

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

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

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

8 THIS DOCUMENT RELATES TO:
9 ALL ACTIONS

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

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

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

18 BACKGROUND

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

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

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

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

5 I. O'Bannon v. NCAA

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

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

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

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

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

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

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

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

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

17 II. This Litigation

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

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

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

20 Defendants and the consolidated Plaintiffs reached a
21

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

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

6 LEGAL STANDARD

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

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

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

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

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

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

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

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

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

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

If the moving party does not meet its initial burden of

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

5 DISCUSSION

6 I. Res Judicata and Collateral Estoppel

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

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

28 Collateral estoppel "prevents a party from relitigating an

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 II. Section 1 of the Sherman Act

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

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

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

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

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

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

28

1 A. Anticompetitive Effects in the Relevant Market

2 1. Market Definition

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

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

22 2. The Challenged Restraints and Significant
23 Anticompetitive Effects

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

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

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

15 B. Procompetitive Benefits of the Restraints

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 C. Less Restrictive Alternatives

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

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

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

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

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

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

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

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

26
27
28 challenge only the portions of the conference rules that require
compliance with challenged NCAA rules. See Pls. Reply, App’x A
(listing challenged language of each rule).

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

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

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

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

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

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

1 athletes. Poret Rep. at 19-21.

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

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

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

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

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

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

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

25 CONCLUSION

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

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

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

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

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

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

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

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

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

10 IT IS SO ORDERED.

11
12 Dated: March 28, 2018



CLAUDIA WILKEN
United States District Judge

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