

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

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

No. 14-md-02541 CW

FINDINGS OF FACT  
AND CONCLUSIONS OF  
LAW

INTRODUCTION

Plaintiffs are current and former student-athletes who played men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball during the relevant period. Defendants are the National Collegiate Athletic Association (NCAA) and eleven of its conferences<sup>1</sup> that participate in FBS football and Division I basketball.

Plaintiffs challenge the current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services. Plaintiffs contend that these limits on compensation, which are set and enforced by agreement of Defendants, violate federal antitrust law, because Plaintiffs

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<sup>1</sup> Conference Defendants are: Pac-12 Conference (Pac-12), The Big Ten Conference, Inc. (Big Ten), The Big 12 Conference, Inc. (Big 12), Southeastern Conference (SEC), and The Atlantic Coast Conference (ACC) (collectively, the Power Five Conferences); American Athletic Conference (AAC), Conference USA, Inc., Mid-American Conference (MAC), Mountain West Conference, Sun Belt Conference, and Western Athletic Conference (WAC).

1 would receive greater compensation in exchange for their athletic  
2 services in the absence of these artificial limits.

3 Defendants respond that the limits are procompetitive for two  
4 reasons. First, the limits help preserve the demand for college  
5 sports because consumers value amateurism as Defendants define it.  
6 Second, the rules promote integration of student-athletes into  
7 their academic communities, which in turn improves the college  
8 education they receive in exchange for their services.

9 The Court resolved certain of the issues relevant to  
10 Plaintiffs' claims on summary judgment, and presided over a non-  
11 jury trial on the remaining issues.

12 The Court finds and concludes that Defendants agreed to and  
13 did restrain trade in the relevant market, affecting interstate  
14 commerce, and that the challenged limits on student-athlete  
15 compensation produce significant anticompetitive effects. The  
16 Court further finds that the only procompetitive effect that  
17 Defendants established, namely preventing unlimited cash payments,  
18 unrelated to education, similar to those observed in professional  
19 sports, can be achieved through less restrictive means.  
20 Specifically, the Court finds that an alternative compensation  
21 scheme that would allow limits on the grant-in-aid scholarships at  
22 not less than the cost of attendance and limits on compensation  
23 and benefits unrelated to education, but that would generally  
24 prohibit the NCAA from limiting education-related benefits, would  
25 be virtually as effective as the challenged rules in achieving the  
26 only procompetitive effect that Defendants have shown here. The  
27 only education-related compensation that the NCAA could limit  
28 under this alternative would be academic or graduation awards or

1 incentives, provided in cash or cash-equivalent. The limit  
2 imposed by the NCAA could not be less than its current or future  
3 caps on athletics participation awards.

4 Based on the findings of fact and conclusions of law set  
5 forth below, the Court will enter separately a permanent  
6 injunction barring the restraints that the Court finds to be  
7 overly and unnecessarily restrictive.

8 FINDINGS OF FACT<sup>2</sup>

9 I. Background

10 The NCAA, then known as the Intercollegiate Athletic  
11 Association (IAA), was founded in 1905 to regulate college  
12 football. Today, the NCAA and its members collectively issue  
13 rules that govern many aspects of athletic competitions among NCAA  
14 member schools. Joint Stipulation of Facts (Stip. Facts) ¶ 1,  
15 Docket No. 1098.

16 The NCAA comprises three Divisions. Id. ¶ 2. Of the NCAA's  
17 eleven hundred schools, approximately three hundred and fifty  
18 schools compete in Division I. Id. ¶ 5. Division I itself is  
19 divided, for the purposes of football competition, into two  
20 subdivisions, one of which is the FBS. Id. ¶ 6. There are  
21 thirty-two conferences in Division I. Id. ¶ 7. Conferences may  
22 enact and enforce conference-specific rules, but these must be  
23 consistent with the NCAA's own rules. Id.

24 \_\_\_\_\_  
25 <sup>2</sup> Defendants moved to strike portions of Plaintiffs' closing  
26 brief, Docket No. 1125, on the ground that they improperly rely on  
27 expert testimony to support substantive assertions of fact. The  
28 Court will resolve this motion by way of a separate order. The  
findings of fact in this order do not rely on evidence that is  
inadmissible.

1 The NCAA rules governing participation in Division I  
2 generally are enacted by the Division I Board of Directors. Id.  
3 ¶¶ 11, 12. The rules that Plaintiffs challenge here govern a  
4 small subset of the conduct that the NCAA regulates.

5 The NCAA generates approximately one billion dollars in  
6 revenues each year. See Defs.' Ex. 0532 (D0532); Pls.' Ex. 0030  
7 (P0030). Its revenues have increased consistently over the years.  
8 See P0030. Most of the NCAA's revenues are derived from the  
9 Division I men's basketball post-season tournament known as March  
10 Madness, and the media and marketing rights relating to it. Trial  
11 Transcript (Tr.) (McNeely) at 2134; D0532 at 0006. The total  
12 value of the current multi-year media contracts for March Madness,  
13 which extend to 2032, is \$19.6 billion. See P0045 at 0001-02.  
14 Each year, the NCAA distributes about half of its revenues to the  
15 conferences. Joint Ex. 0021 (J0021); P0030.

16 Division I conferences negotiate their own contracts and  
17 generate their own revenues from regular-season basketball and  
18 regular- and post-season FBS football. See, e.g., Dr. Daniel  
19 Rascher Direct Testimony Declaration ¶¶ 169-172, Docket No. 865-3.  
20 The FBS conferences have a multi-year media contract with ESPN for  
21 the College Football Playoff, the total value of which is \$5.64  
22 billion. See P0045 at 0006-07. The five conferences with the  
23 largest revenues, known as the Power Five Conferences, each  
24 generate hundreds of millions of dollars in revenues per year, in  
25 addition to the money that the NCAA distributes to them. See  
26 P0031; P0032; P0033; P0036; see also P0037 (showing that SEC made  
27 more than \$409 million in revenues from television contracts alone  
28 in 2017, with its total conference revenues exceeding \$650 million

1 that year). The revenues of the Power Five have increased over  
2 time and are projected to continue to increase. See P0031; P0032;  
3 P0033; P0036; P0037. Conferences distribute most of their  
4 revenues to their member schools.

5 Among the areas that the NCAA regulates are the compensation  
6 and benefits that can be afforded to student-athletes. The 1906  
7 bylaws of the IAA, as the NCAA was originally known, expressly  
8 prohibited student-athletes from receiving any compensation  
9 whatsoever, even athletics scholarships, in exchange for their  
10 participation in college sports. In 1956, the NCAA enacted a new  
11 set of rules permitting schools to award athletics scholarships,  
12 known as "grants-in-aid," to student-athletes. Stip. Facts ¶ 25,  
13 Docket No. 1098. These rules imposed a limit on the size of the  
14 grant-in-aid that schools were permitted to offer. Id. The limit  
15 precluded student-athletes from receiving any financial aid beyond  
16 that needed for commonly accepted educational expenses, which were  
17 tuition, fees, room and board, books, and cash for incidental  
18 expenses such as laundry.

19 In 1976, the cash for incidental expenses was disallowed by  
20 way of an amendment to the definition of the grant-in-aid that  
21 limited the scope of commonly accepted educational expenses to  
22 include only "tuition and fees, room and board and required  
23 course-related books." Stip. Facts ¶ 26, Docket No. 1098. Cash  
24 for incidental expenses related to school attendance, such as  
25 laundry, supplies, and transportation, was not included in the  
26 grant-in-aid limit. This definition of a grant-in-aid remained in  
27 place until August 2015. See Stip. Facts ¶ 10, Docket No. 1093.  
28

1 On August 7, 2014, the NCAA adopted a new legislative process  
2 for the Power Five, which is referred to as the Autonomy  
3 structure.<sup>3</sup> It allows those five conferences collectively to  
4 adopt legislation in specific areas, which include limits on  
5 grants-in-aid. Soon afterward, in January 2015, the Power Five  
6 voted to increase the overall limit on grants-in-aid, from the  
7 limit then in place, to a higher limit based on the cost of  
8 attendance at each school. See O'Bannon v. Nat'l Collegiate  
9 Athletic Ass'n, 802 F.3d 1049, 1054-55 (9th Cir. 2015) (O'Bannon  
10 II), cert. denied, 137 S. Ct. 277 (2016). This became effective  
11 on August 1, 2015. The revised "full grant-in-aid" comprises  
12 "tuition and fees, room and board, books and other expenses  
13 related to attendance at the institution up to the cost of  
14 attendance[.]" Division I Bylaw 15.02.6; Stip. Facts ¶ 10, Docket  
15 No. 1093. Cost of attendance is calculated by each school in  
16 accordance with federal regulations. J1517 at 0002; Stip. Facts  
17 ¶¶ 3-6, Docket No. 1093. It is generally several thousand dollars  
18 higher than the prior grant-in-aid limit because it includes cash  
19 for incidental expenses related to the cost of attendance. See  
20 Stip. Facts ¶ 5, Docket No. 1093.

21 Compensation and benefits in addition to the full grant-in-  
22 aid, some related and some unrelated to education, are also  
23 allowed and regulated by the NCAA. These include benefits the  
24 NCAA denominates "incidental to athletics participation," as well  
25 as money from the NCAA's Student Assistance Fund and Academic  
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27 <sup>3</sup> See NCAA Constitution, Article 5.3.2.1.2; Stip. Facts ¶ 17,  
28 Docket No. 1098.

1 Enhancement Fund, government grants, and payments from outside  
2 entities. Other compensation is generally prohibited.

3 In 2009, a group of Division I male basketball and FBS  
4 football student-athletes brought an antitrust class action  
5 against the NCAA and its licensees to challenge the association's  
6 rules preventing them from being paid by schools or other entities  
7 for the sale of licenses to use their names, images, and/or  
8 likenesses (NIL) in videogames, live game telecasts, and other  
9 footage.<sup>4</sup> See O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F.  
10 Supp. 3d 955, 962-63 (N.D. Cal. 2014) (O'Bannon I), aff'd in part,  
11 vacated in part, 802 F.3d 1049 (9th Cir. 2015). The rules  
12 challenged by the O'Bannon plaintiffs related to the release, use,  
13 and licensing of NIL. The then-applicable maximum limit on the  
14 grant-in-aid was discussed and implicated in the relief ordered by  
15 the Court, but the plaintiffs did not specifically challenge it in  
16 O'Bannon I. Some of the rules challenged in the present case were  
17 challenged in O'Bannon; others were not.

18 This Court held in O'Bannon I that the NCAA rules challenged  
19 there violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Id.  
20 at 963. The Court found that the plaintiffs met their burden to  
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22 <sup>4</sup> The class in O'Bannon was defined as including "[a]ll  
23 current and former student-athletes residing in the United States  
24 who compete on, or competed on, an NCAA Division I (formerly known  
25 as 'University Division' before 1973) college or university men's  
26 basketball team or on an NCAA Football Bowl Subdivision (formerly  
27 known as Division I-A until 2006) men's football team and whose  
28 images, likenesses and/or names may be, or have been, included or  
could have been included (by virtue of their appearance in a team  
roster) in game footage or in videogames licensed or sold by  
Defendants, their co-conspirators, or their licensees." O'Bannon  
II, 802 F.3d at 1055-56.

1 show that the NCAA had fixed the price of the student-athletes'  
2 NIL rights, which had significant anticompetitive effects in the  
3 relevant market. Id. at 971-73, 988-93. On the question of  
4 procompetitive justifications of the restraints, the Court found  
5 that the NCAA's challenged restrictions on student-athlete  
6 compensation played "a limited role in driving consumer demand for  
7 FBS football and Division I basketball-related products." Id. at  
8 1001. The Court also found that the challenged rules might  
9 facilitate the integration of student-athletes with their academic  
10 communities. Id. at 1003.

11 The O'Bannon plaintiffs proposed alternatives they asserted  
12 were less restrictive than the NCAA rules they challenged. This  
13 Court found that two of these proposed alternatives, which relied  
14 specifically on the use of revenue derived from NIL licensing,  
15 constituted "less restrictive means of achieving" the challenged  
16 rules' limited procompetitive effects. Id. at 982-84; 1004-07.

17 Accordingly, this Court issued an injunction barring the NCAA  
18 from enforcing any rules that would prohibit its member schools  
19 and conferences from offering their FBS football and men's  
20 Division I basketball recruits compensation for the use of their  
21 NIL in addition to a full grant-in-aid as then defined. The Court  
22 permitted the NCAA to implement rules capping the amount of  
23 compensation that could be paid to student-athletes while they are  
24 enrolled in school as long as the amount of the cap was not lower  
25 than the cost of attendance for students at that school. Id. at  
26 1007-08. The Court also required the NCAA to allow member schools  
27 to deposit a limited share of NIL licensing revenue in trust for  
28 their student-athletes. Id. at 1008. The Ninth Circuit affirmed



1 the liability finding and the remedy prohibiting the NCAA from  
2 limiting payment of a share of NIL revenues to less than the cost  
3 of attendance. It vacated the remedy allowing a trust fund  
4 payment. O'Bannon II, 802 F.3d at 1074-79. By the time the  
5 O'Bannon injunction went into effect, the NCAA had already  
6 increased, through the Autonomy structure, the grant-in-aid limit  
7 to the cost-of-attendance amount for all Division I student-  
8 athletes, regardless of NIL use or revenue.

9 Plaintiffs in the present case are student-athletes who  
10 played Division I FBS football and men's and women's basketball  
11 between March 5, 2014, and the present.<sup>5</sup> Order Granting Motion  
12 for Rule 23(b)(2) Class Certification (Class Cert. Order) at 1,  
13 Docket No. 305. The Court certified three injunctive relief  
14 classes in the consolidated action under Federal Rule of Civil  
15 Procedure 23(b)(2), each consisting of student-athletes who would  
16 be offered or receive a full grant-in-aid during the pendency of  
17 this action.<sup>6</sup> Id. at 4-5, 31.

18 \_\_\_\_\_  
19 <sup>5</sup> The first of the actions that became a part of this  
20 consolidated case, Alston v. NCAA, Case No. 14-cv-01011, was filed  
21 on March 5, 2014. Additional actions were filed in that year and  
22 in 2015. The United States Judicial Panel on Multidistrict  
23 Litigation transferred actions filed in other districts to this  
24 Court pursuant to 28 U.S.C. § 1407. Plaintiffs in all of the  
25 actions, except Jenkins v. NCAA, Case No. 14-cv-02758, filed a  
26 consolidated amended complaint. Docket No. 60.

27 <sup>6</sup> The Division I FBS Football Class is defined as "[a]ny and  
28 all NCAA Division I Football Bowl Subdivision ('FBS') football  
29 players who, at any time from the date of the Complaint through  
30 the date of the final judgment, or the date of the resolution of  
31 any appeals therefrom, whichever is later, received or will  
32 receive a written offer for a full grant-in-aid as defined in NCAA  
33 Bylaw 15.02.5, or who received or will receive such a full grant-  
34 in-aid." Class Cert. Order at 5, Docket No. 305. The Division I  
35 Men's Basketball Class and the Division I Women's Basketball Class  
36 are defined similarly. Id. In the Jenkins action, the Court

## 1 II. Agreement in Restraint of Trade Affecting Interstate Commerce

2 On summary judgment, the Court found that the existence of an  
3 agreement (i.e., a contract, combination, or conspiracy)  
4 restraining trade and affecting interstate commerce was  
5 undisputed. Defendants did not contest evidence showing that (1)  
6 the compensation limits that Plaintiffs challenge are enacted by  
7 agreement of Defendants and other NCAA members through the NCAA's  
8 legislative process and are embodied in NCAA rules published in  
9 the NCAA Division I Manual; (2) Defendants enforce these rules by  
10 requiring all NCAA members to comply with them, and by punishing  
11 violations; (3) the challenged rules affect interstate commerce,  
12 because they regulate transactions between Plaintiffs and their  
13 schools in multiple states nation-wide; and (4) these transactions  
14 are commercial because they regulate an essential component of  
15 Division I basketball and FBS football. Order Granting in Part  
16 and Denying in Part Cross-Motions for Summary Judgment (Summary  
17 Judgment Order) at 15, Docket No. 804.

18 The Court also found on summary judgment that the challenged  
19 NCAA rules restrain trade in that they limit the compensation that  
20 student-athletes may receive for their athletic services. These  
21 limits cap athletics-based grants-in-aid at the cost of  
22 attendance, but they also allow and fix the prices of numerous and  
23 varied additional benefits and compensation on top of a grant-in-

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28 certified the men's football and basketball classes; women's  
basketball class certification was not sought in that case. Id.

1 aid that have a monetary value above the cost of attendance.<sup>7</sup>  
2 Some of these rules regulate compensation that relates to  
3 education; others regulate compensation incidental to athletics  
4 participation and unrelated to education, including monetary  
5 awards that reward performance in athletics. The compensation  
6 limits are artificially set through an exercise of Defendants'  
7 monopsony power, and Plaintiffs would receive more compensation in  
8 exchange for their athletic services in the absence of the  
9 challenged limits. This Court had made similar findings in  
10 O'Bannon I, which were affirmed on appeal in O'Bannon II.

11 O'Bannon I, 7 F. Supp. 3d at 971-73; O'Bannon II, 802 F.3d at  
12 1064-69. Horizontal price-fixing among competitors is usually a  
13 per se violation of antitrust law. However, because "a certain  
14 degree of cooperation" is necessary to market athletics  
15 competition, the Court applies the Rule of Reason. See O'Bannon  
16 II, 802 F.3d at 1069 (citation and internal quotation marks  
17 omitted).

### 18 III. Rule of Reason: Market Definition

19 The Court's first step in applying the Rule of Reason is to  
20 determine the relevant market. On summary judgment, at the  
21 request of both parties and in the absence of a genuine issue of  
22 material fact, the Court adopted the market definition from the  
23  
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26 <sup>7</sup> The rules that Plaintiffs challenge here are listed and  
27 described in Plaintiffs' Opening Statement at 13-15 and Appendices  
28 A-C, Docket No. 868-3.

1 O'Bannon case.<sup>8</sup> The relevant market there was that for a college  
2 education combined with athletics, or, alternatively, the market  
3 for the student-athletes' athletic services. See Summary Judgment  
4 Order at 18, Docket No. 804. In O'Bannon I, the Court had found  
5 that the plaintiffs' antitrust claims could be analyzed as a  
6 monopoly or, alternatively, as a monopsony. 7 F. Supp. 3d at 991.  
7 Under the theory of monopsony, sometimes referred to as a buyers'  
8 cartel, schools were characterized as buyers and student-athletes  
9 as sellers in a market for recruits' athletic services and  
10 licensing rights. Id. The NCAA did not challenge the market  
11 definitions on appeal and the Ninth Circuit adopted them.  
12 O'Bannon II, 802 F.3d at 1070.

13 At trial in this case, Plaintiffs based their claims on a  
14 theory of monopsony only. Dr. Rascher, Plaintiffs' economics  
15 expert, defined the relevant market here as comprising national  
16 markets for Plaintiffs' labor in the form of athletic services in  
17 men's and women's Division I basketball and FBS football, wherein  
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19 <sup>8</sup> After the Court had entered summary judgment on market  
20 definition, Defendants argued that the Court should have  
21 considered or adopted an alternative market definition that their  
22 economics expert, Dr. Kenneth Elzinga, discussed in his report,  
23 namely a "multi-sided market for college education in the United  
24 States" in which colleges operate as multi-sided platforms that  
25 balance their pricing to numerous constituencies. Elzinga Report  
26 at 26-28; see also Order Reaffirming Exclusion of Certain Expert  
27 Testimony by Dr. Elzinga at 9, Docket No. 1018. The Court  
28 rejected this argument on the ground that it was untimely, because  
Defendants did not offer any alternative definition of the  
relevant market or point to any admissible evidence to raise a  
genuine issue of material fact with respect to market definition  
during summary judgment proceedings; and on the ground that Dr.  
Elzinga's expert opinions about a multi-sided relevant market were  
unreliable and inadmissible. See generally id.

1 each class member participates in his or her sport-specific  
2 market. See Rascher Report ¶¶ 30-130, 148-85. In these markets,  
3 the class-member recruits sell their athletic services to the  
4 schools that participate in Division I basketball and FBS football  
5 in exchange for grants-in-aid and other benefits and compensation  
6 permitted by NCAA rules. Dr. Rascher found that Defendants have  
7 monopsony power in all of these markets and exercise that power to  
8 cap artificially the compensation offered to recruits. Id. ¶ 37.

9 Dr. Rascher's definition of these markets is based on  
10 economic analyses similar to those performed in the O'Bannon case.  
11 His analyses here are predicated on updated data and take into  
12 account women's Division I basketball, which was not at issue in  
13 O'Bannon. Id. ¶¶ 148-53. Dr. Rascher's economic analyses show  
14 that the most talented athletes are concentrated in the respective  
15 markets for Division I basketball and FBS football; possible  
16 alternatives, such as the National Association of Intercollegiate  
17 Athletics (NAIA) or the National Christian College Athletic  
18 Association (NCCAA), have not proved to be viable substitutes;  
19 none of the major professional sports leagues in class members'  
20 sports provide competitive options for most college-aged talent;  
21 high barriers to entry into the market preclude any viable  
22 alternatives emerging for class members' athletic services; and  
23 the geographic scope of the markets is nationwide. Id. ¶¶ 154-85.  
24 In sum, class members cannot obtain the same combination of a  
25 college education, high-level television exposure, and  
26 opportunities to enter professional sports other than from  
27 Division I schools.

28 //

## 1 IV. Rule of Reason: Anticompetitive Effects

2 On summary judgment, the Court found that the challenged  
3 restraints produce significant anticompetitive effects in the  
4 relevant market. The absence of a genuine dispute with respect to  
5 the existence of an agreement among Defendants that is intended  
6 to, and does, limit student-athlete compensation in the relevant  
7 market, is in and of itself sufficient to find that this agreement  
8 has a strong potential for significant anticompetitive effects.  
9 Plaintiffs offered evidence of significant anticompetitive  
10 effects, however, which Defendants did not meaningfully dispute.  
11 The Court had also found significant anticompetitive effects with  
12 respect to the rules challenged in O'Bannon I, which the Ninth  
13 Circuit affirmed in O'Bannon II. O'Bannon I, 7 F. Supp. at 973,  
14 993; O'Bannon II, 802 F.3d at 1057-58, 1070-72.

15 The economic analyses of Plaintiffs' experts established that  
16 the challenged rules have the effect of artificially compressing  
17 and capping student-athlete compensation and reducing competition  
18 for student-athlete recruits by limiting the compensation offered  
19 in exchange for their athletic services. The compensation that  
20 student-athletes receive under the challenged rules does not  
21 correlate meaningfully with the value of their athletic services,  
22 based on indicators of their talent.<sup>9</sup> This is consistent with the  
23 absence of rigorous competition among schools with respect to  
24 student-athlete compensation. In a market free of the challenged  
25 restraints, competition among schools would increase in terms of

26 \_\_\_\_\_  
27 <sup>9</sup> Dr. Edward Lazear, Plaintiffs' economics expert on summary  
28 judgment, relied on ratings of talent based on a system for rating  
athletes by 247sports.com. Lazear Report ¶ 29.

1 the compensation they would offer to recruits, and student-athlete  
2 compensation would be higher as a result. Student-athletes would  
3 receive offers that would more closely match the value of their  
4 athletic services. See Lazear Report ¶¶ 11-50.

5 Plaintiffs' experts' analyses also show that Defendants are  
6 able to artificially compress and limit student-athlete  
7 compensation as described above because they possess monopsony  
8 power in the relevant market. See Rascher Report ¶¶ 30-130, 148-  
9 85; id. ¶ 37 ("Defendants and their co-conspirators have monopsony  
10 power in all three markets - that is, they have the power to  
11 collectively depress input prices without fear of loss of revenue  
12 in excess of the immediate cost savings"). Because of the absence  
13 of viable alternatives to Division I basketball and FBS football,  
14 and because of reduced competition among conferences due to the  
15 challenged compensation limits, the market for recruits in these  
16 sports is highly or perfectly concentrated under the current NCAA  
17 compensation limits. By contrast, if each conference were free to  
18 set its own compensation limits in competition with other  
19 conferences, the market concentration would decrease from highly  
20 or perfectly concentrated, to "moderately concentrated" for FBS  
21 football and "unconcentrated" for Division I basketball. Rascher  
22 Report ¶¶ 155-57.

23 This evidence shows that student-athletes are harmed by the  
24 challenged compensation limits, because these rules deprive them  
25 of compensation they would receive in the absence of the  
26 restraints.

27 At trial, Plaintiffs offered additional proof of the  
28 anticompetitive effects of the NCAA's limits on compensation. It

1 shows that changes had been made, starting in August 2014, to the  
2 amounts and types of permissible student-athlete compensation.  
3 The changes were caused, in part, by the desire of the Power Five,  
4 those conferences with the highest revenues in Division I, to  
5 divert some of their relatively significant resources away from  
6 expenditures that only indirectly benefit student-athletes (such  
7 as expenditures on opulent athletic facilities and multi-million  
8 dollar coaches' salaries) and toward student-athlete compensation.  
9 See, e.g., P0056 at 0001-02; Rascher Direct Testimony Declaration  
10 ¶ 212. Dr. Harvey Perlman, chancellor of the University of  
11 Nebraska, agreed with the statement that, "[i]n short, we recruit  
12 by shifting funds from regulated benefits for student athletes to  
13 unregulated frills[.]" Perlman Deposition Transcript (Dep. Tr.)  
14 at 60-61.

15 In a presentation in 2013, the presidents and chancellors of  
16 the Power Five had asked the Division I Board of Directors for  
17 autonomy in a variety of subject areas, for the following reasons:  
18 (1) the recognition of criticisms and accusations "of exploiting  
19 student athletes for our own financial gain"; (2) the desire to  
20 avoid "unintended consequences" if "ill-advised reforms are  
21 imposed" as a result of these criticisms; (3) a wish to move away  
22 from efforts to "create 'a level playing field,'" because "[t]oo  
23 often, our efforts to improve the lives of student athletes have  
24 been deflected because of cost implications that are manageable by  
25 our institutions but not by institutions with less resources"; and  
26 (4) a sense that efforts to "'level the playing field'" led the  
27 Power Five to "spend these resources in almost any way we want  
28 EXCEPT to improve support for student athletes." P0056 at 0001-



1 02. This is evidence that these conferences were prevented from  
2 making the increases in student-athlete compensation that they  
3 would have made absent the anticompetitive effects of the  
4 challenged restraints.

5 After the new Autonomy structure became effective on August  
6 7, 2014, in January 2015, the Power Five voted to increase the  
7 overall limit on grant-in-aid athletics scholarships from the  
8 limit in place at the time of the O'Bannon I trial to the higher,  
9 cost-of-attendance limit, effective on August 1, 2015.<sup>10</sup> The Power  
10 Five also created new forms of permissible compensation for  
11 student-athletes, and expanded the scope of previously permissible  
12 benefits or compensation. These changes permitted student-  
13 athletes to borrow against their future professional earnings to  
14 purchase loss-of-value insurance (Division I Bylaw 12.1.2.4.4);

15 \_\_\_\_\_  
16 <sup>10</sup> This Court issued its O'Bannon I injunction on August 8,  
17 2014, to take effect on August 1, 2015. Case No. 09-cv-3329,  
18 Docket Nos. 292, 298. On July 31, 2015, the Ninth Circuit stayed  
19 the injunction. Case No. 09-cv-3329, Docket No. 418. On  
20 September 30, 2015, while the injunction was stayed, the Ninth  
21 Circuit issued its opinion affirming in part this Court's  
22 decision; the judgment became effective on December 28, 2015, when  
23 the Ninth Circuit issued its mandate. See O'Bannon II, 802 F.3d  
24 at 1079; Case No. 09-cv-3329, Docket Nos. 437, 463. Thus, the  
25 Autonomy structure change to the full grant-in-aid limit became  
26 effective before the injunctive relief ordered by this Court in  
27 O'Bannon I ever went into effect. The Autonomy structure change  
28 differs from the relief ordered in O'Bannon; it permits grants-in-  
aid up to the cost of attendance for any Division I athlete (in  
any sport) and is not limited to compensation for the use or  
licensing of NIL. By contrast, the relief ordered in O'Bannon I,  
in relevant part, prohibited the NCAA from precluding its members  
from compensating Division I men's basketball and FBS football  
student-athletes for the licensing or use of their NIL, at an  
amount lower than the cost of attendance. Compare Division I  
Bylaw 15.02.6 "Full Grant-in-Aid" with Case No. 09-cv-3329, Docket  
No. 292 (injunction).

1 expanded reimbursement or payment of travel expenses for certain  
2 family members to attend certain events (Division I Bylaw  
3 16.6.1.1); provided unlimited food (Division I Bylaw 16.5.2.5);  
4 and required schools to pay for medical care for athletics-related  
5 injuries for at least two years after graduation (Division I Bylaw  
6 16.4.1).

7 Although the Power Five's Autonomy legislative enactments  
8 have resulted in greater compensation for student-athletes, such  
9 compensation is still capped by overarching NCAA limits that  
10 prevent the Power Five and all NCAA members from expanding  
11 compensation beyond a point determined by the NCAA through its  
12 traditional rulemaking process.<sup>11</sup>

13 In light of the foregoing, the Court finds that Defendants,  
14 through the NCAA, have monopsony power to restrain student-athlete  
15 compensation in any way and at any time they wish, without any  
16 meaningful risk of diminishing their market dominance. This is  
17 because the NCAA's Division I essentially is the relevant market  
18 for elite college football and basketball. And, because elite  
19 student-athletes lack any viable alternatives to Division I, they  
20 are forced to accept, to the extent they want to attend college  
21 and play sports at an elite level after high school, whatever  
22 compensation is offered to them by Division I schools, regardless  
23 of whether any such compensation is an accurate reflection of the  
24

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25 <sup>11</sup> See, e.g., Trial Tr. (Lennon) at 1618 (the Power Five's  
26 ability to modify athletics financial aid caps is limited by NCAA  
27 Bylaw 15.01.6); id. at 1620 (the Power Five's ability to award  
28 expenses and benefits is limited by NCAA Bylaw 12.1.2.1.4); id. at  
1629 (the NCAA Board of Directors has the authority to override  
Autonomy legislation).

1 competitive value of their athletic services. Moreover, the  
2 compensation that class members receive under the challenged rules  
3 is not commensurate with the value that they create for Division I  
4 basketball and FBS football; this value is reflected in the  
5 extraordinary revenues that Defendants derive from these sports.

6 The challenged rules thus have severe anticompetitive effects  
7 and student-athlete are harmed as a result of the challenged  
8 rules, because the rules deprive them of compensation that they  
9 would otherwise receive for their athletic services.

10 V. Rule of Reason: Asserted Justifications for the Challenged  
11 Restraints<sup>12</sup>

12 A. Consumer Demand for Amateurism

13 Defendants argue that the challenged compensation limits are  
14 procompetitive because "amateurism is a key part of demand for  
15 college sports" and "consumers value amateurism." Defs.' Closing  
16 Brief at 7, 10, Docket No. 1128. The corollary is that if  
17 consumers did not believe that student-athletes were amateurs,  
18 they would watch fewer games and revenues would decrease as a  
19 result. Defendants rely on the notion that it is the "principle"  
20 of amateurism that drives consumer demand, and that the challenged  
21 restraints are procompetitive because they "implement" or  
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23 <sup>12</sup> Two additional pro-competitive justifications had been  
24 offered previously: increased output and competitive balance.  
25 These were rejected by the Court on summary judgment. They also  
26 were rejected in O'Bannon I and the NCAA did not address them on  
27 appeal, so the rejection was accepted in O'Bannon II. See Summary  
28 Judgment Order at 23 n.7, Docket No. 804; see also O'Bannon II,  
802 F.3d at 1072. Some testimony offered by Defendants at this  
trial seemed aimed at resurrecting these justifications. The  
Court will not consider these arguments again.

1 "effectuate" that principle. Id. at 37. They did not offer  
2 evidence to establish that the challenged compensation rules, in  
3 and of themselves, have any direct connection to consumer demand.

4 Defendants nowhere define the nature of the amateurism they  
5 claim consumers insist upon. Defendants offer no stand-alone  
6 definition of amateurism either in the NCAA rules or in argument.  
7 The "Principle of Amateurism," as described in the current version  
8 of the NCAA's constitution, uses the word "amateurs" to describe  
9 the amateurism principle, and is thus circular. It does not  
10 mention compensation or payment. The constitution says, "Student-  
11 athletes shall be amateurs in an intercollegiate sport, and their  
12 participation should be motivated primarily by education and by  
13 the physical, mental and social benefits to be derived. Student  
14 participation in intercollegiate athletics is an avocation, and  
15 student-athletes should be protected from exploitation by  
16 professional and commercial enterprises." NCAA Constitution  
17 Article 2.9. No connection between the "Principle of Amateurism"  
18 and the challenged compensation limits is evident. Mike Slive,  
19 who served as commissioner of the SEC, one of the Power Five, from  
20 2002 to 2015, testified that amateurism is "just a concept that I  
21 don't even know what it means. I really don't." Slive Dep. Tr.  
22 at 23, 45. He repeated, "You know, the term amateur I've never  
23 been clear on what is meant either by in your question or  
24 otherwise, what is really meant by amateurism[.]" Id. at 43.

25 The definition of amateurism that Defendants point to is one  
26 that cannot be found in the Division I manual. Defendants and  
27 their witnesses often describe amateurism by reference to what  
28 they say it is not: namely, amateurism is not "pay for play."

1 See, e.g., Defs.' Closing Brief at 36 n.214, Docket No. 1128  
2 ("Amateurism is, by definition, 'not paying' the participants.");  
3 Trial Tr. (Lennon) at 1275-77 (justifying challenged compensation  
4 limits on the ground that they prevent "pay for play").  
5 Defendants do not explain the origin or meaning of the term "pay  
6 for play." The NCAA constitution and the Division I Bylaws do not  
7 define, or even mention, "pay for play."

8       The concept of "pay" is addressed only in certain bylaws that  
9 govern student-athlete compensation and eligibility. In these  
10 bylaws, "pay" is defined only indirectly; it is defined by listing  
11 a variety of forms of compensation that could be considered pay,  
12 and indicating that each form of compensation constitutes  
13 prohibited "pay," unless it falls within one of many exceptions or  
14 is otherwise permitted by the NCAA. Thus, whether any form of  
15 compensation constitutes "pay" in violation of NCAA rules cannot  
16 be determined except by studying all of the relevant bylaws and  
17 all of their exceptions and cross-references. Erik Price, the Pac  
18 12's Rule 30(b)(6) witness, testified, "Well, I think the NCAA,  
19 the way Bylaw 12 is written is a series of things that you cannot  
20 do, and by then still remain an amateur. It doesn't exactly have  
21 a beautiful definition of [amateurism]." Pac 12 Rule 30(b)(6)  
22 witness (Erik Price) Dep. Tr. at 60; see Division I Bylaw 12.1.2  
23 (listing items that would cause a student-athlete to lose "amateur  
24 status" and eligibility for intercollegiate competition); Division  
25 I Bylaw 12.1.2(a) (prohibiting a student-athlete from using his or  
26 her athletic skills "for pay in any form" in his or her sport);  
27 but see Division I Bylaw 12.1.2.4 ("Exceptions to Amateurism  
28 Rule").

1 "Pay" under NCAA rules does not necessarily track the plain  
2 meaning of the word, whereby something of monetary value is  
3 provided in exchange for something else. Indeed, a review of the  
4 bylaws shows that many forms of payment, often in unrestricted  
5 cash, from schools and other sources, are allowed by the NCAA as  
6 "not pay," and thus as not inconsistent with amateurism. Much of  
7 this permissible compensation appears on its face to be akin to  
8 "pay" under the plain meaning of the word. In some instances it  
9 is provided to student-athletes in exchange for their athletic  
10 performance, making it similar to what a reasonable person could  
11 consider to be "pay for play."

12 As noted, the NCAA allows grants-in-aid up to the cost of  
13 attendance, which are intended to pay for the student-athletes'  
14 education-related expenses. It also allows monetary awards it  
15 describes as "incidental to athletics participation" on top of a  
16 grant-in-aid, which reward participation or achievement in  
17 athletics, such as qualifying for a bowl game in FBS football.  
18 See Division I Bylaw 16.1.4.1 and Figures 16-1, 16-2, 16-3; Trial  
19 Tr. (Lennon) at 1275. These performance awards, which are not  
20 related to education and can be provided on top of a full cost-of-  
21 attendance grant-in-aid, are allowed at several hundred dollars  
22 for each award, but the rules permit student-athletes to qualify  
23 for multiple of these awards, meaning that they could receive  
24 several thousand dollars in cash-equivalent compensation if they  
25 perform well enough in their sport. See Rascher Direct Testimony  
26 Declaration ¶¶ 72, 205; Dr. Kenneth Elzinga Direct Testimony  
27 Declaration ¶¶ 95-96, Docket No. 883-1 (a student-athlete on a  
28 team that won a national championship could receive \$5,600 total

1 in athletics participation awards when combined); Hostetter Dep.  
2 Tr. at 207. These awards can be provided to student-athletes in  
3 the form of Visa gift cards that can be used like cash.<sup>13</sup> See  
4 Hostetter Dep. Tr. at 224-27. Robert Bowsby, the Big 12  
5 Conference's Rule 30(b)(6) witness, explained that "these things  
6 [gift cards] were all previously geared towards being mementos of  
7 the . . . games" and "it's . . . taken . . . another turn, and the  
8 gift cards are representative of that." Big 12 Conference Rule  
9 30(b)(6) witness (Robert Bowsby) Dep. Tr. at 160. On their face,  
10 athletics participation awards seem to violate other Division I  
11 bylaws, including those that prohibit cash or cash-equivalent  
12 payment or compensation that incentivizes athletic performance  
13 (Division I Bylaws 12.1.2.1.4.1 and 12.1.2.1.5); nevertheless,  
14 these awards do not constitute a prohibited form of payment or  
15 compensation only because the NCAA has chosen to permit them.

16 Without affecting their status as amateurs, Division I  
17 student-athletes can also receive money from their schools, from  
18 monies provided by the NCAA each year through the conferences, by

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20 <sup>13</sup> At the time of O'Bannon I, student-athletes could receive  
21 performance awards in the form of store-specific gift cards but  
22 can now receive these awards in the form of Visa gift cards. See  
23 Hostetter Dep. Tr. at 224-27. Performance awards also can be  
24 provided in the form of "gift suites," which involve allowing  
25 student-athletes access to a location where they can select from a  
26 variety of gifts. See Elzinga Direct Testimony Declaration ¶ 95.  
27 Gifts available through gift suites include prepaid debit cards  
28 from stores such as Best Buy, iPad minis, speakers, watches, and  
headphones. See, e.g., James Dep. Tr. at 168 (received a watch  
and a \$452 Best Buy gift card at gift suite, which he used to buy  
his mother a television); Jemerigbe Dep. Tr. at 206 (received iPad  
mini, iTunes gift card, headphones, and speaker through gift  
suites).

1 way of the Student Assistance Fund (SAF) and the Academic  
 2 Enhancement Fund (AEF), on top of a full cost-of-attendance grant-  
 3 in-aid.<sup>14</sup> In 2018, the NCAA made available for distribution more  
 4 than \$84 million in SAF money, and more than \$48 million in AEF  
 5 money. This money is disbursed by schools to assist student-  
 6 athletes in meeting financial needs, improve their welfare or  
 7 academic support, or recognize academic achievement.<sup>15</sup> Division I

8  
 9 <sup>14</sup> Division I Bylaw 16.11.1.8 ("A student-athlete may receive  
 10 money from the NCAA Student Assistance Fund."); Division I Bylaw  
 11 15.01.6.1 ("The receipt of money from the NCAA Student Assistance  
 12 Fund for student-athletes is not included in determining the  
 13 permissible amount of financial aid that a member institution may  
 14 award to a student-athlete.").

15 <sup>15</sup> The Division I Bylaws address only the uses of SAF monies  
 16 that are impermissible. Neither schools nor conferences report to  
 17 the NCAA detailed information (i.e., by student-athlete or by  
 18 expense) to show how SAF funds were allocated; conferences report  
 19 to the NCAA only amounts and types of uses of SAF monies in the  
 20 aggregate. Trial Tr. (Lennon) at 1634-35. SAF monies have been  
 21 used for expenses related to education, including postgraduate  
 22 scholarships; fees for internship programs; international student  
 23 fees, taxes, and insurance; school supplies and electronics (such  
 24 as laptops, cameras, tablets); graduate school application fees;  
 25 graduate school exam fees; tutoring; and academic achievement or  
 26 graduation awards. J0002 at 0010; J0020 at 0001; P0043 at 0001;  
 27 J0019 at 0001. SAF monies also have been used for benefits that  
 28 are not related to education, such as loss-of-value insurance  
 premiums, Trial Tr. (Lennon) at 1340; medical expenses;  
 professional program testing; career assessments; travel expenses  
 for both the student-athlete and family members; clothing;  
 magazine subscriptions; and grocery reimbursement. J0002 at 0010;  
 J0020 at 0001. AEF monies have been used for education-related  
 benefits, such as academic achievement or graduation awards;  
 summer school; fifth- or sixth-year aid; tutoring; academic  
 support services; international student fees and taxes;  
 professional program testing; and supplies (expendable or  
 educational). J0021 at 0004-05. They have also been used for  
 benefits that are not related to education, such as insurance  
 premiums; medical, dental, or vision expenses (not covered by  
 another insurance program); clothing; travel; and capital  
 improvements/equipment. Id.; Stip. Facts ¶ 15, Docket No. 1094.



1 Revenue Distribution Plan, J0021 at 0004, 0014. It can be  
2 provided in cash or as a benefit, and it is not limited to  
3 education-related expenses. The schools are not constrained in  
4 the amount of these funds they can disburse to an individual  
5 student-athlete; they are limited only in the aggregate by the  
6 amount that the NCAA distributes through these funds each year.  
7 Since 2015, SAF disbursements to individual student-athletes has  
8 reached to the tens of thousands of dollars above a full cost-of-  
9 attendance grant-in-aid,<sup>16</sup> and in some cases, \$50,000 for premiums  
10 for loss-of-value insurance against the loss of future  
11 professional earnings, Trial Tr. (Lennon) at 1340.

12 Schools can also make thirty-dollar per diem payments to  
13 student-athletes for un-itemized incidental expenses while they  
14 are travelling for certain events. Division I Bylaw 16.8.1.1.  
15 Schools can pay travel expenses for certain family members to  
16 attend certain events. Division I Bylaw 16.6.1. In January 2015,  
17 without changing any bylaws, the NCAA began to pay up to \$3,000  
18 for family members of student-athletes who reach the Final Four  
19 but do not advance to the basketball championships, and up to  
20 \$4,000 to attend the basketball championships. See P0148. Also  
21 in January 2015, the College Football Playoff committee began to  
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23 <sup>16</sup> See P0104 (showing SAF payments above the cost of  
24 attendance (COA) provided to in-state students at Ohio State  
25 University, with the highest above-COA payment being \$14,740);  
26 P0105 (showing SAF payments above COA provided to out-of-state  
27 students at Ohio State University, with the highest above-COA  
28 payment being \$49,015); P0106 (showing SAF payments above COA at  
nineteen schools, with the highest above-COA payment being  
\$61,000); Rascher Direct Testimony Declaration ¶¶ 75, 78-81; Trial  
Tr. (Lennon) at 1338-40; Trial Tr. (Rascher) at 111.

1 pay up to \$3,000 for each competing athlete's family members to  
2 travel to that event. Id.

3 Cost-of-attendance grants-in-aid themselves provide cash for  
4 expenses, as well as providing tuition, room, board, and books at  
5 no cost to the student-athlete. Any athletics aid in excess of  
6 the fixed expenses of tuition, room, board and books is provided  
7 to the student-athlete in the form of a cash stipend. The cash  
8 stipend can total several thousand dollars for some students.  
9 Defendants do not monitor how student-athletes spend their  
10 stipend. NCAA Rule 30(b)(6) witness (Kevin Lennon) Dep. Tr. at  
11 35, 37; Hostetter Dep. Tr. at 85-86. Schools may provide full  
12 cost-of-attendance grants-in-aid to student-athletes who have  
13 already received federal Pell grants, which also are calculated to  
14 cover the cost of attendance. Any athletics aid in excess of  
15 tuition, room, board, and books, therefore, pays student-athletes  
16 a second time for the same cost-of-attendance expenses that the  
17 Pell grant is intended to cover.<sup>17</sup>

18 Each school may award two post-eligibility graduate school  
19 scholarships per year of \$10,000 each that can be used at any  
20 institution (Senior Scholar Awards). Division I Bylaw 16.1.4.1.1.

21 \_\_\_\_\_  
22 <sup>17</sup> Division I Bylaw 15.1.1. Pell grants are awarded by the  
23 government based on financial need measured by the difference  
24 between a student's ability to pay and the cost of attendance.  
25 The maximum amount of a Pell grant is \$6,000. Noll Direct  
26 Testimony Declaration ¶¶ 78-79. When a student-athlete receives  
27 athletics aid permitted by the NCAA in addition to a Pell grant,  
28 the athletics aid may exceed the student's need as determined by  
federal regulations. See J1518 at 0001-02. This is an exception  
to the general practice that requires schools to adjust non-  
federal aid awards to ensure that the total aid does not exceed a  
student's financial need. Id.

1 This is an exception to the NCAA's prohibition on post-eligibility  
2 financial aid to attend graduate school at a different  
3 institution. Defendants have not provided any cogent explanation  
4 for why the NCAA generally prohibits financial aid for graduate  
5 school at another institution, or for why the Senior Scholar  
6 Awards are limited in quantity and amount. The record suggests  
7 that these limitations are arbitrary. For example, when asked  
8 whether increasing the current limit on Senior Scholar Awards from  
9 two students per school to five students per school would render  
10 the awards inconsistent with amateurism, the NCAA's Rule 30(b)(6)  
11 witness, Kevin Lennon, provided no meaningful response other than  
12 to justify the current limit on the basis that the membership  
13 decided that limiting the awards to two students per school  
14 constituted a "reasonable cap." Trial Tr. (Lennon) at 1551-53.  
15 Lennon agreed that if the membership wanted to increase the awards  
16 "from two to three . . . they'd certainly be permitted to raise  
17 that[.]" Lennon Rule 30(b)(6) Dep. Tr. at 179.

18 In addition to the payments in excess of cost of attendance  
19 allowed from schools to student-athletes described above, the NCAA  
20 has allowed, and in recent years increased, payments that student-  
21 athletes may receive from outside entities without being found  
22 ineligible to play. For example, since 2015, international  
23 student-athletes have been allowed to receive unlimited payment  
24 from their national Olympic governing body in exchange for their  
25 performance at certain international competitions. And student-  
26 athletes continue to receive unlimited funds from the U.S. Olympic  
27 Committee for their performance in the Olympics; this also is not  
28 "pay." NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 50-51

1 (a swimmer received \$115,000 for participating in the Olympics,  
2 permissible under NCAA rules).

3 A given student-athlete is permitted to receive, in  
4 combination, all of the foregoing compensation and benefits for  
5 which he or she qualifies, on top of a full cost-of-attendance  
6 grant-in-aid, regardless of what the total amount of such  
7 compensation may turn out to be. Yet this compensation, some of  
8 which is unrelated to education and some of which is provided in  
9 cash or a cash-equivalent, is not considered to be "pay" and  
10 student-athletes who receive it remain amateurs.

11 These payments and benefits are, without a doubt, justifiable  
12 and well-deserved. They are relevant to the analysis of  
13 Defendants' consumer-demand procompetitive justification for two  
14 reasons. First, the rules that permit, limit, or forbid student-  
15 athlete compensation and benefits do not follow any coherent  
16 definition of amateurism, including Defendants' proffered  
17 definition of no "pay for play," or even "pay." The only common  
18 thread underlying all forms and amounts of currently permissible  
19 compensation is that the NCAA has decided to allow it.

20 Second, whatever understanding consumers have of amateurism,  
21 they enjoy watching sports played by student-athletes who receive  
22 compensation and benefits such as these, because this compensation  
23 has been paid and increased while college athletics has become and  
24 remains exceedingly popular and revenue-producing. This belies  
25 Defendants' position that the challenged current restrictions on  
26 student-athlete compensation are necessary to preserve consumer  
27 demand. Indeed, as discussed in more detail below, increases in  
28 compensation since 2015 have not reduced consumer demand,

1 suggesting that all of the current limits on student-athlete  
2 compensation are not necessary to preserve consumer demand.

3 Defendants' only economics expert on the issue of consumer  
4 demand, Dr. Elzinga, failed to show that the challenged  
5 compensation limits are necessary to preserve consumer demand.  
6 First, Dr. Elzinga's opinions on consumer demand are unreliable.  
7 He did not study any standard measures of consumer demand, such as  
8 revenues, ticket sales, or ratings. See Trial Tr. (Noll) at 285-  
9 287. The "narrative" evidence that formed the primary basis of  
10 his demand analysis was not representative. Trial Tr. (Elzinga)  
11 at 477-78, 445-47 (acknowledging that his economic analysis did  
12 not include interviews of fans, coaches, student-athletes,  
13 broadcasters, or conference commissioners). Instead, he  
14 interviewed people connected with the NCAA and its schools, who  
15 were chosen for him by defense counsel. Id. at 446-47.

16 Second, Dr. Elzinga's analysis of consumer demand is not  
17 relevant because he failed to study the effect of changes to  
18 student-athlete compensation on consumer demand. Dr. Elzinga  
19 explained his failure to study this issue by opining that "no test  
20 of the effect of amateurism" is possible "because there is no  
21 period during which the NCAA did not have and enforce amateurism  
22 standards." See Elzinga Direct Testimony Declaration ¶ 20. Dr.  
23 Elzinga also posits that studying the effects on consumer demand  
24 of changes to compensation would be unnecessary in any event  
25 because the principle of amateurism has been "materially  
26 consistent over the years." Id. ¶ 23. He explains that "[t]he  
27 central tenet of amateurism is not a specific dollar amount (as in  
28 \$X = amateur, but \$X + ε = professional)," rather, it is whether

1 student-athletes are "being paid to play." Id. ¶¶ 14, 34-35; see  
2 also id. ¶ 14 ("[T]he difference between amateurism and  
3 professionalism isn't captured in some wooden and mechanical way  
4 by the number of dollars a student-athlete receives. True  
5 student-athletes are amateurs in the sense that they are not being  
6 paid to play.") (emphasis omitted).

7 The record directly undercuts the premises of Dr. Elzinga's  
8 analysis. Dr. Elzinga's assertion that there is "no period"  
9 during which the NCAA did not "have and enforce amateurism  
10 standards" is contradicted by undisputed facts, which show that  
11 "NCAA did not have any rule-making or enforcement authority over  
12 its members until the 1950s." Stip. Facts ¶ 23, Docket No. 1098.  
13 And, as discussed above in the Background section, the NCAA's  
14 implementation of amateurism has changed materially on multiple  
15 occasions throughout its history.<sup>18</sup> Further, Dr. Elzinga's  
16 contention that amateurism does not depend on a specific dollar  
17 amount is contradicted by the NCAA. The NCAA's Rule 30(b)(6)  
18 witness, Kevin Lennon, testified that specific dollar limits on  
19 student-athlete compensation incidental to athletics  
20 participation, such as performance awards, are set precisely for  
21 the purpose of distinguishing between permissible compensation and  
22 "pay for play." Trial Tr. (Lennon) at 1275. In other words, the  
23

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24 <sup>18</sup> In addition to the changes described in the Background  
25 section above, the fact that the NCAA currently permits student-  
26 athletes to receive the other forms of compensation discussed in  
27 this section in addition to a full grant-in-aid scholarship, such  
28 as compensation "incidental to athletics participation, including  
performance awards, also distinguishes today's concept of the  
amateur student-athlete from that in effect in earlier years.

1 amounts are set for the purpose of distinguishing between  
2 amateurism and non-amateurism. Dollar amounts (and changes to  
3 such amounts), therefore, cannot be said to be irrelevant to the  
4 analysis of this procompetitive justification. As described  
5 above, such amounts can reach the hundreds and thousands of  
6 dollars.

7 For these reasons, the Court is not convinced by Dr.  
8 Elzinga's testimony.

9 The only economic analysis in the record that specifically  
10 speaks to the effects of compensation amounts on consumer demand  
11 is that by Dr. Rascher. Dr. Rascher analyzed two natural  
12 experiments to determine whether increases in student-athlete  
13 compensation would have an impact on consumer demand. He  
14 concluded that increased student-athlete compensation does not  
15 negatively affect consumer demand for Division I basketball and  
16 FBS football. The Court finds Dr. Rascher's analysis and opinions  
17 to be reliable and persuasive.

18 The first natural experiment involved comparing consumer  
19 demand before and after the increase to the grant-in-aid limit to  
20 the cost of attendance, which was voted on in January 2015 and  
21 implemented in August 2015. As explained earlier, this change to  
22 the grant-in-aid limit, on its own, resulted in a significant  
23 increase in permissible compensation per student-athlete, because  
24 it allowed grants-in-aid to provide cash for expenses that  
25 previously could not be covered, such as supplies and  
26 transportation. Rascher Direct Testimony Declaration ¶¶ 52, 54;  
27 Noll Direct Testimony Declaration ¶ 12. Some schools adjusted  
28 their cost-of-attendance calculations so that the value of a full

1 cost-of-attendance grant-in-aid would be greater. See, e.g.,  
2 Trial Tr. (Lennon) at 1365 (“some” schools’ financial aid offices  
3 “revisited their calculation[s]” regarding the cost of attendance  
4 after the increase of the grant-in-aid limit to cost of  
5 attendance). Moreover, because the NCAA rule that permits schools  
6 to award full grants-in-aid to student-athletes in addition to a  
7 Pell grant was not adjusted after the change to the grant-in-aid  
8 limit in 2015, the amount of cash provided above the cost of  
9 attendance increased even more for student-athletes who are  
10 awarded both a Pell grant and a full grant-in-aid scholarship.  
11 See Noll Direct Testimony Declaration ¶¶ 78-79.

12 Dr. Rascher’s conclusions are also supported by the fact that  
13 the NCAA has increased its SAF and AEF distributions since 2015.  
14 See P0039 at 0001; D0695 at 0001. As noted, a student-athlete can  
15 receive unlimited money through the school, from the NCAA’s SAF  
16 and AEF, on top of a full cost-of-attendance grant-in-aid. Since  
17 2015, SAF cash to individual students has reached to the tens of  
18 thousands of dollars above a full cost-of-attendance grant-in-aid.  
19 See P0104; P0105; P0106; Rascher Direct Testimony Declaration ¶¶  
20 75, 78-81. The schools are not constrained in terms of the amount  
21 of these funds they can disburse to an individual student-athlete.  
22 Stip. Facts ¶¶ 3-12, Docket No. 1094.

23 Thus, Dr. Rascher found that total permissible student-  
24 athlete compensation has increased since August 2015, resulting in  
25 thousands of class members receiving significant benefits and  
26 compensation on top of full cost-of-attendance grants-in-aid since  
27 O’Bannon I was decided. Rascher Direct Testimony Declaration ¶  
28



1 52.<sup>19</sup> This has had no negative impact on consumer demand; to the  
2 contrary, Dr. Rascher found that NCAA, conference, and school  
3 revenues from Division I basketball and FBS football have  
4 increased since 2015. Rascher Direct Testimony Declaration ¶¶ 45,  
5 47, 52, 54-55; P0139, P0030, P0032-P0039; P0048, P0049; P0137.  
6 The revenues of the schools in the Power Five alone for basketball  
7 and FBS football increased from a very large amount in 2014-2015  
8 disclosed under seal, to an even larger amount in 2015-16.  
9 Rascher Direct Testimony Declaration ¶ 47; see also P0045; J0017  
10 at 0012-13 (showing that generated revenues have increased since  
11 2014 for schools in the Power Five and other schools not in the  
12 Power Five). Revenues are one of the best economic measures of  
13 consumer demand. Rascher Direct Testimony Declaration ¶ 51.

14 Dr. Rascher acknowledged that some of the media revenues he  
15 examined are derived from multi-year contracts that were executed  
16 before 2015 and have escalating clauses (i.e., the payments under  
17 the contracts will increase each year for their duration without  
18 the need to renegotiate). Trial Tr. (Rascher) at 32.

19 Nonetheless, some of the most valuable and longest-term contracts  
20 were executed after 2015.<sup>20</sup> This supports the finding that

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21  
22 <sup>19</sup> Again, this is not intended to suggest that student-  
23 athletes should not receive these payments, but that the increases  
24 in compensation described above have not negatively affected  
25 consumer demand.

26 <sup>20</sup> For example, in 2016, the NCAA extended its agreement with  
27 CBS/Turner for the March Madness tournament; the previous contract  
28 was to run through 2024. The 2016 extension increased  
substantially the average annual fees owed to the NCAA relative to  
the prior iteration of the contract. D0532 at 0023; Rascher  
Direct ¶ 47; P0045 at 0001-02. The total value of the 2016  
extension, which covers eight years, from 2024 to 2032, is \$8.8

1 consumer demand was not negatively affected after more student-  
2 athlete compensation became permissible in 2015. Dr. Rascher also  
3 testified that multi-year contracts that were executed before 2015  
4 show that the increase in student-athlete compensation in 2015 did  
5 not negatively impact consumer demand given that these contracts  
6 were not renegotiated after the compensation change in 2015.<sup>21</sup>

7 Trial Tr. (Rascher) at 32.

8 The second natural experiment is based on the University of  
9 Nebraska Post-Eligibility Opportunities (PEO) program, which was

10  
11 billion. P0045 at 0002. The prior iteration, which covers  
12 fourteen years, from 2010 to 2024, is valued at \$10.8 billion.  
13 P0045 at 0001. Additionally, the 2016 extension is through 2032;  
14 witnesses who have experience negotiating media contracts in the  
15 context of college sports have described this as a major extension  
16 on the ground that contracts of greater potential value to  
17 broadcasters are typically executed for a longer timeframe. See  
18 Trial Tr. (Aresco) at 1009 (characterizing the 2016 extension as a  
19 "major extension"); id. at 998 (in the context of media contracts  
20 in college sports, "[t]he more attractive the product, the longer  
21 [the networks would] want to go" with the length of a contract).

22 <sup>21</sup> Some defense witnesses speculated that networks or sponsors  
23 could choose to renegotiate broadcast rights fees under provisions  
24 for "changed circumstances" if they believed that Division I  
25 basketball and FBS football changed from amateur to professional.  
26 See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at  
27 247. This testimony, however, is not supported. Defendants have  
28 not pointed to any instance in which networks or sponsors have  
chosen to renegotiate licensing rights fees as a result of changes  
in student-athlete compensation or otherwise, and the record shows  
no renegotiations or fees adjustments after the grant-in-aid limit  
was increased to cost of attendance on August 1, 2015. See, e.g.,  
Big 12 Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. at 121,  
125-28. No evidence was presented that student-athlete  
compensation or amateurism have even been discussed with media  
partners in this context, suggesting that these issues are not of  
concern to media partners and that renegotiation based on these  
issues is unlikely. See, e.g., Conference USA Rule 30(b)(6)  
witness (Judy McLeod) Dep. Tr. 149-50; Big 12 Rule 30(b)(6)  
witness (Robert Bowlsby) Dep. Tr. 125-28.

1 created after the O'Bannon I trial and allows post-eligibility aid  
2 from the university, on top of a grant-in-aid, of up to \$7,500 for  
3 education-related endeavors, including graduate school, as well as  
4 study abroad, or an internship. Perlman Dep. Tr. 127-28. This  
5 natural experiment shows two things. First, at least one school  
6 has the desire to offer post-eligibility benefits such as these  
7 provided on top of a grant-in-aid. Second, there is no evidence  
8 that the creation of this program has reduced consumer demand for  
9 Nebraska sports or Division I basketball or FBS football in  
10 general. The evidence is to the contrary: Nebraska's chancellor  
11 testified that this program is consistent with amateurism because  
12 it advances "the kinds of activities that higher education are  
13 involved with" and that Nebraska's "Athletic Director talks about  
14 it at every opportunity, public and private[.]" Perlman Dep. Tr.  
15 at 127-28; see also Trial Tr. (Rascher) 19-20; Rascher Direct  
16 Testimony Declaration ¶¶ 206-07; Trial Tr. (Elzinga) at 434-37.

17 Dr. Rascher's analysis and opinions, therefore, support a  
18 finding that, because the described increases to student-athlete  
19 compensation did not lead to a decrease in consumer demand,  
20 similar future increases in compensation would not reduce demand.

21 Some defense witnesses corroborated Dr. Rascher's  
22 conclusions. See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis)  
23 Dep. Tr. at 112 (negotiated media contracts for NCAA, testified  
24 that increase of grant-in-aid limit to cost of attendance did not  
25 affect consumer demand for FBS football and Division I  
26 basketball); Big 12 Rule 30(b)(6) witness (Robert Bowsby) Dep.  
27 Tr. at 67-68 (he is not aware of "any impact on revenue" based on  
28

1 "greater meals and snacks," and "with respect to Big 12 members'  
2 ability to provide cost of attendance scholarships").

3 Defendants try to show that consumer demand is dependent on  
4 maintaining current restrictions on student-athlete compensation  
5 by presenting the opinions of a survey expert, Dr. Bruce Isaacson,  
6 who concluded that "amateurism" is an "important" factor in  
7 consumers' decision to watch or attend college sports, and is an  
8 "important reason for the popularity of college sports." Dr.  
9 Bruce Isaacson Direct Testimony Declaration ¶¶ 24, 26, 160, 13,  
10 Docket No. 883-3. Dr. Isaacson surveyed 1,086 consumers of  
11 college football and basketball, id. ¶¶ 111, 114, on-line to  
12 determine the reasons why they watch college sports. One of the  
13 reasons that respondents could select was that student-athletes  
14 are "amateurs and/or not paid." He also asked whether consumers  
15 would favor or oppose certain compensation scenarios.

16 Dr. Isaacson's survey results and the inferences he draws  
17 from them do not establish or reliably indicate that a  
18 relationship exists between the challenged compensation limits and  
19 consumer demand for Division I basketball and FBS football.

20 First, the Court is not persuaded that the selection by some  
21 respondents of the "amateurs and/or not paid" option as a reason  
22 for viewing college sports sheds any light on the question of  
23 whether the challenged compensation limits, or increases in them,  
24 would cause those respondents to view fewer college sports events.  
25 Dr. Isaacson did not define "amateurs" or "not paid" in his  
26 survey, or determine what either of those terms meant to  
27 respondents. Trial Tr. (Isaacson) at 1907-09. Worse, the use of  
28 the phrase "amateurs and/or not paid" renders the responses

1 hopelessly ambiguous. (emphasis added). The phrase includes the  
2 response "amateurs or not paid," implying that a respondent could  
3 believe that an athlete could be an amateur though not unpaid.  
4 Dr. Isaacson "intend[ed] [the terms] to be synonymous" but admits  
5 that he provided no indication to respondents in his survey that  
6 they were so intended. Id. at 1908-09.

7 Even so, Dr. Isaacson's conclusion that "amateurism" is an  
8 "important" factor in consumers' decision to watch or attend  
9 college sports is an overstatement, because only 31.7% selected  
10 the "amateur and/or not paid" option as a reason why they watch or  
11 attend college sports, meaning that the great majority of  
12 respondents, 68.3%, gave other reasons. Isaacson Direct Testimony  
13 Declaration ¶¶ 153, 24, 26; Trial Tr. (Isaacson) at 1903-04. More  
14 respondents selected the options "I like it when certain colleges  
15 win or lose" and "my friends or family watch games, or attend  
16 games in person" than the "amateurs and/or not paid" option (which  
17 was the third most common selection). This suggests that these  
18 more-frequently selected reasons are more "important" factors for  
19 viewing college sports than "amateurism and/or not paid."  
20 Moreover, the respondents who selected the "amateurs and/or not  
21 paid" option selected an average of more than four other reasons  
22 they watch college sports. Trial Tr. (Isaacson) at 1902.

23 Second, Dr. Isaacson did not show that opposition or support  
24 for the hypothetical compensation scenarios he asked about would  
25 serve as a reliable indicator of how consumers would actually  
26 behave if the scenarios were implemented. Trial Tr. (Isaacson) at  
27 1893; Dr. Hal Poret Direct Testimony Declaration ¶ 28. Dr.  
28 Isaacson tested four compensation scenarios: (1) academic

1 incentive payment; (2) graduation incentive payment; (3) off-  
2 season expenses; and (4) unlimited payments. Isaacson Direct  
3 Testimony Declaration ¶ 126. He also tested a fifth “control”  
4 scenario that was not related to compensation. Id. ¶ 130. Dr.  
5 Isaacson’s survey did not ask whether respondents would view fewer  
6 or more Division I basketball and FBS football events if  
7 additional compensation were provided to student-athletes. Dr.  
8 Isaacson acknowledged that measuring consumer preferences is “not  
9 the same thing” as measuring future consumer behavior, and that he  
10 did not do any work to measure any relationship between the two.<sup>22</sup>  
11 See Trial Tr. (Isaacson) at 1894-96; see also id. (testified at  
12 his deposition that his “survey does not attempt to measure future  
13 behavior”); see also Poret Direct Testimony Declaration ¶ 28 and  
14 Poret Rebuttal Testimony ¶¶ 2-3 (opposition to a scenario does not  
15 translate to a change in behavior if the scenario were  
16 implemented).<sup>23</sup>

17 By contrast, Plaintiffs’ survey expert, Dr. Hal Poret, did  
18 attempt to measure the potential impact on future consumer  
19 behavior of providing additional compensation.<sup>24</sup> He conducted a

20 \_\_\_\_\_  
21 <sup>22</sup> The NCAA offered in O’Bannon a survey by Dr. J. Michael  
22 Dennis that did ask respondents about their future behaviors.  
23 This survey suffered from other defects. See O’Bannon I, 7 F.  
24 Supp. 3d at 975-76; O’Bannon II, 802 F.3d at 1059.

25 <sup>23</sup> Moreover, Dr. Isaacson acknowledged that he was “not  
26 providing an opinion on whether or not opposition to a particular  
27 benefit relates to amateurism. I’m going to leave that to you and  
28 the NCAA and the conferences.” See Trial Tr. (Isaacson) at 1912.

<sup>24</sup> The Court finds that Dr. Poret’s survey results and the  
conclusions he draws therefrom regarding future consumption of  
Division I basketball and FBS football are based on a methodology  
that is sufficiently reliable. Dr. Poret showed that his use of

1 survey of 2,696 people who watch or attend college basketball or  
2 football to assess the extent to which certain scenarios involving  
3 increased compensation, if permitted by conferences and schools,  
4 would cause them to watch or attend these sports events more or  
5 less often. Poret Direct Testimony Declaration ¶¶ 4, 17 and n.2,  
6 18. Unlike Dr. Isaacson, Dr. Poret specifically asked respondents  
7 to indicate whether scenarios whereby compensation provided by  
8 conferences or schools would include some compensation that is not  
9 currently permitted or is currently limited would affect their  
10 viewership or attendance and, if so, to indicate the extent. Id.  
11 ¶¶ 44-47. Dr. Poret tested scenarios involving (1) a healthcare  
12 fund; (2) an academic incentive payment of up to \$10,000 per  
13 school year; (3) a one-time graduation incentive payment of up to  
14 \$10,000; (4) a post-eligibility undergraduate scholarship; (5) a  
15 work-study payment; (6) off-season expenses; (7) a graduate school  
16 scholarship for the cost of attendance; and (8) a post-eligibility  
17 study abroad scholarship. Poret Direct Testimony Declaration ¶  
18 24. Dr. Poret concluded, based on the survey responses, that  
19 viewership and attendance would not be negatively impacted if the  
20 scenarios he tested were implemented individually. Id. ¶ 59;  
21 Trial Tr. (Poret) at 1792, 1795. Dr. Poret's survey, therefore,  
22 supports the finding that the current limits on student-athlete  
23 compensation, to the extent they relate to the scenarios that he  
24 tested, are not necessary to preserve consumer demand.

25 \_\_\_\_\_  
26 controls and other aspects of his survey's design allowed him to  
27 assess reliably the potential impact on future consumer behavior  
28 of implementing the scenarios he tested. Poret Rebuttal Testimony  
¶¶ 12-26; Trial Tr. (Poret) at 1713-16; 1725-26; 1729; 1781-82;  
1784.

1 Defendants presented no evidence that NCAA bylaws limiting  
2 compensation are enacted based on any analysis of consumer  
3 demand.<sup>25</sup> Limits on student-athlete compensation and benefits are  
4 set through "a deliberative process" of NCAA members, Trial Tr.  
5 (Lennon) at 1309, and are based on the "delicate balancing that  
6 the membership . . . engage[s] in," Trial Tr. (Lennon) at 1552.  
7 That deliberative process and delicate balancing do not appear to  
8 include considering any possible effects on consumer demand.  
9 Indeed, Lennon, who has worked for the NCAA for more than thirty  
10 years, testified that he does not recall any instance in which any  
11 study on consumer demand was considered by the NCAA membership  
12 when making rules about compensation. Trial Tr. (Lennon) at 1550-  
13 51. Lennon did not offer much insight as to what the NCAA  
14 membership does consider when it decides where to set a  
15 compensation cap, and the explanations that he did provide suggest  
16 that the caps are set arbitrarily.

17 Defendants also rely on the testimony of lay witnesses to try  
18 to establish a connection between the compensation limits and  
19 consumer demand. These lay witnesses presented their own personal  
20 opinions and those of unidentified other people with whom they

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21 <sup>25</sup> Some witnesses referred to studies conducted by third  
22 parties at the request and for the use of conferences. See Trial  
23 Tr. (Scott) at 1167, 1153-57; D0541 (third-party study  
24 commissioned by the Pac-12, dated January 2014); Trial Tr. (Scott)  
25 1149-53, 1172; D0683 (third-party study commissioned by the Big  
26 Ten, dated September 21, 2009); Trial Tr. (Smith) at 1412-18;  
27 D0239 (third-party study commissioned by the Big Ten, dated June  
28 3, 2008). There is no evidence that these or any other studies  
were considered by the NCAA when enacting any bylaws limiting  
compensation. These studies were admitted for a limited purpose  
and not for the truth of the matter asserted therein because their  
contents constitute hearsay within hearsay.



1 have spoken. This testimony posits that consumers oppose  
2 increasing compensation to student-athletes and support what the  
3 witnesses described as amateurism. The witnesses imply that these  
4 consumers would watch fewer games if they did not believe that  
5 student-athletes were amateurs. But there is no way to know what  
6 that concept means to the consumers these witnesses reported on.

7 Some lay defense witnesses testified that, absent the  
8 challenged NCAA limits in their current form, conferences would  
9 set limits, or not, based upon different values and resources, and  
10 that could diminish the consumer appeal of national tournaments or  
11 rivalries or lead to conference realignment. See, e.g., Trial Tr.  
12 (Scott) at 1141-1143. But, at present, there is wide variation  
13 among conferences and their members in Division I in terms of the  
14 compensation they permit their student-athletes to receive within  
15 the current NCAA limits.<sup>26</sup> Further, resources, budgets, revenues,  
16 and performance among schools and conferences that continue to  
17 play each other in Division I already vary significantly, and the  
18 disparities that exist are longstanding.<sup>27</sup> There is no evidence

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19  
20 <sup>26</sup> For example, the Ivy League does not offer any athletics-  
21 based scholarships. Military academies offer no athletics  
22 scholarships but pay their students as salaried employees. Some  
23 conferences, like the Big 12, require their members to offer  
24 athletics scholarships up to the maximum allowed by the NCAA.  
25 Some schools in other conferences cap athletics-related  
26 compensation at the cost of attendance (in other words, these  
27 schools do not permit students to, for example, receive a full  
28 cost-of-attendance grant-in-aid on top of a Pell grant). Rascher  
Direct Testimony Declaration ¶¶ 41, 96; Big 12 Handbook J0005 at  
0017.

<sup>27</sup> See e.g., Trial Tr. (Aresco) at 1054-55 (disparities in  
revenue and branding opportunities currently exist between  
conferences, and schools with fewer resources still play schools  
with greater resources); Bowsby Dep. Tr. at 38-39 (agreeing that

1 that this lack of uniformity detracted from the popularity of  
2 national tournaments or rivalries. Rascher Direct Testimony  
3 Declaration ¶¶ 97-98. The variety in compensation models and  
4 resources across schools and conferences may, in fact, promote the  
5 popularity of national tournaments. See Trial Tr. (Elzinga) at  
6 546 (agreeing that a "david/goliath story" is appealing to  
7 consumers in the national NCAA men's basketball tournament, March  
8 Madness, because it provides "differentiation" due to the schools'  
9 varying economic models and strengths); id. at 483.<sup>28</sup> Moreover,  
10 this testimony is further undermined by the fact that other rules  
11 that assist in promoting equity among conferences, such as the  
12 limits on total scholarships, are not being challenged in this  
13 litigation and would not be modified through any of the proposed  
14 alternatives.<sup>29</sup>

15 Further, even if modifications to the NCAA's current  
16 compensation scheme resulted in some conferences realigning their

17 \_\_\_\_\_  
18 the concept of "competitive equity is largely a mirage" because  
19 "in reality, there hadn't been much balance in the past"); Slive  
20 Dep. Tr. at 39 ("the effort to ensure a level playing field was an  
21 unattainable concept").

22 <sup>28</sup> See also Lynn Holzman Dep. Tr. 129-30 (NCAA Vice President  
23 for Women's Basketball, testifying that under current NCAA rules  
24 for March Madness, "institutions with different resources,  
25 institutions that provide athletic scholarships and some that  
26 don't end up being matched up and play against one another. So if  
27 there's an institution that permissibly is providing a benefit or  
28 something to student-athletes, under the current construct of the  
29 championship, an institution that does not provide the same thing,  
30 in my opinion, would be okay for them to play one another").

31 <sup>29</sup> See Trial Tr. (Aresco) at 1025-26 (the "larger schools"  
32 cannot "take 200 of the best student athletes" because "there are  
33 scholarship limits, 85 per school. And that was imposed in 1992.  
34 And it was to enhance the competition in college football").

1 membership because of differences in values, the argument that  
2 this would harm college sports as a product is unconvincing.  
3 Changes in conference membership have happened frequently in the  
4 last two decades. See Trial Tr. (Elzinga) at 485-87 (it is a  
5 "well-established fact" that "dozens and dozens of teams have"  
6 changed conferences over the years and conference changes "have  
7 increased in the past two decades"); Stip. Facts ¶ 10, Docket No.  
8 1098.

9 The record does not support a finding that media or other  
10 commercial agreements would be renegotiated or terminated if  
11 conferences realigned. Some of the conference media agreements in  
12 the record contain clauses that permit the networks to renegotiate  
13 fees or terminate the agreement in the event that certain schools  
14 leave the conference. There is no evidence that any agreement was  
15 renegotiated or terminated in the past as a result of realignment.  
16 Instead, when the Big East experienced a significant realignment  
17 and ultimately became the AAC in July 2013, ESPN did not terminate  
18 its contract with the Big East/AAC; in fact, the existence of this  
19 contract was described as one of the reasons why the Big East/AAC  
20 was able to "recover" from the realignment. Trial Tr. (Aresco) at  
21 1023, 1048; J1509 at 0003-05.

22 Defense lay witnesses also testified that consumer demand for  
23 Division I basketball and FBS football is driven by consumers'  
24 perception that student-athletes are, in fact, students. See,  
25 e.g., Bowsby Dep. Tr. at 12-13 ("This really isn't about amateurs  
26 or not amateurs. This is . . . about the concept of student  
27 athlete."); NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at  
28 166 (he would draw the line to limit pay in the context of

1 consumer demand as follows: "the line is if it's now not  
2 about . . . going to school, but now it's about paying somebody to  
3 play a sport"); Trial Tr. (Blank) at 954, 869 (fans of college  
4 sports "love seeing their fellow students out there playing");  
5 Trial Tr. (Blank) at 949-50 (viewership of college sports is based  
6 on student-athletes being "students at the university"); Trial Tr.  
7 (Smith) at 1411-12 (same); Trial Tr. (Smith) at 1394-95, 1407-08  
8 (the "collegiate fan is more aligned to the educational experience  
9 that college sports provide"). Michael Aresco, the commissioner  
10 of the AAC who previously worked for CBS and ESPN, noted that the  
11 programming of televised college sports focuses on "the college  
12 experience," which includes the campus, academics, and community  
13 service. See Trial Tr. (Aresco) at 1032. This testimony does not  
14 establish that the challenged rules have a connection to consumer  
15 demand, however, because student-athletes would continue to be  
16 students in the absence of the challenged rules. Fellow students,  
17 alumni, and neighbors of the schools would continue to identify  
18 with them.

19 The Court does credit the importance to consumer demand of  
20 maintaining a distinction between college sports and professional  
21 sports. In addition to the fact that college sports are played by  
22 students actually attending the college, student-athletes are not  
23 paid the very large salaries that characterize the professional  
24 sports leagues that many student-athletes aspire to, the National  
25 Basketball Association and the National Football League.

26 Some lay witnesses, particularly those who have professional  
27 experience with third-party networks such as CBS or ESPN,  
28 testified that the value of media rights contracts has a

1 relationship to the popularity of college sports as being  
2 distinguishable from professional sports. Trial Tr. (Aresco) at  
3 1004, 1032-35; see also NCAA Rule 30(b)(6) witness (Mark Lewis)  
4 Dep. Tr. at 65-66 ("the people that are our fans who create that  
5 consumer demand would feel differently if college sports looked  
6 like professional sports"); id. at 99 ("if the college game looks  
7 to be professional sports, less people will watch it" and "there  
8 won't be the same demand" and "revenue will decline").

9 The Court credits this testimony and finds that some of the  
10 challenged compensation limits may have some effect in preserving  
11 consumer demand to the extent that they serve to support the  
12 distinction between college sports and professional sports. That  
13 distinction cannot be based on student-athletes not receiving any  
14 compensation and benefits on top of a grant-in-aid; this is  
15 because student-athletes currently can receive thousands or tens  
16 of thousands of dollars in such compensation, related and  
17 unrelated to education, while remaining NCAA amateurs.  
18 Accordingly, it follows that the distinction between college and  
19 professional sports arises because student-athletes do not receive  
20 unlimited payments unrelated to education, akin to salaries seen  
21 in professional sports leagues.

22 Rules that prevent unlimited payments such as those observed  
23 in professional sports leagues, therefore, are procompetitive when  
24 compared to having no such restrictions. Such rules include those  
25 challenged that are necessary to limit compensation and benefits  
26 unrelated to education. The same is true with respect to the  
27 challenged limit on grants-in-aid; because the difference between  
28 the fixed costs of tuition, room, board, and books and the cost of

1 attendance is paid to student-athletes in cash, removing the limit  
2 on the grant-in-aid could result in unlimited cash payments.

3       However, rules that limit or prohibit non-cash education-  
4 related benefits do not serve to foster consumer demand by  
5 maintaining a distinction between college and professional sports.  
6 The value of such benefits, like a scholarship for post-  
7 eligibility graduate school tuition, is inherently limited to its  
8 actual value, and could not be confused with a professional  
9 athlete's salary. Further, the relationship of the benefits to  
10 education would serve to emphasize that the recipients are  
11 students, and not professional athletes. A subset of these  
12 education-related rules, namely those that limit cash or cash-  
13 equivalent benefits, such as academic or graduation awards or  
14 incentives, have a procompetitive effect to the extent that they  
15 prevent unlimited cash payments similar to those observed in  
16 professional sports. As will be discussed in more detail below in  
17 the section on less restrictive alternatives, the current  
18 challenged rules that limit education-related benefits and  
19 compensation are more restrictive than necessary to accomplish  
20 this procompetitive effect.

21       B. Integration

22       Defendants' second remaining procompetitive justification is  
23 that the challenged limits promote the integration of student-  
24 athletes with their academic communities, which improves the  
25 college education student-athletes receive.<sup>30</sup> Within this rubric,

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26       <sup>30</sup> In this context, Defendants also argue that academic  
27 integration itself plays a role in preserving consumer demand for  
28 college sports. This is merely a restatement of the argument that  
the challenged limits preserve consumer demand because consumers

1 Defendants present evidence that student-athletes benefit from  
2 receiving a college education, that the challenged limits help to  
3 incentivize academics and that the limits help integrate student-  
4 athletes into their academic communities where otherwise a “wedge”  
5 might be created.

6 Defendants have not shown that the challenged rules have an  
7 effect on improving or promoting integration. While the evidence  
8 shows that student-athletes benefit from receiving a college  
9 education, it does not support the notion that any such benefits  
10 arise out of, or are caused by, the challenged compensation  
11 limits.

12 Defendants rely on the expert testimony of Dr. James Heckman  
13 to support the proposition that student-athletes benefit from  
14 their college education. Plaintiffs quarrel with Dr. Heckman’s  
15 methodology,<sup>31</sup> but accepting his opinion that student-athletes  
16 benefit from attending college, this opinion says nothing about  
17 whether the challenged compensation rules cause the benefits that  
18 he observed. Indeed, Dr. Heckman conceded as much at trial. See  
19 Trial Tr. (Heckman) at 564-66. Dr. Heckman also conceded that  
20 additional compensation could improve outcomes for student-  
21 athletes, which contradicts the notion that the challenged  
22 compensation limits have a positive effect on student-athlete

23 \_\_\_\_\_  
24 value amateurism. Indeed, the evidence that Defendants offer to  
25 support both of these arguments overlaps. The Court considers  
26 this argument to be part of the consumer demand justification.

27 <sup>31</sup> Dr. Heckman’s analysis was based on data whose temporal  
28 scope did not capture the class period in this litigation, and did  
not include any information about whether the student-athletes  
actually received an athletics scholarship (and if so, the amount  
of such scholarship) or any of the other types of compensation  
that are at issue in this case.

1 outcomes. Trial Tr. (Heckman) at 597 (if a student-athlete  
2 received "another \$10,000" then the "student is clearly better  
3 off. No question about it").

4 Defendants also proffer lay witness testimony on the benefits  
5 of college education. None of this shows a connection between the  
6 challenged compensation limits and the benefits of the education.  
7 Some student-athletes testified that they gained skills and  
8 learning opportunities, but they did not attribute these benefits  
9 to the caps on their grant-in-aid athletic scholarships. See,  
10 e.g., Trial Tr. (Hartman) at 825-27.

11 Dr. Heckman's opinion that student-athletes would be  
12 incentivized to spend time on athletics to the detriment of  
13 academics if they received additional compensation is undermined  
14 by evidence suggesting that additional compensation can have a  
15 positive impact on academic achievement. See, e.g., NCAA  
16 Research: Trends in Graduation Success Rates and Federal  
17 Graduation Rates at NCAA Division I Institutions (Nov. 2017),  
18 J0018 at 0026-29; see also Trial Tr. (Petr) 1884-85 (showing that  
19 graduation rates for student-athletes in Division I basketball and  
20 FBS football have increased since 2015, when permissible  
21 athletics-related compensation increased).

22 Defendants point to policies that assist with student-  
23 athletes' involvement in academics and other aspects of university  
24 life, but these policies are not related to the challenged  
25 compensation limits. See, e.g., Trial Tr. (Blank) at 887-89  
26 (student-athletes at Wisconsin are not limited in their selection  
27 of major or to athlete-only dorms, and are permitted to miss only  
28 a certain number of classes in a season); Trial Tr. (Smith) at



1 1398-99 (Ohio State requires student-athletes to live on campus  
2 for two years); Trial Tr. (Hatch) at 1997 (same at Notre Dame);  
3 Division I Bylaw 17.1 (governing required time off); Emmert Dep.  
4 Tr. at 209-15 (proposals to reduce athletics time demands).

5 Defendants next contend that the challenged rules help  
6 prevent a "wedge" between student-athletes and other students that  
7 could result if student-athletes received compensation that was  
8 not available to ordinary students. Defendants again rely on Dr.  
9 Heckman, who opined that academic achievement incentives would  
10 isolate student-athletes "from the rest of the student body" and  
11 affect the "camaraderie in these various institutions." Trial Tr.  
12 (Heckman) at 631-33. Defendants also point to testimony, by  
13 university administrators and former student-athletes, that  
14 additional compensation for student-athletes would create tensions  
15 and resentment between student-athletes and non-athletes, as well  
16 as among student-athletes to the extent that any additional  
17 compensation is not provided equally. See, e.g., Trial Tr.  
18 (Hatch) at 2000-01; Trial Tr. (Smith) at 1409-10; Jemerigbe Dep.  
19 Tr. at 294-95.

20 This testimony is outweighed by the fact that income  
21 disparities inevitably exist as a result of family background or  
22 wealth derived from other sources. See e.g. Trial Tr. (Blank) at  
23 920-21 (Wisconsin students come from different socioeconomic  
24 backgrounds). Moreover, levels of student-athlete compensation  
25 vary already. The amount of a cost-of-attendance grant-in-aid is  
26 calculated by each school with the discretion to adjust it on an  
27 individual-student basis. J1517 at 0002; Stip. Facts ¶¶ 3-6,  
28 Docket No. 1093; NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr.

1 at 164. Another reason why compensation can vary among student-  
2 athletes is that the NCAA permits them to receive their grant-in-  
3 aid on top of federal Pell grants, which the government awards to  
4 some but not all student-athletes. Also variable is the payment  
5 of SAF and AEF benefits, which are not limited on an individual-  
6 student basis, and the awards incidental to athletics  
7 participation, including performance awards paid in Visa gift  
8 cards. Athletes who perform well in the Olympics can receive  
9 unlimited compensation for their performance; such compensation  
10 has reached six figures. NCAA Rule 30(b)(6) witness (Mark Lewis)  
11 Dep. Tr. at 50-51. And athletes in certain sports, such as  
12 tennis, can receive up to \$10,000 in prize money per year prior to  
13 enrolling in college and still compete as amateurs. See Division  
14 I Bylaw 12.1.2.4.2.1. At least for some, these disparities are  
15 not problematic. See, e.g., Trial Tr. (Jenkins) at 735-736 (he  
16 did not resent a football teammate who received more than a  
17 million dollars from a baseball professional league as a  
18 recruitment bonus).

19 In O'Bannon I, the Court found that the challenged limits may  
20 help integrate student-athletes with their academic communities by  
21 preventing a wedge, which may improve their college education.  
22 See 7 F. Supp. 3d at 980-81. The Ninth Circuit affirmed that  
23 finding, although it noted that on appeal the NCAA focused its  
24 argument regarding procompetitive justifications entirely on the  
25 amateurism justification. O'Bannon II, 802 F.3d at 1072.  
26 Nonetheless, support for the Court's finding with respect to  
27 integration in O'Bannon I was weak, and it is weaker now.  
28 Evidence was presented at this trial that did not exist at the

1 time of the O'Bannon trial showing that the challenged rules are  
2 not necessary to prevent a wedge between student-athletes and  
3 other students. This is the natural experiment resulting from the  
4 increase to the cost of attendance for grants-in-aid. As  
5 discussed above, since 2015, student-athletes have been allowed to  
6 receive thousands of dollars in increased compensation and  
7 benefits from full cost-of-attendance grants-in-aid and other  
8 payments. Rascher Direct Testimony Declaration ¶¶ 52, 54, 75, 78-  
9 81; Noll Direct Testimony Declaration ¶ 12; P0104; P0105; P0106.  
10 Yet, there is no evidence that, since 2015, student-athletes have  
11 experienced more separation. The NCAA's Rule 30(b)(6) witness,  
12 Kevin Lennon, has acknowledged that there is no evidence that the  
13 recent increase in student-athlete compensation has created a  
14 wedge. Trial Tr. (Lennon) at 1355-58 (agreeing that there is no  
15 evidence that increased compensation that student-athletes have  
16 received because of the increase of the grant-in-aid limit to cost  
17 of attendance and because of benefits that became permissible or  
18 expanded recently, such as premiums for loss-of-value insurance  
19 against loss of future professional wages, unlimited food, and  
20 travel expenses for family members for certain events, has created  
21 a wedge).

22 In fact, the challenged limits may serve to increase  
23 separation among students, not decrease or prevent it. According  
24 to Dr. Perlman, the University of Nebraska chancellor, the  
25 challenged compensation limits result in schools spending their  
26 recruitment resources on "unregulated frills" in facilities that  
27 benefit student-athletes exclusively, which promotes separation.  
28 See, e.g., Perlman Dep. Tr. at 60-61; see also Bilas Dep. Tr. at

1 105-06 (Kentucky's "opulent" facility for basketball players  
2 "functions to segregate them from the normal student population");  
3 Emmert Dep. Tr. at 24-29 (expenditures on training facilities,  
4 stadiums, and student-athlete living quarters are not limited by  
5 NCAA). Limits on compensation may constrain student-athletes'  
6 financial ability to engage in social activities with other  
7 students. See, e.g., Trial Tr. (Alston) at 680 (additional  
8 compensation would have permitted him to "mingle" more with non-  
9 athletes). Accordingly, the evidence here does not support the  
10 notion that the challenged rules promote integration by preventing  
11 a wedge.

12 Finally, Defendants proffer Dr. Heckman's opinion that a  
13 "substantial change" to what he terms the "Collegiate Model" would  
14 alter the incentives of "participants/stakeholders in the college  
15 sports world," and would result in a "new equilibrium." Heckman  
16 Direct Testimony Declaration ¶ 14. This opinion does not appear  
17 to be related to the integration theory. Further, Dr. Heckman did  
18 not conduct any empirical, econometric, or quantitative analysis  
19 to distinguish "substantial" changes from those that are not; when  
20 asked at trial to describe exactly what would qualify as a "large"  
21 or "substantial" change, he referred to dollar amounts that "have  
22 been put out in the literature" or that others had mentioned  
23 during trial, but he declined to adopt any such numbers as what he  
24 believes, based on his own work, is "large" or "substantial."  
25 Trial Tr. (Heckman) at 607-11.

26 Because Defendants have not met their burden to show that the  
27 challenged limits are procompetitive due to an effect on promoting  
28 integration, by preventing a wedge or otherwise, the Court finds

1 that Defendants have not shown that the challenged rules are  
2 justified based on this theory.

3 VI. Rule of Reason: Alternatives to the Challenged Restraints

4 The Court finds that the current rules, read together, are  
5 more restrictive than necessary to prevent demand-reducing  
6 unlimited compensation indistinguishable from that observed in  
7 professional sports. Plaintiffs propose three alternatives to the  
8 challenged restraints as less restrictive.

9 First, they propose an alternative that would prohibit the  
10 NCAA from placing any limits on compensation or benefits, whether  
11 or not related to education, given in exchange for athletic  
12 services. This would permit individual conferences to set limits  
13 on such compensation or benefits.

14 Second, they propose an alternative that would allow the NCAA  
15 to continue limiting the compensation or benefits given in  
16 exchange for athletic services except for (1) benefits that are  
17 related to education, and (2) the seventeen benefits incidental to  
18 athletics participation that the NCAA currently allows and caps.  
19 These are listed in Plaintiffs' Opening Statement, Appendix C,  
20 Docket No. 868-3. While these could no longer be capped by the  
21 NCAA, limits on these two types of compensation and benefits could  
22 nonetheless be maintained or set by individual conferences.

23 Third, Plaintiffs propose an alternative that would allow the  
24 NCAA to continue to limit the compensation or benefits given in  
25 exchange for athletic services, but would not allow NCAA limits on  
26 compensation and benefits related to education. Again, limits on  
27 education-related benefits could be set by individual conferences.  
28

1 For all of the proposed alternatives, any permissible limits  
2 could be enforced by the NCAA, the conferences, or the schools.  
3 Schools, of course, could continue to set their own limits on  
4 their offers.

5 A. First and Second Proposed Alternatives

6 The Court finds that Plaintiffs' first proposed alternative,  
7 which would eliminate all NCAA limits on compensation, would not  
8 be as effective as the current rules in preserving consumer demand  
9 for Division I basketball and FBS football; that alternative  
10 leaves open the possibility that at least some conferences would  
11 allow their schools to offer student-athletes unlimited cash  
12 payments that are unrelated to education. Such payments could be  
13 akin to those observed in professional sports leagues. Payments  
14 of that nature could diminish the popularity of college sports as  
15 a product distinct from professional sports. The Court notes that  
16 Plaintiffs' survey expert Dr. Poret did not test a proposed  
17 scenario of cash compensation greater than \$10,000 in value.

18 Plaintiffs and their experts strenuously argue and opine,  
19 perhaps correctly, that if this alternative were adopted,  
20 conference officials, as rational economic actors, would not act  
21 contrary to their members' aggregate economic interests, and would  
22 not choose to pay amounts of cash compensation unrelated to  
23 education that would be demand-reducing for Division I sports.  
24 Whether by survey or trial and error, these actors would  
25 eventually discover the level of cash compensation to student-  
26 athletes that would encourage competition for recruits but would  
27 not reduce the demand for their product. Be that as it may, the  
28 inevitable trial-and-error phase could result in miscalculations

1 by one or more conferences as to levels of cash pay that would not  
2 reduce demand for the product, and this could produce unintended  
3 consequences.

4 It is to be hoped that gradual change will be instructive.  
5 If it were persuaded to do so, the NCAA could conduct market  
6 research and allow gradual increases in cash compensation to  
7 student-athletes to determine an amount that would not be demand-  
8 reducing.

9 Plaintiffs' second proposed alternative likewise would not be  
10 as effective in achieving the procompetitive effect of the  
11 challenged rules to the extent that it would remove the NCAA caps  
12 on athletics participation awards and other compensation and  
13 benefits that are unrelated to education. It would prohibit NCAA  
14 caps on cash or cash-equivalent awards or incentives. Without  
15 such limits, conferences could suddenly decide to allow the award  
16 of any sum of cash to some or all student-athletes. This could  
17 lead to unlimited cash payments and the same effect as the first  
18 alternative.

19 B. Third Proposed Alternative as Modified: Prohibiting  
20 Limits on Most Education-Related Payments

21 The Court finds that a less restrictive alternative to the  
22 current set of challenged NCAA limits would be to (1) allow the  
23 NCAA to continue to limit grants-in-aid at not less than the cost  
24 of attendance; (2) allow the association to continue to limit  
25 compensation and benefits unrelated to education; (3) enjoin NCAA  
26 limits on most compensation and benefits that are related to  
27 education, but allow it to limit education-related academic or  
28 graduation awards and incentives, as long as the limits are not

1 lower than its limits on athletic performance awards now or in the  
2 future. This is Plaintiffs' third proposed alternative, as  
3 modified by the Court. It would be less restrictive than the  
4 current compensation rules, allowing for additional compensation  
5 and benefits related to education. It would therefore be less  
6 harmful to competition in the relevant market, but would not  
7 provide a vehicle for unlimited cash payments, unrelated to  
8 education.

9 The types of education-related benefits that could not be  
10 capped by the NCAA would include those that it currently prohibits  
11 or limits in some fashion. These include computers, science  
12 equipment, musical instruments and other items not currently  
13 included in the cost of attendance calculation but nonetheless  
14 related to the pursuit of various academic studies. Also included  
15 would be post-eligibility scholarships to complete undergraduate  
16 or graduate degrees at any school; scholarships to attend  
17 vocational school; expenses for pre- and post-eligibility  
18 tutoring; expenses related to studying abroad that are not covered  
19 by the cost of attendance; and paid post-eligibility internships.  
20 See Trial Tr. (Lennon) at 1559-1565, 1571-72; NCAA Rule 30(b)(6)  
21 witness (Kevin Lennon) Dep. Tr. 195-213; Division I Bylaw  
22 13.2.1.1(k). There may be other education-related benefits that  
23 the NCAA, in an exercise of its good faith judgment, would allow.  
24 Payment for these benefits would be limited to their actual value  
25 and could be provided in kind. For that reason, they would not be  
26 a vehicle for potentially unlimited cash payments.

27 A subset of education-related benefits, namely, cash academic  
28 or graduation awards and incentives, if not capped by the NCAA,



1 could potentially be unlimited and allow for payments  
2 indistinguishable from those received in professional sports.  
3 Accordingly, limits on these awards or incentives may have the  
4 procompetitive effect of preventing professional-style unlimited  
5 cash payments. This alternative would allow the NCAA to place a  
6 limit on such awards, as long as the limit is not less than the  
7 maximum amount of compensation that an individual student-athlete  
8 could receive in an academic school year in participation,  
9 championship, or special achievement awards (combined) under  
10 Division I Bylaw, Article 16, and listed in Figures 16-1, 16-2,  
11 and 16-3 of the Division I Manual, J0024 at 0249-50. (These  
12 figures list the current caps.) If the NCAA increased the current  
13 athletics participation awards limit just described, any limits on  
14 academic or graduation awards and incentives must be increased so  
15 that they are never less than the new athletics participation  
16 awards limit. Allowing the NCAA to cap education-related awards  
17 and incentives at the athletics participation awards limit, which  
18 is an amount that has been shown not to decrease consumer demand  
19 and not to be inconsistent with the NCAA's understanding of  
20 amateurism, would enable the NCAA to prevent unlimited cash,  
21 demand-reducing payments. On the other hand, the NCAA could  
22 decide to set higher limits, or no limits at all, for academic or  
23 graduation awards and incentives.

24 Individual conferences could vote to set or maintain limits  
25 on education-related benefits that the NCAA will not be allowed to  
26 cap. Conferences could also set limits on academic and graduation  
27 awards and incentives. This would not have an anticompetitive  
28 effect because no individual conference dominates nearly the

1 entire market, like the NCAA does. Rascher Direct Testimony  
2 Declaration ¶¶ 160-61. Market concentration would be reduced in  
3 the absence of NCAA caps limiting education-related compensation  
4 and benefits described above. Thus, the third alternative would  
5 be less restrictive than maintaining the current NCAA compensation  
6 scheme. Id. ¶¶ 162, 175.

7 NCAA's latitude to superintend college sports would not be  
8 greatly impacted. This alternative would affect only a small  
9 fraction of the NCAA's rulemaking jurisdiction, namely rules that  
10 limit education-related compensation and benefits.

11 The third alternative as modified would be virtually as  
12 effective as the current rules in achieving the effect on the  
13 preservation of consumer demand for Division I basketball and FBS  
14 football that the Court found here, and its implementation would  
15 not require significant increased costs.

16 1. Virtually as Effective

17 As discussed above, according to Defendants' own witnesses,  
18 consumer demand for Division I basketball and FBS football is  
19 driven largely by consumers' perception that student-athletes are,  
20 in fact, students. Providing additional, even uncapped,  
21 education-related compensation and benefits to student-athletes  
22 would not affect student-athletes' status as students. These  
23 benefits are, by definition, related to education and thus would  
24 be consistent with the values propounded by the NCAA. The  
25 Principle of Amateurism in its constitution, quoted above, holds  
26 that amateur student-athletes should be motivated primarily by  
27 education. Education-related compensation and benefits would  
28 enhance the student-athletes' connection to academics. See, e.g.,

1 Perlman Dep. Tr. at 126-27 ("I think if you're paying them to play  
2 athletics, I think it is inconsistent with the idea of what a  
3 student athlete is. I don't think it's inconsistent to provide  
4 them with benefits that relate to the educational enterprise");  
5 MAC Rule 30(b)(6) witness (Jon Steinbrecher) Dep. Tr. at 189  
6 (compensation above cost of attendance is not problematic because  
7 "the key point" is "linking what we're doing to the pursuit of the  
8 educational opportunities of the individual involved"); Renfro  
9 Dep. Tr. at 84 ("I personally don't see the offer of a post  
10 graduate grant in aid as something that violates the concept of  
11 amateurism[.]"); Bowlsby Dep. Tr. at 13-14 (an inducement to stay  
12 in school an extra year or to graduate "is worthy of  
13 consideration").

14 Other evidence shows that providing additional education-  
15 related compensation would not negatively impact consumer demand.  
16 See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at  
17 269-70 (changes to the NCAA rules regarding compensation and  
18 benefits that have occurred in the last five years have not had  
19 "any adverse impact on consumer demand" because "they're all tied  
20 to education"). Prohibitions or limitations on such benefits have  
21 not been shown to be necessary to preserve the distinction between  
22 college and professional sports in that the benefits are  
23 inherently limited in value and nature and can be provided in  
24 kind, not cash; accordingly, they could not be confused with  
25 professional-style unlimited cash payments. The natural  
26 experiments, discussed above, show that recent increases in  
27 student-athlete compensation, related and even unrelated to  
28 education, have not decreased consumer demand for Division I

1 basketball or FBS football. Dr. Hal Poret's survey also supports  
2 this finding. One of the scenarios he tested was offering  
3 scholarships to complete an undergraduate or graduate degree at  
4 any institution, which he found would not negatively impact  
5 consumer demand. Poret Direct Testimony Declaration ¶¶ 17, 19-24,  
6 26, 59, 131. Dr. Isaacson's survey does not speak to the possible  
7 effects of implementing this alternative, because he did not test  
8 any analogous scenarios.

9 The academic and graduation awards and incentives that would  
10 be allowed with a cap in the same amount as current caps on  
11 athletic performance awards likewise will be virtually as  
12 effective as the current compensation scheme. The amount will not  
13 be demand-reducing because it will be in the same amount that is  
14 allowed for athletic performance awards, which are deemed to be  
15 consistent with amateurism and the preservation of the distinction  
16 between college and professional sports. And because they are  
17 education-related, they will further the perception of the  
18 student-athletes as students.

19 Thus, this alternative set of rules will be as effective as  
20 the current set of challenged rules in preserving consumer demand.  
21 It will also allow the NCAA to maintain the distinction between  
22 college student-athletes playing for educational benefits and  
23 professional athletes playing for large cash salaries unrelated to  
24 education. The education-related amounts that could be expended  
25 under this alternative would be either inherently limited by the  
26 actual value of the benefit, or limited by the NCAA at a level  
27 that has been shown not to be demand-reducing or inconsistent with  
28 amateurism. The NCAA will be permitted to continue to cap grants-

1 in-aid at not less than the cost of attendance. The association  
2 will remain free to bar or limit compensation and benefits that  
3 are unrelated to education, including cash or cash-equivalent  
4 awards for athletic performance. Conferences individually will be  
5 free to limit any benefits that the NCAA could not.

6 2. No Significant Increased Costs

7 The Court finds that the implementation of this third  
8 alternative as modified would not result in significant increased  
9 costs. To the contrary, because this alternative would result in  
10 the elimination of NCAA caps on most education-related benefits,  
11 it would eliminate the need to expend resources on compliance and  
12 enforcement in connection with such caps. The NCAA engages in  
13 rule-making, interpretation, investigations, and enforcement of  
14 its rules.<sup>32</sup> It could employ its systems and resources to the  
15 extent it chooses to limit cash or cash-equivalent academic or  
16 graduation awards and incentives.

17 Individual conferences would not be required to enact their  
18 own rules to limit any education-related benefits that the NCAA  
19 would not be able to cap. Even so, the Court finds no evidence  
20

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21 <sup>32</sup> Starting in August 2019, as a result of the findings and  
22 recommendations of the Commission on College Basketball chaired by  
23 Dr. Condoleezza Rice, see P0060, the NCAA will add a body composed  
24 of "both external investigators with no school or conference  
25 affiliations and select NCAA enforcement staff" to adjudicate  
26 independently cases involving potential violations of NCAA rules  
27 that are deemed "complex." Stip. Facts ¶ 9, Docket No. 1098  
28 (internal quotation marks omitted). Examples of complex cases  
include alleged violations of core NCAA values such as  
prioritizing academics and the well-being of college athletes.  
Id. The perceived need for this new enforcement mechanism is  
unrelated to the changes mandated here, but this mechanism could  
certainly be used to police them.

1 that the costs that could be incurred to do so, if any, would be  
2 significant. Conferences are required to be "legislative  
3 bod[ies]," Division I Constitution Article 3.3.1.1, and thus, they  
4 already can and do enact their own rules. The scope of the  
5 benefits that could not be capped by the NCAA under this  
6 alternative would be those related to education, which is a small  
7 fraction of the conduct that the NCAA currently regulates and  
8 enforces. Any new rulemaking activities by the conferences would  
9 be correspondingly limited.

10 Conferences are also required by the NCAA to have compliance  
11 programs and are involved in ensuring compliance with both NCAA  
12 and conference rules by their members. The changes contemplated  
13 here would not add to their enforcement burden. Conferences also  
14 may require their members to enforce both conference and NCAA  
15 rules. See, e.g., The Big 10 Handbook at J0006 at 0013 (providing  
16 that it "shall be the responsibility of each member university" to  
17 "adhere to and enforce all Conference Rules and Agreements, and  
18 the NCAA Constitution, Bylaws and Regulations and their respective  
19 interpretations"). Thus, schools currently engage in compliance  
20 efforts, including investigations, and enforcement of NCAA and  
21 conference rules relating to student-athlete compensation and  
22 eligibility.<sup>33</sup> Schools also currently interpret NCAA rules. P0146

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23  
24  
25 <sup>33</sup> The NCAA requires all of its members to comply with and  
26 enforce its rules. See, e.g., Division I Constitution Article  
27 1.3.2 (requiring member institutions to "apply and enforce" NCAA  
28 legislation about eligibility, financial aid, and recruiting,  
among other matters); Division I Constitution Article 2.1  
(requiring member schools to maintain "institutional control").

1 at 0002. Implementing this alternative will impose little or no  
2 additional burden on the schools.

3 Some defense witnesses testified that eliminating all of the  
4 challenged NCAA limits would result in new costs to the  
5 conferences and schools. See, e.g., Trial Tr. (Scott) 1180; Trial  
6 Tr. (Smith) at 1520-23. The Court finds that this testimony lacks  
7 specificity or support and thus is speculative. Other evidence  
8 also outweighs or undermines it.<sup>34</sup> Additionally, this testimony  
9 hypothesized the removal of all NCAA compensation limits, which  
10 diminishes its relevance in the context of implementing the third  
11 alternative as modified, whereby only a subset of the challenged  
12 rules will be affected.<sup>35</sup>

13 Finally, to the extent that new enforcement costs at the  
14 conference or school levels are incurred, the NCAA could shift to  
15 its members some of the resources it now spends on enforcement, so  
16 there would be no net new costs. Trial Tr. (Scott) at 1240  
17 (suggesting that any new costs at the conference and school levels  
18 could be offset by such distributions). In sum, the Court finds

19 \_\_\_\_\_  
20 <sup>34</sup> For example, Larry Scott testified that in the absence of  
21 NCAA compensation limits, there would be "significant additional  
22 infrastructure and expense" at the Pac-12 relating to "rule  
23 development." Trial Tr. (Scott) at 1136-37. But other evidence  
24 shows that the Pac-12 already has a system in place for passing  
and amending bylaws relating to student-athlete financial aid and  
otherwise. See Pac-12 Handbook, J0010 at 0008, 0014, 0015, 0017-  
18.

25 <sup>35</sup> Defendants contend in their opening statement that adopting  
26 any of Plaintiffs' proposed alternatives would result in  
27 conference realignment, which would entail increased costs. As  
28 discussed above, conference realignment is common and the evidence  
does not support a finding that adopting the third alternative  
would result in conference realignment.

1 that any new costs of implementing this alternative would not rise  
2 to the level of "significant."

3 The Court notes that it asked Defendants several times,  
4 during the closing argument hearing held on December 18, 2018, and  
5 previously, to propose, based on their superior knowledge of the  
6 NCAA and its members and their functions, adjustments to the  
7 challenged rules or to Plaintiffs' proposed less restrictive  
8 alternatives that would be more workable from their perspective.  
9 They offered none.

#### 10 CONCLUSIONS OF LAW

##### 11 I. Legal Standard under Section 1 of the Sherman Act

12 Section 1 of the Sherman Act makes it unlawful to form a  
13 "contract, combination in the form of trust or otherwise, or  
14 conspiracy, in restraint of trade or commerce among the several  
15 States[.]" 15 U.S.C. § 1. "To establish a claim under Section 1  
16 of the Sherman Act, Plaintiffs must show 1) that there was a  
17 contract, combination, or conspiracy; 2) that the agreement  
18 unreasonably restrained trade under either a per se rule of  
19 illegality or a rule of reason analysis; and 3) that the restraint  
20 affected interstate commerce." Cnty. of Tuolumne v. Sonora Cmty.  
21 Hosp., 236 F.3d 1148, 1155 (9th Cir. 2001) (citation and internal  
22 quotation marks omitted).

23 Here, Plaintiffs challenge the NCAA rules that generally (1)  
24 cap at the cost of attendance grants-in-aid they may receive for  
25 their athletic services, and (2) limit the additional compensation  
26 and benefits that they can receive in addition to a grant-in-aid  
27 athletic scholarship, which have a monetary value above the cost  
28 of attendance. Plaintiffs contend that Defendants enact these



1 limits by exercising their monopsony power by way of price-fixing  
2 agreements that are made and enforced through the NCAA's bylaws.  
3 Plaintiffs contend that they would receive more compensation in  
4 exchange for their athletic services in the absence of these  
5 limits.

6 As discussed in the findings of fact above, on summary  
7 judgment the Court found no genuine dispute of material fact as to  
8 the existence of an agreement among Defendants in restraint of  
9 trade that affects interstate commerce, which satisfies the first  
10 and third elements of a Section 1 claim. Specifically, Defendants  
11 did not meaningfully dispute evidence showing that (1) the  
12 compensation limits that Plaintiffs challenge are enacted by  
13 agreement of Defendants through the NCAA's legislative process and  
14 are embodied in NCAA rules published in the NCAA Division I  
15 Manual; (2) Defendants enforce these rules by requiring all NCAA  
16 members to comply with them, and by punishing violations; (3)  
17 these rules affect interstate commerce, because they regulate  
18 transactions between Plaintiffs and their schools with respect to  
19 Plaintiffs' athletic services in multiple states nation-wide; and  
20 (4) these transactions are commercial because they regulate an  
21 essential component of Division I basketball and FBS football.  
22 Summary Judgment Order at 15, Docket No. 804; see also O'Bannon  
23 II, 802 F.3d at 1065-66 (holding that the NCAA's compensation  
24 rules are restraints of trade that regulate "commercial  
25 transaction[s]").

26 As to the remaining element of a Section 1 claim, which  
27 requires a showing that the challenged restraints are unreasonable  
28 under either the per se rule or the Rule of Reason, the Court held

1 on summary judgment that the NCAA's regulations "must be tested  
2 under a rule-of-reason analysis" as opposed to under the per se  
3 rule. Summary Judgment Order at 15, Docket No. 804; see also  
4 O'Bannon II, 802 F.3d at 1053 (holding that "the NCAA's amateurism  
5 rules . . . must be analyzed under the Rule of Reason").

6 Horizontal price-fixing agreements, those among competitors,  
7 like the challenged rules in this case, "are ordinarily condemned  
8 as a matter of law under an 'illegal per se' approach because the  
9 probability that these practices are anticompetitive is so high  
10 . . . . In such circumstances a restraint is presumed unreasonable  
11 without inquiry into the particular market context in which it is  
12 found." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of  
13 Univ. of Okla., 468 U.S. 85, 100 (1984) (Board of Regents)  
14 (citation omitted). But where, as here, a "certain degree of  
15 cooperation" is necessary to market college sports, the Rule of  
16 Reason is appropriate. O'Bannon II, 802 F.3d at 1069 (quoting  
17 Board of Regents, 468 U.S. at 117) (internal quotation marks  
18 omitted).

19 II. Issue or Claim Preclusion

20 As a threshold matter, Defendants argue that Plaintiffs have  
21 not shown that this case is not precluded by the Ninth Circuit's  
22 ruling in O'Bannon II. The Court denied Defendants' motion for  
23 summary judgment that this action is barred by O'Bannon II under  
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1 the doctrines of res judicata<sup>36</sup> and collateral estoppel.<sup>37</sup> See  
2 Summary Judgment Order at 9-15, Docket No. 804. Defendants invite  
3 the Court to revisit these issues, arguing that Plaintiffs must,  
4 but have failed to, show that a new antitrust violation occurred  
5 since O'Bannon I or that there has been any material change in the  
6 factual basis for O'Bannon II.

7 It is not Plaintiffs' burden to show that this action is not  
8 precluded; instead, the burden of proving preclusion is on  
9 Defendants. See Karim-Panahi v. Los Angeles Police Dep't, 839  
10 F.2d 621, 627 n.4 (9th Cir. 1988) (res judicata); Kendall v. Visa  
11 U.S.A., Inc., 518 F.3d 1042, 1050-51 (9th Cir. 2008) (collateral  
12 estoppel). Defendants failed to satisfy this burden on summary  
13 judgment, and they have offered nothing new to warrant altering  
14 the Court's summary judgment holding on this issue.

15 In its Summary Judgment Order, the Court found that material  
16 differences between this action and the O'Bannon case prevent a  
17

18 <sup>36</sup> Res judicata prohibits the re-litigation of any claims that  
19 were raised or could have been raised in a prior action. Tahoe-  
20 Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322  
21 F.3d 1064, 1077-78 (9th Cir. 2003). Three elements must be  
22 present for res judicata to apply: (1) an identity of claims; (2)  
23 a final judgment on the merits; and (3) the same parties or their  
24 privies. Id. at 1077.

25 <sup>37</sup> Collateral estoppel "prevents a party from relitigating an  
26 issue decided in a previous action if four requirements are met:  
27 '(1) there was a full and fair opportunity to litigate the issue  
28 in the previous action; (2) the issue was actually litigated in  
that action; (3) the issue was lost as a result of a final  
judgment in that action; and (4) the person against whom  
collateral estoppel is asserted in the present action was a party  
or in privity with a party in the previous action.'" Kendall v.  
Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th Cir. 2008) (citation  
omitted).

1 finding that this action is precluded by that case. These include  
2 (1) that class members in the two actions are not in complete  
3 privity; and (2) that the conduct and rules challenged, the rights  
4 implicated, and the evidence presented and available were not the  
5 same in both actions.<sup>38</sup>

6 The class in O'Bannon did not include, as does one of the  
7 classes here, female student-athletes. The class in O'Bannon was  
8 not limited to student-athletes in receipt of an offer for a full  
9 grant-in-aid athletic scholarship; it included male Division I  
10 basketball and FBS football student-athletes whose NIL were used  
11 or could have been used in game footage or videogames licensed or  
12 sold by the NCAA and its licensees, regardless of whether they  
13 received any scholarship money. O'Bannon II, 802 F.3d at 1055-56.  
14 By contrast, the classes in this case include student-athletes who  
15 were offered or received a full grant-in-aid athletic scholarship.  
16 No use of their NIL was necessary; therefore, these classes are  
17 not limited to student-athletes whose NIL were used or licensed.  
18 Additionally, the classes in this case are limited to student-  
19 athletes who received an offer for a full grant-in-aid from March  
20 5, 2014, to the date of final judgment in this action; few of the  
21 male class members in this case would have been O'Bannon class

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22 <sup>38</sup> See Costantini v. Trans World Airlines, 681 F.2d 1199,  
23 1201-02 (9th Cir. 1982) (citation omitted) (holding that a single  
24 cause of action for the purpose of applying res judicata exists in  
25 successive lawsuits, if, among other things, both actions "involve  
26 infringement of the same right," and "substantially the same  
27 evidence" was presented in both actions); Cent. Delta Water Agency  
28 v. United States, 306 F.3d 938, 953 (9th Cir. 2002) (holding that  
collateral estoppel cannot be applied where the facts of the prior  
action are merely "similar" to the ones in the second case)  
(citation and internal quotation marks omitted).

1 members because most would have been recruited after the O'Bannon  
2 I trial, which ended in August 2014.

3 The crux of the O'Bannon case was the right to student-  
4 athletes' NIL. The plaintiffs sought relief as a result of price-  
5 fixing conduct by the NCAA and its licensing partners that  
6 prevented them from benefiting financially, through compensation  
7 from their schools or from outside sources, from the use and  
8 licensing of their NIL. The class members in O'Bannon were  
9 required to release the rights to their NIL, the use and licensing  
10 of which had monetary value, to the NCAA as a condition of  
11 eligibility to play in Division I basketball and FBS football;  
12 this was the case regardless of whether they received a grant-in-  
13 aid. The rules challenged in O'Bannon related to NIL rights and  
14 their commercialization by the NCAA and its licensees, to the  
15 exclusion of student-athletes.<sup>39</sup> See O'Bannon II, 802 F.3d at 1055  
16 ("The gravamen of O'Bannon's complaint was that the NCAA's  
17 amateurism rules, insofar as they prevented student-athletes from  
18 being compensated for the use of their NIL, were an illegal  
19 restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. §  
20 1."); id. at 1072 (concluding that "the NCAA's compensation rules  
21 fix the price of one component (NIL rights) of the bundle that  
22 schools provide to recruits"). The plaintiffs in O'Bannon did not  
23 challenge the limit on a full grant-in-aid athletic scholarship,  
24 although the limit was implicated in the less restrictive

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26 \_\_\_\_\_  
27 <sup>39</sup> See O'Bannon I, Case No. 09-cv-3329, Pls.' Trial Brief at  
28 4, Docket No. 172 (listing challenged rules); Case No. 09-cv-1967,  
Third Am. Consolidated Complaint ¶ 359, Docket No. 832 (same).

1 alternative that the plaintiffs proposed and that this Court  
2 adopted.

3 In this case, by contrast, Plaintiffs seek relief from price-  
4 fixing conduct by the NCAA, Conference Defendants, and other NCAA  
5 members that prevents them from receiving compensation and  
6 benefits from their schools in excess of certain limits in  
7 exchange for their athletic services. The conduct at issue here  
8 is not connected to NIL rights. The rules challenged in this  
9 case, in addition to the limit on a grant-in-aid, include those  
10 that limit other compensation and benefits that student-athletes  
11 can receive on top of a full cost-of-attendance grant-in-aid. See  
12 Pls.' Opening Statement at 13-15 and Appendices A-C, Docket No.  
13 868-3, for a list of the challenged rules. They include those  
14 that limit compensation and benefits related to education, such as  
15 scholarships for undergraduate or graduate study at other  
16 institutions. They also include rules that limit compensation and  
17 benefits incidental to athletics participation but are unrelated  
18 to education, such as performance awards and travel expenses for  
19 student-athletes' family members. These rules were not challenged  
20 in O'Bannon. Accordingly, neither these rules nor the  
21 compensation and benefits that can be provided pursuant to them  
22 were comprehensively addressed in that case.

23 Some of the rules challenged in this case did not exist or  
24 have materially changed since the O'Bannon trial, those relating  
25 to reimbursement for travel expenses for family members, student-  
26 athletes borrowing against their future earnings to purchase loss-  
27 of-value insurance, and payments to international student-athletes  
28 from their home countries.

1 While some NCAA rules were challenged in both cases, these  
2 are core rules that address eligibility and compensation in  
3 general terms.<sup>40</sup> This overlap is a consequence of the  
4 interconnected nature of NCAA bylaws, and does not indicate that  
5 the two actions overlap in terms of the specific and distinct  
6 conduct being challenged, or the rights affected. The fact that  
7 the limit on the grant-in-aid is addressed in both cases also does  
8 not preclude this action. The NCAA changed this limit before the  
9 Court's injunction in O'Bannon went into effect, and the NCAA's  
10 changed rule differs from the less restrictive alternative that  
11 the Court found in O'Bannon I with respect to the student-athletes  
12 who would receive the relief and the source and type of the  
13 compensation that would cover the difference between the prior  
14 grant-in-aid limit and the cost of attendance.

15 Moreover, since O'Bannon, there have been material increases  
16 in permissible compensation above the cost of attendance that is  
17 not related to education. These increases are relevant to the  
18 question of whether restrictions on student-athlete compensation  
19 are necessary to preserve consumer demand for college sports as  
20 distinct from professional sports. These include the payment by  
21 schools from SAF monies of \$50,000 premiums for loss-of-value  
22 insurance against the loss of future professional earnings in case

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23  
24 <sup>40</sup> For example, challenged rules that are common to both cases  
25 include Division I Bylaw 13.2.1 (prohibiting benefits and  
26 financial aid not permitted by the NCAA); Division I Bylaw 16.02.5  
27 (prohibiting funds, awards, or benefits not permitted by the  
28 NCAA); and Division I Bylaw 12.1.2.1 (listing prohibited forms of  
"pay"). These rules must be read in conjunction with rules that  
address compensation and benefits in more specific terms and in  
more specific contexts.

1 of injury in college. In January 2015, the NCAA began to pay up  
2 to \$3,000 for family members of student-athletes to attend the  
3 Final Four games and up to \$4,000 to attend basketball  
4 championships; the College Football Playoff committee began to pay  
5 up to \$3,000 for each competing athlete's family members to travel  
6 to that event. Student-athletes previously could receive  
7 performance awards in the form of store-specific gift cards but  
8 can now receive these awards, in capped amounts, in the form of  
9 Visa gift cards that can be used anywhere that accepts Visa.  
10 Schools can now provide unlimited food to student-athletes.

11 Defendants note that some of the forms of compensation and  
12 benefits addressed in this case, such as Pell grants, benefits  
13 from the SAF, and store-specific gift cards, were mentioned or can  
14 be found in the record in O'Bannon. This fact is not sufficient  
15 to support Defendants' claim preclusion argument.

16 Because student-athlete compensation has expanded since  
17 O'Bannon, Defendants also argue that no new actionable conduct or  
18 material change in the factual basis of O'Bannon has occurred  
19 since O'Bannon I to justify a conclusion that this action is not  
20 precluded. This argument misses the point. It is the fact that  
21 the prices of student-athlete compensation are fixed, as opposed  
22 to the amount at which these prices are fixed, that renders the  
23 agreements at issue anticompetitive. See O'Bannon II, 802 F.3d at  
24 1071 ("It is no excuse that the prices fixed are themselves  
25 reasonable.") (quoting Catalano, Inc. v. Target Sales, Inc., 446  
26 U.S. 643, 647 (1980)) (internal quotation marks omitted).  
27 Defendants do not dispute that the challenged rules embody  
28 agreements among competitors that fix the prices of student-



1 athlete compensation. Accordingly, the Court cannot dismiss  
2 Defendants' "anticompetitive price-fixing agreement as benign,"  
3 see id., simply because they contend that the fixed prices are  
4 more reasonable than they used to be. See Associated Press v.  
5 United States, 326 U.S. 1, 16 n.15 (1945) ("[T]he Sherman Act  
6 cannot be evaded by good motives.") (citation and internal  
7 quotation marks omitted).

8 The material factual differences discussed above defeat  
9 Defendants' preclusion arguments and warrant examining the conduct  
10 challenged in this case under the Rule of Reason. See Oltz v. St.  
11 Peter's Cmty. Hosp., 861 F.2d 1440, 1449 (9th Cir. 1988) ("The  
12 rule of reason requires an evaluation of each challenged restraint  
13 in light of the special circumstances involved. That the analysis  
14 will differ from case to case is the essence of the rule.")  
15 (citation omitted). Whether the challenged price-fixing conduct  
16 here is justified by a procompetitive effect must be proved, and  
17 not presumed. See O'Bannon II, 802 F.3d at 1063-64.

18 In sum, because Plaintiffs raise new antitrust challenges to  
19 conduct affecting a different class, in a different time period,  
20 relating to rules and forms of compensation that are not the same  
21 as those challenged in O'Bannon, the claims in this case are not  
22 precluded by O'Bannon II.

### 23 III. The Rule of Reason

24 The Rule of Reason is intended for the analysis of  
25 "agreements whose competitive effect can only be evaluated by  
26 analyzing the facts peculiar to the business, the history of the  
27 restraint, and the reasons why it was imposed." Nat'l Soc. of  
28 Prof'l Eng's v. United States, 435 U.S. 679, 692 (1978). "[T]he

1 purpose of the analysis is to form a judgment about the  
2 competitive significance of the restraint; it is not to decide  
3 whether a policy favoring competition is in the public interest,  
4 or in the interest of the members of an industry.” Id.; see also  
5 Cont’l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)  
6 (“Under this rule, the factfinder weighs all of the circumstances  
7 of a case in deciding whether a restrictive practice should be  
8 prohibited as imposing an unreasonable restraint on  
9 competition.”).

10 Several Ninth Circuit opinions have articulated burden-  
11 shifting schemes to apply the Rule of Reason. “Under the rule of  
12 reason burden-shifting scheme, plaintiffs first must ‘delineate a  
13 relevant market and show that the defendant plays enough of a role  
14 in that market to impair competition significantly.’” Cnty. of  
15 Tuolumne, 236 F.3d at 1150 (citation omitted). Second, if the  
16 plaintiffs make that showing, the burden then shifts to the  
17 defendants to offer evidence that a legitimate procompetitive  
18 effect is produced by the challenged behavior. Id. Third, if the  
19 defendants do so, the burden then shifts back to the plaintiffs to  
20 demonstrate that there are less restrictive alternatives to the  
21 challenged conduct. Id. Finally, if the plaintiffs fail “to meet  
22 their burden of advancing viable less restrictive alternatives,”  
23 the court then will “reach the balancing stage,” wherein the court  
24 “must balance the harms and benefits” of the challenged conduct to  
25 determine whether it is “reasonable.” Id. at 1160 (citing Phillip  
26 E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of  
27 Antitrust Principles and Their Application ¶ 1507b).

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## IV. Rule of Reason: Market Definition

1 Plaintiffs first must show that the challenged conduct has  
2 significant anticompetitive effects in the relevant market.  
3 "Proof that defendant's activities had an impact upon competition  
4 in the relevant market is 'an absolutely essential element of the  
5 rule of reason case.'" Supermarket of Homes, Inc. v. San Fernando  
6 Valley Bd. of Realtors, 786 F.2d 1400, 1405 (9th Cir. 1986)  
7 (citation omitted). The term "relevant market" in this context  
8 "encompasses notions of geography as well as product use, quality,  
9 and description. The geographic market extends to the area of  
10 effective competition . . . where buyers can turn for alternative  
11 sources of supply. The product market includes the pool of goods  
12 or services that enjoy reasonable interchangeability of use and  
13 cross-elasticity of demand." Tanaka v. Univ. of S. Cal., 252 F.3d  
14 1059, 1063 (9th Cir. 2001) (citation and internal quotation marks  
15 omitted).

16 As discussed in the findings of fact, Plaintiffs produced  
17 sufficient evidence on summary judgment to establish the existence  
18 of a relevant market comprising national markets for Plaintiffs'  
19 labor in the form of athletic services in men's and women's  
20 Division I basketball and FBS football, wherein each class member  
21 participates in his or her sport-specific market. In these  
22 markets, the class members sell their athletic services to the  
23 schools that participate in Division I basketball and FBS football  
24 in exchange for grants-in-aid and other compensation and benefits  
25 permitted by NCAA rules on top of grants-in-aid. Because of the  
26 absence of any viable substitutes for Division I basketball and  
27 FBS football, Defendants hold monopsony power in all of these  
28

1 markets and exercise that power to cap artificially the  
2 compensation offered to recruits. This is reflected in the high  
3 degree of concentration found in the relevant market. Class  
4 members cannot obtain the same combination of a college education,  
5 high-level television exposure, and opportunities to enter  
6 professional sports other than from Division I schools. See  
7 O'Bannon I, 7 F. Supp. 3d at 965-68, 991-93 (finding relevant  
8 market wherein Division I basketball and FBS football schools  
9 compete to recruit elite football and basketball players);  
10 O'Bannon II, 802 F.3d at 1056-57, 1070 (affirming relevant market  
11 found in O'Bannon I on the ground that the NCAA did not "take  
12 issue with the way that the district court defined" the relevant  
13 market).

14 During summary judgment proceedings, Defendants did not  
15 request that the Court adopt an alternative market definition, or  
16 point to any admissible evidence to create a genuine issue of  
17 material of fact with respect to market definition. Although  
18 Defendants argued later that this Court should have considered or  
19 adopted a multi-sided market definition, the Court rejected these  
20 arguments on the ground that they were untimely, and on the ground  
21 that the only evidence to support the belated multi-sided market  
22 definition was inadmissible in any event. See generally Order  
23 Reaffirming Exclusion of Certain Expert Testimony by Dr. Elzinga,  
24 Docket No. 1018.

25 V. Rule of Reason: Anticompetitive Effects

26 The requisite showing of significant anticompetitive effects  
27 calls for evidence that "the activity is the type that restrains  
28 trade and that the restraint is likely to be of significant

1 magnitude." Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th  
2 Cir. 1991). This can be done by showing that "the defendant plays  
3 enough of a role" in the relevant market "to impair competition  
4 significantly," or by showing that the challenged restraint "has  
5 actually produced significant anti-competitive effects," such as  
6 by restricting output or fixing a price. Id.; Board of Regents,  
7 468 U.S. at 109 ("[W]hen there is an agreement not to compete in  
8 terms of price or output, 'no elaborate industry analysis is  
9 required to demonstrate the anticompetitive character of such an  
10 agreement.'" ) (citation omitted).

11 Because Defendants have near complete dominance of, and  
12 exercise monopsony power in, the relevant market, and because it  
13 is undisputed that the challenged restraints suppress competition  
14 and fix the price of student-athletes' services, the Court has  
15 found that the anticompetitive effects of the challenged rules are  
16 severe. On summary judgment, the Court found no genuine issue of  
17 material fact that the challenged rules cause significant  
18 anticompetitive effects in the relevant market. Plaintiffs  
19 produced sufficient evidence on summary judgment and at trial to  
20 show that the challenged rules amount to overt horizontal price-  
21 fixing among competitors, because they essentially eliminate price  
22 competition as to one key aspect of the recruitment of student-  
23 athletes in Division I basketball and FBS football, namely the  
24 price of the services of student-athletes. See Board of Regents,  
25 468 U.S. at 100 (noting that horizontal price-fixing agreements  
26 have a "high" probability of resulting in anticompetitive effects  
27 and are "ordinarily condemned as a matter of law" under an illegal  
28 per se approach).

1 This evidence also established that the challenged rules harm  
2 class members, because the rules deprive them of compensation they  
3 would receive in the absence of the restraints. See O'Bannon II,  
4 802 F.3d at 1071 (holding that NCAA compensation rules have  
5 anticompetitive effects because they "extinguish" one form of  
6 competition among schools seeking to land recruits and deprive  
7 student-athletes of compensation they would receive absent the  
8 rules) (citation and internal quotation marks omitted).

9 VI. Rule of Reason: Asserted Justifications for the Challenged  
10 Restraints

11 Because Plaintiffs have established that the challenged rules  
12 restrain competition and have severe anticompetitive effects, the  
13 burden shifts to Defendants to show that the challenged price-  
14 fixing conduct "brings about some procompetitive effect in order  
15 to justify it under the antitrust laws." O'Bannon II, 802 F.3d at  
16 1073 (emphasis omitted).

17 The only two asserted procompetitive justifications for the  
18 challenged rules that survived summary judgment<sup>41</sup> are (1) that the  
19 challenged rules promote amateurism, which in turn enhances  
20 consumer demand for Division I basketball and FBS football; and  
21 (2) that the challenged rules promote integration of student-  
22 athletes with their academic communities, which in turn improves  
23

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24 <sup>41</sup> The Court will not consider arguments relating to  
25 procompetitive justifications that it rejected on summary  
26 judgment. See Summary Judgment Order at 23 n.7, Docket No. 804;  
27 see also O'Bannon II 802 F.3d at 1072 (affirming the district  
28 court's rejection of competitive balance and increased output  
procompetitive justifications because the NCAA "offered no  
meaningful argument that those findings were clearly erroneous").

1 the quality of the college education that student-athletes receive  
2 for their athletic services.

3 A. Consumer Demand for Amateurism

4 Defendants first contend that the challenged rules are  
5 procompetitive because they promote the principle of amateurism,  
6 which enhances consumer demand. Defendants argue that consumers  
7 value amateurism, and that consumer demand for Division I  
8 basketball and FBS football would deteriorate if student-athletes  
9 received more compensation. To support their contentions,  
10 Defendants rely on the expert opinions of Dr. Elzinga and Dr.  
11 Isaacson, and lay testimony by various NCAA, conference, and  
12 school administrators regarding the preferences of viewers of  
13 college sports.

14 As a threshold matter, it is important to recognize that the  
15 challenged limits on compensation cannot be deemed procompetitive  
16 simply because they promote or are consistent with amateurism. To  
17 be procompetitive, the challenged rules must have some  
18 procompetitive effect on the relevant market.

19 Although their theory is that the challenged rules promote  
20 amateurism, Defendants did not offer an affirmative definition of  
21 amateurism. While Defendants place great emphasis on the  
22 Principle of Amateurism, which is described in the Division I  
23 constitution, the principle does not mention or address  
24 compensation; nor does it prohibit or even discourage  
25 compensation. Accordingly, no link appears between this principle  
26 and the challenged compensation limits.

27 Defendants argue that amateurism can be defined based on what  
28 it is not, namely, amateurism is not "pay for play." But the

1 concept of "pay for play" does not help define amateurism because  
2 this term itself is undefined.

3 Defendants have not pointed to any NCAA bylaws that define  
4 amateurism, pay for play, or pay. In the bylaws, "pay" is defined  
5 only indirectly, by way of a list of forms of compensation that  
6 the NCAA permits and does not permit. A reading of these bylaws  
7 discloses no principled, articulable difference between amateurism  
8 and not amateurism, or "pay for play" and not "pay for play." The  
9 only thing that can be inferred is that compensation constitutes  
10 "pay for play" or "pay" if the NCAA has decided to forbid it, and  
11 compensation is not "pay for play" or "pay" if the NCAA has  
12 decided to permit it.

13 The NCAA permits grants-in-aid up to the cost of attendance.  
14 In addition, student-athletes can receive cash or cash-equivalent  
15 compensation that exceeds the cost of attendance by thousands of  
16 dollars. The NCAA permits schools and conferences to pay student-  
17 athletes awards for their performance in their sport, which can be  
18 paid in cash-equivalent Visa cards; student-athletes who reach  
19 high levels of competition can receive up to \$5,600 in such awards  
20 in a school year. Because these awards are directly correlated  
21 with athletic performance, they appear, on their face, to be "pay  
22 for play," and thus, inconsistent with amateurism as Defendants  
23 and their witnesses describe that term. Yet, they are allowed.  
24 Also permissible are SAF payments in the thousands of dollars for  
25 varying purposes, including for \$50,000 premiums for loss-of-value  
26 insurance against future loss of professional wages.

27 The NCAA permits schools to provide per diem payments to  
28 student-athletes for un-itemized expenses. It also permits



1 schools to pay for family members' travel expenses to attend  
2 certain events; separately, the NCAA and the College Football  
3 Playoff committee have paid thousands of dollars for family  
4 members to travel to the Final Four, as well as the basketball and  
5 FBS championships. The NCAA allows outside organizations to  
6 provide payments to certain student-athletes for their  
7 performance; in the case of student-athletes who do well in the  
8 Olympics or in international competitions, the payments that can  
9 be provided under current NCAA rules are unlimited.

10 Some of the compensation and benefits above the cost of  
11 attendance that the NCAA currently permits are related to  
12 education. For example, the NCAA permits schools to provide  
13 student-athletes with funding for post-eligibility graduate school  
14 at any institution, although this is capped at \$10,000 per  
15 student, two students per school, per year. These are the Senior  
16 Scholar Awards. It also permits schools to pay, with SAF funds,  
17 for education-related items and expenses, such as laptops and pre-  
18 eligibility tutoring, that are not covered by the cost of  
19 attendance.

20 An individual student-athlete could receive all of the  
21 aforementioned forms of compensation, in combination, without  
22 losing his or her status as an amateur or eligibility to play in  
23 Division I sports. When combined, this compensation can total  
24 thousands and even tens of thousands of dollars above a full cost-  
25 of-attendance grant-in-aid. Again, the Court does not mean to  
26 imply that these payments should not be made. The point is that  
27 student-athletes' receipt of this compensation in excess of the  
28 cost of attendance, some of which is related to education and some

1 of which is not, has not led to a reduction in consumer demand for  
2 college sports as a distinct product, which continues apace.

3 Defendants' only economics expert on consumer demand, Dr.  
4 Elzinga, did not even attempt to examine whether a relationship  
5 exists between compensation and consumer demand. He opines that  
6 this analysis is not possible because amateurism has always  
7 existed and the NCAA has always enforced it; he also opines that  
8 any such analysis would be unnecessary in any event because  
9 amateurism is not about whether student-athletes receive specific  
10 dollar amounts in compensation, but is instead about whether they  
11 are paid to play, which is a concept that he does not define. Dr.  
12 Elzinga's opinions and assumptions are contrary to the record,  
13 which shows that the NCAA has not always enforced amateurism  
14 rules; that amateurism, and amounts of permissible student-athlete  
15 compensation, have changed materially over time; and that the  
16 amounts of compensation that student-athletes receive are very  
17 relevant to the determination of whether a student-athlete is an  
18 NCAA amateur or not, because the NCAA's limits on certain forms of  
19 compensation are set based on specific dollar amounts for that  
20 very purpose. Accordingly, the Court found Dr. Elzinga's opinions  
21 to be unconvincing.

22 Defendants attempted to establish a connection between  
23 student-athlete compensation and consumer demand by way of the  
24 opinions of their survey expert, Dr. Isaacson. His opinions,  
25 however, do not establish or suggest that a relationship exists  
26 between the challenged rules and consumer demand.

27 The only economic analysis in the record that addresses the  
28 impact of changes to student-athlete compensation on consumer

1 demand, that of Dr. Rascher, shows that recent increases in  
2 student-athlete compensation, related and unrelated to education,  
3 have not decreased consumer demand. Dr. Rascher concluded, in  
4 fact, that revenues, which are an indicator of demand, at the  
5 NCAA, conference, and school levels have increased since 2015,  
6 when class members' permissible compensation increased  
7 significantly as a result of the change to the grant-in-aid limit  
8 that year and the expansion or creation of other benefits that  
9 schools can provide on top of a full grant-in-aid. Accordingly,  
10 Dr. Rascher's findings suggest that additional increases in  
11 compensation would not reduce consumer demand.

12 Dr. Rascher's conclusions are corroborated by other evidence,  
13 including the opinions of Plaintiffs' survey expert, Dr. Poret,  
14 and some testimony from defense witnesses.

15 Dr. Poret specifically tested whether providing certain forms  
16 of additional compensation to student-athletes would affect future  
17 viewership or attendance of basketball and football. He concluded  
18 that viewership and attendance would not be negatively impacted if  
19 the scenarios he tested were implemented individually.

20 If limits on student-athlete compensation were necessary to  
21 maintain consumer demand, one would expect to see increases in  
22 compensation leading to decreases in consumer demand. The  
23 evidence described above shows that actual increases in  
24 compensation have not decreased demand, and it suggests that  
25 future increases in compensation likewise would not do so.

26 The challenged compensation limits do not appear to be set by  
27 the NCAA based on considerations of consumer demand. The NCAA's  
28 Rule 30(b)(6) witness, Kevin Lennon, testified that he does not

1 recall any instance in his more than thirty years with the  
2 organization in which a study on consumer demand was considered by  
3 the NCAA membership when making rules about compensation.

4 Defendants rely on lay witness testimony to try to establish  
5 a connection between the challenged compensation rules and  
6 consumer demand. Most of this testimony is predicated on personal  
7 opinion and conversations with unidentified fans of college sports  
8 with whom witnesses have spoken. Some of these witnesses  
9 testified that the challenged rules prevent conferences from  
10 setting different rules on student-athlete compensation based on  
11 their different values and resources; these witnesses posited that  
12 changing the challenged rules could negatively impact the consumer  
13 appeal of national tournaments and rivalries, or could result in  
14 conference realignment, all of which could negatively affect  
15 consumer demand for college sports. But this testimony is  
16 unsupported by the weight of the evidence, which shows that  
17 significant variance already exists among conferences in terms of  
18 student-athlete compensation schemes, resources, and performance,  
19 and that conference realignment has been frequent. None of this  
20 has negatively affected consumer demand or revenues.

21 Some witnesses testified that consumers enjoy college sports  
22 because of the difference between college sports and professional  
23 sports. Much of this difference is based on the fact that  
24 student-athletes are students playing for their school. But this  
25 does not in itself establish any connection between consumer  
26 demand and the challenged rules. Indeed, student-athletes would  
27 remain students even if their compensation were not limited by the  
28 challenged rules. See O'Bannon II, 802 F.3d at 1073 (concluding

1 that the opportunity to earn a higher education “would still be  
2 available to student-athletes if they were paid some compensation  
3 in addition to their athletic scholarships. Nothing in the  
4 plaintiffs’ prayer for compensation would make student-athletes  
5 something other than students and thereby impair their ability to  
6 become student-athletes”).

7 Other distinctions between college and professional sports  
8 are the amounts and types of compensation players receive. The  
9 distinction, currently, cannot be based on student-athletes  
10 receiving no compensation or benefits above the cost of attendance  
11 and professionals receiving large cash salaries, sometimes in the  
12 millions of dollars. This is because student-athletes already  
13 receive moderate amounts in compensation and benefits on top of a  
14 grant-in-aid without affecting the distinction between college and  
15 professional sports. Instead, the Court found that a distinction  
16 between college and professional sports arises from the fact that  
17 student-athletes do not receive unlimited cash payments,  
18 especially those unrelated to education, like those seen in  
19 professional sports leagues.

20 Accordingly, the Court found that, when compared with having  
21 no limits on compensation, some of the challenged compensation  
22 rules may have an effect on preserving consumer demand for college  
23 sports as distinct from professional sports to the extent that  
24 they prevent unlimited cash payments unrelated to education such  
25 as those seen in professional sports leagues. As will be  
26 discussed in more detail in the next section, however, not all of  
27 the challenged rules in their current form are necessary to  
28 achieve this procompetitive effect, and there is a less

1 restrictive alternative to the set of current challenged  
2 compensation restrictions.

3 The challenged compensation limits can be divided into three  
4 categories: (1) the limit on the grant-in-aid at not less than the  
5 cost of attendance; (2) compensation and benefits unrelated to  
6 education paid on top of a grant-in-aid; (3) compensation and  
7 benefits related to education provided on top of a grant-in-aid.

8 The Court found that the challenged limits in the first and  
9 second categories are procompetitive relative to having no limits,  
10 to the extent that they help maintain consumer demand for college  
11 sports as a distinct product by preventing unlimited cash payments  
12 unrelated to education.

13 As for the limits in the third category, only some have been  
14 have been shown to be procompetitive, namely limits on academic or  
15 graduation awards and incentives that are provided in cash or  
16 cash-equivalents. These could become a vehicle for unlimited  
17 payments. The Court found that limits or prohibitions on most  
18 other benefits related to education that can be provided on top of  
19 a grant-in-aid, such as those that limit tutoring, graduate school  
20 tuition, and paid internships, have not been shown to have an  
21 effect on enhancing consumer demand for college sports as a  
22 distinct product, because these limits are not necessary to  
23 prevent unlimited cash compensation unrelated to education.  
24 Educational benefits limited or prohibited by these rules are  
25 distinct from professional-level compensation because they have a  
26 connection to education, are paid to students, their value is  
27 inherently limited to their actual cost, and they can be provided  
28 in kind, not in cash. Defendants have offered no cogent

1 explanation for why limits or prohibitions on these education-  
2 related benefits are necessary to preserve consumer demand. Some  
3 evidence instead suggests that the challenged limits on education-  
4 related compensation are arbitrary.<sup>42</sup> Accordingly, because no  
5 procompetitive justification for limiting these education-related  
6 benefits has been shown, limits on these benefits cannot be  
7 included in a less restrictive alternative.

8 B. Integration

9 Defendants contend that the challenged rules have a  
10 procompetitive effect because they promote the integration of  
11 student-athletes into their academic communities. Defendants  
12 posit that this integration improves the college education that  
13 student-athletes receive for their athletic services.

14 For this proffered justification to be viable, Defendants  
15 would have to establish (1) that the challenged rules promote  
16 integration, and (2) that integration has a procompetitive effect  
17 in the relevant market. As detailed in the findings of fact,  
18 Defendants did not meet their burden to show that the challenged  
19 rules have an effect on promoting integration. That alone  
20 defeats integration as a procompetitive justification.

21  
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 <sup>42</sup> For example, when asked whether increasing the current  
24 limit on Senior Scholar Awards from two students per school to  
25 five students per school would render the awards inconsistent with  
26 amateurism, the NCAA's Rule 30(b)(6) witness, Kevin Lennon,  
27 provided no meaningful response other than to justify the current  
28 limit on the basis that the membership decided that limiting the  
awards to two students per school constituted a reasonable cap.  
Trial Tr. (Lennon) at 1551-53. It could be raised from two to  
three. Lennon Rule 30(b)(6) Dep. Tr. at 179.

1           The evidence shows that student-athletes benefit in various  
2 ways from the college education they receive, but Defendants have  
3 not shown that such benefits arise out of the challenged  
4 compensation limits. Most of the benefits that student-athletes  
5 can gain from attending college are caused, instead, by the  
6 education itself and by other rules and policies, such as those  
7 relating to academic eligibility requirements, tutoring, academic  
8 support, living conditions, and the scheduling of athletic  
9 practice and events. None of these rules and policies, which  
10 appear to be the driving force behind the integration that  
11 Defendants describe, are challenged here. Accordingly, student-  
12 athletes would still enjoy the benefits caused by the latter  
13 rules and policies even if the challenged compensation limits  
14 were changed.

15           Defendants' expert, Dr. Heckman, conceded that additional  
16 compensation could improve outcomes for student-athletes, belying  
17 the notion that the challenged compensation limits, as they  
18 currently stand, are necessary to achieve positive student-  
19 athlete outcomes. Additionally, other evidence shows that  
20 student-athlete achievement, as measured by graduation rates, has  
21 increased since 2015, when permissible athletics-related  
22 compensation increased. This also suggests that the challenged  
23 compensation limits are not necessary to improve student-athlete  
24 academic outcomes. This evidence also undermines Dr. Heckman's  
25 opinion that student-athletes would be incentivized to spend time  
26 on athletics to the detriment of academics if they received  
27 additional compensation.

28



1 Defendants also rely on testimony positing that additional  
2 compensation for student-athletes would create a “wedge” between  
3 student-athletes and non-athletes, and even among student-  
4 athletes if any additional compensation provided were not  
5 distributed equally. The NCAA advanced the same theory in  
6 O’Bannon I. See 7 F. Supp. 3d at 980-81. There, this Court  
7 found that certain limited restrictions on student-athlete  
8 compensation “may help” prevent a wedge between student-athletes  
9 and others on campus, see id. at 980, and the Ninth Circuit  
10 affirmed that finding, although it noted that, on appeal, the  
11 NCAA focused all of its arguments regarding a procompetitive  
12 justification on its amateurism theory. O’Bannon II, 802 F.3d at  
13 1059-60, 1072.

14 Here, the evidence that Defendants cite in support of their  
15 “wedge” theory is even weaker than that presented in O’Bannon I,  
16 and it also is directly contradicted by evidence that was not  
17 available at the time of O’Bannon I. This shows that student-  
18 athlete compensation increased since 2015 and this greater  
19 compensation, which can reach thousands or tens of thousands of  
20 dollars above a full cost-of-attendance grant-in-aid, has not  
21 resulted in increased separation between student-athletes and  
22 other students. This evidence distinguishes the factual record  
23 here regarding the “wedge” theory from the record in O’Bannon I,  
24 and it justifies a different conclusion with respect to the  
25 “wedge” theory and integration as a procompetitive justification.  
26 Divisions among students exist and are inevitable as a result of  
27 factors that are unrelated to the challenged rules. Further, the  
28 challenged rules may create or exacerbate a wedge because they

1 result in some schools spending money that would otherwise go to  
2 student-athlete compensation on frills, like extravagant,  
3 athletes-only facilities.

4 Because Defendants failed to show that the challenged rules  
5 have an effect on promoting integration, Defendants' integration  
6 justification fails.

#### 7 VII. Rule of Reason: Alternatives to the Challenged Restraints

8 Defendants have sufficiently shown a procompetitive effect of  
9 some aspects of the challenged compensation scheme.<sup>43</sup> These are  
10 the cost-of-attendance limit on the grant-in-aid, the limits on  
11 compensation and benefits unrelated to education, and the limits  
12 on cash or cash-equivalent education-related awards and incentives  
13 for academic achievement or graduation. The procompetitive effect  
14 of these caps is preventing unlimited, professional-level cash  
15 payments, unrelated to education, that could blur the distinction  
16 between college sports and professional sports and thereby  
17 negatively affect consumer demand for Division I basketball and  
18 FBS football. Defendants, however, have not shown a  
19 procompetitive justification for caps on education-related  
20 benefits that are inherently limited by their actual cost and that  
21 can be provided in kind, not in cash, such as rules that limit  
22 scholarships for graduate school.

23 The burden shifts to Plaintiffs to show that there are  
24 substantially less restrictive alternative rules that would  
25

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26 <sup>43</sup> Because Defendants have not shown that the challenged rules  
27 can be justified on the ground that they promote integration, the  
28 Court does not consider whether any proffered less restrictive  
alternatives would promote integration.

1 achieve the same procompetitive effect as the challenged set of  
2 rules.

3       Where a restraint “is patently and inexplicably stricter than  
4 is necessary to accomplish” demonstrated procompetitive  
5 objectives, “an antitrust court can and should invalidate it and  
6 order it replaced with a less restrictive alternative.” O’Bannon  
7 II, 802 F.3d at 1075 (emphasis omitted). To be viable, a less  
8 restrictive alternative must be “virtually as effective” in  
9 serving the established procompetitive effect of the challenged  
10 restraints, and its implementation must be achieved “without  
11 significantly increased cost.” See id. at 1074, 1076 n.19  
12 (citation and internal quotation marks omitted). In the context  
13 of NCAA rules limiting student-athlete compensation, a court must  
14 afford the NCAA “ample latitude” to superintend college athletics,  
15 and may not “use antitrust law to make marginal adjustments to  
16 broadly reasonable market restraints.” Id. at 1074-75 (citation  
17 and internal quotation marks omitted).

18       As discussed in the findings of fact, there is a less  
19 restrictive alternative to the set of challenged rules that meets  
20 these requirements. Under these alternative rules, the NCAA can  
21 continue to cap the grant-in-aid at not less than the cost of  
22 attendance. The NCAA can also continue to limit compensation and  
23 benefits, paid in addition to the cost of attendance, that are  
24 unrelated to education. The association can continue to limit  
25 academic or graduation awards or incentives, provided in cash or  
26 cash-equivalent on top of a grant-in-aid, as long as the limit is  
27  
28

1 not less than the athletics participation awards limit.<sup>44</sup> A lower  
2 cap is not necessary to preserve consumer demand because athletics  
3 participation awards, at the current caps, have not been demand-  
4 reducing. In fact, the NCAA considers these amounts consistent  
5 with amateurism. While the NCAA could reduce the athletics  
6 participation awards limit in the future, it may not reduce  
7 academic or graduation awards or incentives to amounts lower than  
8 the current athletics participation awards limit. The NCAA may  
9 increase athletics participation awards in the future, but it must  
10 increase any limits on academic or graduation awards and  
11 incentives so that such limits are never lower than the limit on  
12 athletics participation awards.

13 Defendants have not shown a procompetitive effect for NCAA  
14 rules that restrict inherently limited, non-cash, education-  
15 related benefits provided on top of a grant-in-aid. Accordingly,  
16 such limits are not included in the less restrictive alternative  
17 rules. The types of inherently limited education-related benefits  
18 that are uncapped as part of this alternative include those that  
19 currently are prohibited or limited in some fashion by the NCAA.  
20 These are listed in the findings of fact.

21 As discussed in the findings of fact, this alternative would  
22 be virtually as effective as the challenged set of rules in  
23

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24 <sup>44</sup> As discussed in the findings of fact, the athletics  
25 participation awards limit is the maximum amount of compensation  
26 that an individual student-athlete could receive in an academic  
27 school year in participation, championship, or special achievement  
28 awards (combined) under Division I Bylaw, Article 16, and listed  
in Figures 16-1, 16-2, and 16-3 of the 2018-2019 Division I  
Manual, J0024.

1 preserving the same contribution to consumer demand for Division I  
2 basketball and FBS football, as a product distinct from  
3 professional sports, that the current NCAA compensation scheme  
4 achieves. This is because this alternative expands education-  
5 related compensation and benefits only, and it does so in a way  
6 that would not result in unlimited cash payments, untethered to  
7 education, similar to those observed in professional sports.

8 This alternative also would not require significant new costs  
9 to implement, because it eliminates NCAA caps on education-related  
10 benefits. This will eliminate the need to expend resources on  
11 compliance and enforcement in connection with such caps. To the  
12 extent that the NCAA, conferences, or schools choose to regulate  
13 compensation in any way that is permissible under this  
14 alternative, they could employ existing rule-making,  
15 interpretation, and enforcement structures to do so. The NCAA  
16 could assist conferences and schools in that undertaking, by  
17 reallocating the resources it uses to enforce or interpret the  
18 NCAA caps that this alternative eliminates, or otherwise.

19 The alternative adopted here is consistent with the teachings  
20 of O'Bannon II. As noted above, in that case, the Ninth Circuit  
21 affirmed this Court's conclusion that the NCAA's compensation  
22 limits relating to the use or licensing of NIL violated the  
23 Sherman Act, and affirmed its order that the NCAA could not cap  
24 compensation for student-athletes' NIL at an amount lower than the  
25 cost of attendance. The circuit court reasoned that (1) the  
26 evidence in that case did not "suggest[] that consumers of college  
27 sports would become less interested in those sports" if this  
28 compensation were provided because it "would be going to cover

1 [student-athletes'] 'legitimate costs' to attend school;" and (2)  
2 the additional compensation "would have virtually no impact on  
3 amateurism" as the NCAA defined the concept in that case.  
4 O'Bannon II, 802 F.3d at 1074-75. "By the NCAA's own standards,  
5 student-athletes remain amateurs as long as any money paid to them  
6 goes to cover legitimate educational expenses." Id. at 1075. The  
7 circuit court, however, vacated this Court's order that the NCAA  
8 could not limit the schools' compensation in trust to student-  
9 athletes for their NIL at an amount lower than \$5,000 per year.  
10 The majority found that this Court erred in allowing student-  
11 athletes to be paid cash untethered to their education expenses,  
12 even if such payment was deferred, because that alternative would  
13 not be "virtually as effective as the NCAA's current amateur-  
14 status rule." Id. at 1074.

15 The non-cash education-related benefits allowed here, like  
16 the compensation approved by the court of appeal in O'Bannon II,  
17 will go to cover legitimate education-related costs. As in  
18 O'Bannon II, there is no evidence here suggesting that uncapping  
19 non-cash education-related benefits would negatively affect  
20 consumers' interest in Division I basketball and FBS football.  
21 According to defense witnesses, consumer demand for Division I  
22 basketball and FBS football as distinct from professional sports  
23 is driven by consumers' perception that student-athletes are  
24 students. See Board of Regents, 468 U.S. at 101-02 (noting that  
25 "[t]he identification of this 'product' [college football] with an  
26 academic tradition differentiates [it]" from professional sports).  
27 Additional education-related benefits, if anything, would serve to  
28 enhance student-athletes' connection to academics. The natural

1 experiments discussed in the findings of fact, as well as the  
2 testimony of Plaintiffs' survey expert, Dr. Poret, and some  
3 testimony by defense witnesses, also show that increasing  
4 education-related compensation and benefits would not reduce  
5 consumer demand for Division I basketball or FBS football.  
6 Defendants and their witnesses agree that the types and amounts of  
7 compensation that the NCAA currently permits schools to provide to  
8 student-athletes on top of a grant-in-aid are consistent with what  
9 they describe as amateurism. Some of this currently permissible  
10 compensation on top of a grant-in-aid, which can reach thousands  
11 and even tens of thousands of dollars above the cost of  
12 attendance, is related to education, and some is not. It follows  
13 that allowing limited non-cash education-related benefits on top  
14 of a grant-in-aid is not inconsistent with what Defendants  
15 describe as amateurism.

16 Nor is there evidence here that allowing limited academic  
17 awards would negatively affect consumers' interest in Division I  
18 basketball or FBS football. The NCAA will be permitted to limit  
19 academic and graduation awards and incentives that are provided in  
20 cash or a cash-equivalent to a level that the record shows is not  
21 demand-reducing or inconsistent with NCAA amateurism, namely the  
22 level at which athletics participation awards, which are provided  
23 in cash-equivalents, are capped by the NCAA. The NCAA also will  
24 be permitted to continue to limit grants-in-aid at not less than  
25 the cost of attendance and limit compensation and benefits  
26 unrelated to education.

27 Defendants rely heavily on the following language from  
28 O'Bannon II: "The Rule of Reason requires that the NCAA permit its

1 schools to provide up to the cost of attendance to their student  
2 athletes. It does not require more.” Id. at 1079. But this  
3 language from O’Bannon II cannot be read to preemptively bar any  
4 Rule of Reason challenge to any NCAA rule that restricts or  
5 prohibits student-athlete compensation. Such a broad reading  
6 would be inconsistent with the circuit court’s statement elsewhere  
7 in the opinion that, under the Rule of Reason, the validity of  
8 each rule “must be proved, not presumed.” Id. at 1064.

9 Further, this statement was made in the context of the  
10 majority’s disapproval of allowing deferred cash payments above  
11 the cost of attendance and “untethered to educational expenses.”  
12 Id. at 1078. Based on the evidence in that case, the majority  
13 held that paying student-athletes any amount of cash above the  
14 cost of attendance, if unrelated to education, would “vitiating  
15 their amateur status,” id. at 1077, whereas including additional  
16 compensation in a grant-in-aid up to the cost of attendance would  
17 not.

18 New evidence presented in this case shows that payments above  
19 the cost of attendance do not vitiate student-athletes’ NCAA  
20 amateur status, even when such payments are made in cash-  
21 equivalents, are unrelated to education, and can amount to  
22 thousands and even tens of thousands of dollars. The NCAA permits  
23 student-athletes to receive, above the cost of attendance, cash-  
24 equivalent payments for their athletic performance directly from  
25 their schools and conferences, the cumulative value of which could  
26 reach \$5,600 in an academic school year. This evidence was not  
27 before the Ninth Circuit in O’Bannon II. Moreover, the NCAA also  
28 currently permits a variety of other payments above the cost of



1 attendance that have no tether to education, such as payments of  
2 \$50,000 premiums for loss-of-value insurance against loss of  
3 future professional wages, thousands of dollars of SAF and AEF  
4 monies that can be used in a wide variety of ways, and thousands  
5 of dollars of travel expenses for family members. Defense  
6 witnesses have testified that these payments are not inconsistent  
7 with amateurism. The economic analyses discussed above show that  
8 consumer demand has not been negatively affected.

9 The concern described in O'Bannon II that, if the line of  
10 paying cash, non-education-related compensation were crossed,  
11 there would be "no defined stopping point," id. at 1078-79, is  
12 inapplicable here. The alternative being adopted would remove  
13 NCAA caps on education-related benefits only. These benefits are  
14 inherently limited to their actual value, such as graduate school  
15 tuition. Cash or cash-equivalent academic and graduation awards  
16 and incentives would be limited to the NCAA-approved amounts of  
17 athletics participation awards. Thus, the alternative rules being  
18 adopted here do have a stopping point, and that stopping point  
19 falls within amateurism as Defendants described it in this case.

20 Under these less restrictive rules, the NCAA would retain the  
21 right to define these education-related benefits and to regulate  
22 how schools provide them to student-athletes. For example, the  
23 NCAA could require schools to pay the cost of such benefits  
24 directly to the educational institution or provider from which the  
25 student-athletes will obtain the benefits. In the case of  
26 education-related supplies, such as computers and science  
27 equipment, the NCAA could require schools to pay for these items  
28

1 directly or to reimburse student-athletes for these expenses if  
2 adequate proof of purchase is shown.

3 The adoption of this alternative set of rules also would not  
4 significantly impact the NCAA's ability to superintend college  
5 sports, because only a small fraction of the conduct that the NCAA  
6 regulates would be affected. The NCAA will otherwise remain free  
7 to manage college sports as it wishes.

8 These alternative rules are less restrictive than the current  
9 compensation rules, and therefore less harmful to competition in  
10 the relevant market. They will result in increased competition  
11 among NCAA members and increased education-related compensation  
12 for student-athletes.

### 13 VIII. Balancing

14 As discussed above, the Court has found and concluded that  
15 Plaintiffs have shown a less restrictive alternative to the  
16 challenged rules. Accordingly, the Court can impose its remedy  
17 without weighing the anticompetitive effects of the challenged  
18 restraints against their procompetitive benefits as a final  
19 balancing consideration.

20 Several Ninth Circuit cases describe the balancing inquiry as  
21 being necessary as a final consideration only if the court finds  
22 no viable less restrictive alternative. For example, in County of  
23 Tuolumne, the Ninth Circuit explained that where "plaintiffs have  
24 failed to meet their burden of advancing viable less restrictive  
25 alternatives," a court then "reach[es] the balancing stage," where  
26 it "must balance the harms and benefits of the [challenged  
27 restraints] to determine whether they are reasonable." 236 F.3d  
28 at 1160 (citing Areeda ¶ 1507b at 397). Similarly, in Bhan, the

1 circuit court described the Rule-of-Reason inquiry as involving  
2 four steps, and noted that, after the third step in which a  
3 plaintiff must “try to show that any legitimate objectives can be  
4 achieved in a substantially less restrictive manner,” “[f]inally,  
5 the court must weigh the harms and benefits to determine if the  
6 behavior is reasonable on balance.” 929 F.2d at 1413 (citing  
7 *Areeda* ¶ 1502 at 371-72).

8 An argument can be made that balancing should be done at an  
9 earlier stage, and in the Ninth Circuit, the Rule of Reason  
10 inquiry has been described in varying ways. In *Tanaka*, the  
11 circuit court described it as involving three steps but also noted  
12 that a “restraint violates the rule of reason if the restraint’s  
13 harm to competition outweighs its procompetitive effects.” 252  
14 F.3d at 1063. In *Paladin Assocs., Inc. v. Mont. Power Co.*, the  
15 circuit court described the Rule of Reason inquiry as  
16 “determin[ing] whether the anticompetitive aspects of the  
17 challenged practice outweigh its procompetitive effects,” without  
18 mentioning any burden-shifting steps. 328 F.3d 1145, 1156 (9th  
19 Cir. 2003). In *Am. Ad Mgmt., Inc. v. GTE Corp.*, the court ruled,  
20 “The fact finder must balance the restraint and any justifications  
21 or pro-competitive effects of the restraint in order to determine  
22 whether the restraint is unreasonable.” 92 F.3d 781, 791 (9th  
23 Cir. 1996) (citation, internal quotation marks, and emphasis  
24 omitted).

25 Some Supreme Court cases have described the Rule of Reason  
26 inquiry without mentioning a burden-shifting framework at all.  
27 See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551  
28 U.S. 877, 885 (2007) (under the rule of reason, “the factfinder

1 weighs all of the circumstances of a case in deciding whether a  
2 restrictive practice should be prohibited as imposing an  
3 unreasonable restraint on competition”) (citation and internal  
4 quotation marks omitted).

5 Thus, Supreme Court and Ninth Circuit cases have used various  
6 formulations of the Rule of Reason: three steps followed by  
7 balancing, four steps including balancing, balancing at the second  
8 step, or eschewing a burden-shifting test with defined steps  
9 altogether. None of these cases has endorsed or required the use  
10 of any particular formulation over any other.

11 The Court is not persuaded by Defendants’ contention that the  
12 mention of a three-step test by the Supreme Court in Ohio v.  
13 American Express Co., 138 S. Ct. 2274, 2284 (2018) (analyzing  
14 challenged restraints under the Rule of Reason using “a three-  
15 step, burden-shifting framework”) and by the Ninth Circuit in  
16 O’Bannon II, 802 F.3d at 1060 (referring to the “third and final”  
17 step), means that the Rule of Reason analysis can end without  
18 balancing if a viable less restrictive alternative is not shown.  
19 Neither the Supreme Court nor the Ninth Circuit has so held. In  
20 O’Bannon II, the Ninth Circuit found a less restrictive  
21 alternative was viable; accordingly, balancing as a final  
22 consideration was not necessary in that case. See 802 F.3d at  
23 1070. The Supreme Court’s rule-of-reason analysis in American  
24 Express did not reach the balancing stage either, because the  
25 plaintiffs had not satisfied their burden to show that the conduct  
26 at issue had anticompetitive effects.

27 As can be observed in many citations above, the Supreme Court  
28 and the Ninth Circuit frequently rely on the treatises and other

1 writings of Phillip E. Areeda and Herbert Hovenkamp in cases  
2 involving the Sherman Act. See, e.g., American Express, 138 S.  
3 Ct. at 2284 (citing Areeda & Hovenkamp). These scholars have  
4 noted that a three-step burden-shifting framework and balancing  
5 “are hardly the same thing” because “the sequence of evidentiary  
6 steps, with its shifting burdens, is an attempt to avoid general  
7 balancing.” See Areeda & Hovenkamp ¶ 1507d. Their view is that  
8 balancing is appropriate as a final consideration where no viable  
9 less restrictive alternative has been established. See id. (“A  
10 better way to view balancing is as a last resort when the  
11 defendant has offered a procompetitive explanation for a prima  
12 facie anticompetitive restraint, but no less restrictive  
13 alternative has been shown . . . . The court must then determine  
14 whether the anticompetitive effects made in the prima facie case  
15 are sufficiently offset by the proffered defense.”).

16 If no balancing were required at any point in the analysis,  
17 an egregious restraint with a minor procompetitive effect would  
18 have to be allowed to continue, merely because a qualifying less  
19 restrictive alternative was not shown. In this case, however, the  
20 Court has found a viable less restrictive alternative and will  
21 enter its injunction accordingly.

## 22 IX. Summary of Liability Determinations

23 For the reasons set forth above, the Court finds and  
24 concludes that the challenged rules, in their current form,  
25 unreasonably restrain trade in violation of Section 1 of the  
26 Sherman Act. The challenged rules constitute horizontal price-  
27 fixing agreements enacted and enforced with monopsony power. This  
28 essentially eliminates price competition as to one key aspect of

1 the recruitment of student-athletes in Division I basketball and  
2 FBS football, namely the labor that goes into these sports. As  
3 such, the challenged rules harm student-athletes by depriving them  
4 of compensation they otherwise would receive for their athletic  
5 services.

6 Defendants failed to show that the challenged rules have an  
7 effect on promoting integration of student-athletes and their  
8 academic communities. While Defendants have shown that limiting  
9 student-athlete compensation has some effect in preserving  
10 consumer demand for Division I basketball and FBS football as  
11 compared with no limit, Plaintiffs have shown that not all of the  
12 challenged rules are necessary to achieve this effect and that a  
13 less restrictive alternative set of rules would be virtually as  
14 effective as the set of challenged rules, without requiring  
15 significant costs to implement. The less restrictive alternative  
16 would remove limitations on most education-related benefits  
17 provided on top of a grant-in-aid, while allowing the NCAA to  
18 limit cash or cash-equivalent awards or incentives for academic  
19 achievement or graduation to the same extent it limits athletics  
20 awards. Limits on compensation and benefits that are not related  
21 to education and a limit on the grant-in-aid at not less than the  
22 cost of attendance would remain.

23 X. Remedy

24 The Sherman Act grants the power to district courts to  
25 "prevent and restrain violations" of Section 1. 15 U.S.C. § 4.  
26 In accordance with the viable less restrictive alternative  
27 discussed above, the NCAA may continue to limit the grant-in-aid  
28 at not less than the cost of attendance, and to limit compensation

1 and benefits that are unrelated to education provided on top of a  
2 grant-in-aid. The NCAA may also limit academic or graduation  
3 awards or incentives, provided in cash or cash-equivalent, as long  
4 as the limit imposed by the NCAA is not less than the athletics  
5 participation awards limit.

6 Current NCAA limits on other education-related benefits that  
7 can be provided on top of a grant-in-aid are invalidated. The  
8 NCAA may not limit these benefits in the future.

9 Each conference will continue to be able to limit any  
10 compensation or benefits, including the education-related benefits  
11 that the NCAA will not be permitted to cap, as long as it does so  
12 independently from other conferences. Schools will remain free to  
13 set limits on their own offers to student-athletes.

14 The NCAA will retain the right to define, in an exercise of  
15 discretion and good faith, education-related benefits and to  
16 regulate how schools provide them to student-athletes. The NCAA  
17 may also assist conferences and schools in enforcing any  
18 conference rules limiting educational benefits.

19 The Court will herewith issue an injunction, which will take  
20 effect in ninety days but will be stayed pending the issuance of a  
21 mandate if a notice of appeal is timely filed. The Court will  
22 retain jurisdiction over the enforcement and amendment of the  
23 injunction.

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CONCLUSION

There is a great disparity between the extraordinary revenue that Defendants garner from Division I basketball and FBS football, and the modest benefits that class members receive in exchange for their participation in these sports relative to the value of their athletic services and the contributions they make. Class members contribute their elite talent and time, they limit their educational options, and they risk their long-term health to create enormous financial value for Defendants.

Restricting non-cash education-related benefits and academic awards that can be provided on top of a grant-in-aid has not been proven to be necessary to preserving consumer demand for Division I basketball and FBS football as a product distinct from professional sports. Allowing each conference and its member schools to provide additional education-related benefits without NCAA caps and prohibitions, as well as academic awards, will help ameliorate their anticompetitive effects and may provide some of the compensation student-athletes would have received absent Defendants' agreement to restrain trade.

The clerk shall enter judgment in favor of the Plaintiff class. Plaintiffs shall recover their costs from Defendants. The parties shall not file any post-trial motions based on arguments that have already been made.

IT IS SO ORDERED.

Dated: March 8, 2019



Claudia Wilken  
United States District Judge