trial (Held in June 2014)	Brief Description
	(f) higher limits on "athletically related financial aid"; (g) "awards, benefits and expenses for enrolled student-athletes and their families and friends"; (j) meals and nutrition.
College Athletes Begin Receiving Unlimited Meals and Snacks (NCAA Bylaw 15.2.2.1.6) (*rule revised Apr. 2014; effective Aug. 2014*)	Under this new rule, college athletes are now permitted to receive unlimited athletics-related food. Schools have taken advantage, using it as another recruiting tool. University of Wisconsin Athletic Director Barry Alvarez stated: "You bring recruits in and you say, OK, this is our weight room, this is what we do. . . . And then this is our nutrition, this is our entire program. If we have it and someone else doesn't have it, then we have an advantage."[74]
Loss-of-Value Insurance Permitted to Be Paid for with Student Assistance Fund ("SAF") (*first publicized July 2014; since memorialized on NCAA website*)	SAF money can now be used to pay for loss-of-value insurance for college athletes to protect against potentially lost *professional* wages. Schools have used SAF money to pay the premiums on these loss-of-value policies. [redacted] The NCAA has admitted in binding testimony that the practice of schools subsidizing these insurance premiums is a benefit that is "not related to . . . educational expenses." NCAA (Lennon) Tr. 128:4-7.
College Athletes Begin Receiving SAF Money Above COA (NCAA Bylaw 15.01.6.1)	Under this revised rule, college athletes can receive SAF money in addition to a full COA athletic scholarship. As the NCAA confirmed, "A student athlete would be permitted to receive money from the Special Assistance Fund that would not be required to go under their cost of attendance total." NCAA (Lennon) Tr. 152:19-153:19.

[74] Paul Myerberg, "NCAA Schools Put Money Where Athletes' Mouths Are," USA TODAY, Apr. 26, 2015, https://www.usatoday.com/story/sports/college/2015/04/26/unlimited-food-snacks-wisconsin-oregon-ncaa-student-athletes/26405105/.

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New Developments that Postdate the *O'Bannon* Trial (Held in June 2014)	Brief Description
(*rule revised Jan. 2015*; *effective Aug. 2015*)	
Athletes Permitted to Receive Athletic Performance Bonuses from International Organizations (NCAA Bylaw 12.1.2.1.5.2) (*adopted Jan. 2015*)	Under this new rule, college athletes are permitted to receive hundreds-of-thousands of dollars in performance bonuses from internal athletic organizations. [redacted]
College Athletes Permitted to Borrow Against Future Earnings to Buy Loss-of-Value Insurance (NCAA Bylaw 12.1.2.4.4) (*revised Jan. 2015*)	Under this revised rule, a college athlete is permitted to "borrow against his or her future earnings potential . . . for the purpose of purchasing loss-of-value insurance."
NCAA Permits Families of Players in Division I Basketball Final Four to Receive Free Travel, Meals, and Expenses (*Announced Jan. 2015*)	The NCAA announced that on top of COA, each athlete who competes in the Final Four semifinal games may receive up to $3,000 in travel, hotel, and meal expenses for family members. *See, e.g.*, Pls.' Ex. 3-A, Smith Tr. 51:24-57:18 (discussing Plaintiffs' exhibit with details of additional travel payments).
NCAA Permits Families of Players in Division I Basketball Championships to	The NCAA announced that on top of COA, each athlete who competes in the men's or women's basketball championship game may receive an additional $1,000 in travel, hotel, and meal expenses for family members. Smith Tr. 51:24-57:18.

New Developments that Postdate the *O'Bannon* Trial (Held in June 2014)	Brief Description
Receive Free Travel, Meals, and Expenses (*Announced Jan. 2015*)	
NCAA Permits Families of Players in College Football Playoff to Receive Free Travel, Meals, and Expenses (*Announced Aug.. 2015*)	The NCAA announced that on top of COA, each athlete who competes in the College Football Playoff may receive up to $3,000 in travel, hotel, and meal expenses for family members. Smith Tr. 51:24-57:18.
College Football Playoff Agrees to Pay Family-Members Expenses for the National Semifinals and Finals (*Announced Aug. 2015*)	College Football Playoff agreed to pay $2,500 to each athlete who competes in the College Football Playoff for family-member travel, hotel, and meal expenses. Smith Tr. 51:24-57:18.
Schools That Initially Said They Would Not Offer COA for Philosophical Reasons Changed Their Minds and Began Offering COA (*E.g., June 2016 and April 2017*)	After the NCAA rules first permitted schools to offer COA, some schools said they were not interested in doing so. For example, in September 2015, James Madison University and the University of Delaware both said they would not: [redacted] However, less than a year later, in June 2016, James Madison announced that it would begin offering COA scholarships for men's and women's basketball. Pls.' Ex. 123, Plaintiffs' Dep. Ex. 91 (Alger) ("James Madison to Offer Cost of Attendance for Basketball"). Less than a year later, in April 2017, Delaware announced that it would

New Developments that Postdate the *O'Bannon* Trial (Held in June 2014)	Brief Description
	begin offering COA stipends to its men's and women's basketball players. The Delaware Athletic Director stated: "After conversation and evaluation, we believe that it's the right thing for us from a competitive advantage perspective[.] . . . We want to be able to recruit the best kids and that is something that is important in that process."[75]
Defendants Admit During This Litigation That Gift Suites and Bowl Gifts Are Athletic Participation Benefits Above COA	• NCAA admits that athletic gifts are "not tied to [the] principle of amateurism. [They're] tied to the incidental to participation . . . there's an acknowledgement that awards will be given for participation . . ." (NCAA (Lennon) Tr. 120:8-122:22); • Big 12 Commissioner Bob Bowlsby testified, "I'm not sure how [gifts provided in gifts suites] could be tethered to education" (Pls.' Ex. 16, Big 12 (Bowlsby) Tr. 162:10-14); • Former SEC Commissioner Mike Slive testified that $450 Best Buy gift card received by bowl game participants was "not really" connected to the players' educational experiences (Pls.' Ex. 17, Slive Tr. 218:4-10).

[75] Kevin Tresolini, "Delaware Gains Basketball Recruiting Advantage with COA," NEWS JOURNAL, Apr. 11, 2017, http://www.delawareonline.com/story/sports/college/ud/2017/04/11/delaware-gains-basketball-recruiting-advantage-coa/100339330/.