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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

This Document Relates to:

ALL ACTIONS EXCEPT
Jenkins v. Nat'l Collegiate Athletic Ass'n, Case No. 14-cv-02758-CW

Case No. 4:14-md-2541-CW

PLAINTIFFS' CLOSING ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

The ten-day trial confirmed what Plaintiffs promised in their Opening Statement: Defendants could not, and would not, come forward with evidence sufficient to meet their heavy burden to justify the challenged restraints, *i.e.*, to prove that Defendants' compensation restraints preserve consumer demand by promoting "amateurism" or cause "integration." It is undisputed that, since the record closed in *O'Bannon*, there are now thousands of Class Members receiving compensation and benefits significantly in excess of cost of attendance ("COA") and untethered to education. Yet Defendants presented no economic or consumer-survey evidence to show any harm to either consumer demand or integration caused by this widespread above-COA compensation.[1] Instead, defense witnesses repeatedly admitted that there has been no harm at all.[2]

Defendants' complete failure of proof is a result of the fact that amateurism and integration have been exposed at trial as economically invalid myths clung to only by those with a pecuniary or philosophical interest in the *status quo*. Contrary to what the NCAA claimed in *O'Bannon*, and before that in *White,* the trial record demonstrates that there is no bright-line, consumer-demand-driven definition of amateurism: not at the old GIA cap, not at or above COA, nor at any other economic point of demarcation. Rather, as NCAA President Mark Emmert admitted in February, Defendants' amateurism line "has evolved and constantly does"; "the rules of the association have accumulated over the years, and there's no doubt in [his] mind, and . . . most of the member universities[']minds, that some of these rules have simply been written for a different age."[3] In the words of former NCAA Vice President David Berst, the NCAA's definition of "amateur" is "***not steeped in any sacred absolute principle that had to be preserved.***"[4]

Kevin Lennon, the NCAA's Vice President of Division I ("D-I"), and its 30(b)(6) witness about the amateurism rules, admitted at both his deposition[5] and trial[6] that Defendants now permit

[1] Trial Tr. (Rascher) 144:15-145:13; *id.* (Noll) 285:7-287:13.
[2] *E.g.*, NCAA (Lewis) Tr. 79:1-21, 112:2-16; NCAA (Lennon) Tr. 63:21-64:1, 316:4-25; Trial Tr. (Lennon) 1558:8-1559:3.
[3] P0077-0005-0006; *id.* -0015-16.
[4] P0065-0002 (emphasis added).
[5] NCAA (Lennon) Tr. 58:13-59:16, 71:23-73:2, 74:22-75:8, 287:6-19.
[6] Trial Tr. (Lennon) 1322:14-25.

numerous benefits above COA that "***are not related to the principles of amateurism***,"[7] and that are periodically changed and determined by the D-I conferences and Board of Directors ***without ever studying whether a change in compensation rules would impact consumer demand or integration***.[8] Rather, the recurring conversation that Lennon recalls regarding the adoption of NCAA compensation rules is: "I've heard ***cost considerations*** as it related to ***all the rules***."[9]

These admissions reflect the NCAA's long history—as testified to by Dr. Roger Noll—of manipulating the compensation rules defining "amateurism" to serve as an expedient and circular Humpty Dumpty concept in which on one day, *e.g.*, awarding two postgraduate scholarships to Class Members is prohibited "pay-for-play," and the next day, the same benefit is deemed fully consistent with amateurism simply because the D-I members have said so.[10] Lennon testified as the NCAA corporate designee that these ever-changing determinations of what is and what is not "pay-for-play" are exclusively the whim of a D-I membership vote at a given moment.[11]

Against this backdrop, it is unsurprising that Defendants failed to carry their substantial burden to prove with probative evidence—as opposed to philosophical musings—that the challenged restraints preserve consumer demand for Defendants' products or cause the integration of athletes. In fact, Defendants' antitrust economist, Dr. Kenneth Elzinga, admitted that he did not conduct any study of empirical or other economic evidence to support Defendants' consumer demand or integration claims.[12] Defendants' integration expert, Dr. James Heckman, admitted that he did not conduct any empirical analysis of the impact of different compensation payments made to Class Members on their academic performance or integration.[13] Defendants' consumer survey expert, Dr. Bruce Isaacson, admitted that he did not measure the impact on future consumer demand if new compensation or

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[7] NCAA (Lennon) Tr. 85:13-23; 316:4-25 (emphasis added).
[8] Trial Tr. (Lennon) 1550:25-1551:12 (could not "recall any" "economic study of any type ever . . . presented at a single NCAA meeting where they set various caps for benefits to determine whether or not there would be an adverse effect on consumer demand"); *see also id.* 1550:13-24, 1650:12-22 (could not recall consumer demand ever discussed in the justification memo for a proposed rule).
[9] *Id.* 1551:13-18 (emphasis added).
[10] Noll Decl. ¶¶ 37-47; *see also* J0024-0240 (Bylaw 16.1.4.1.1).
[11] NCAA (Lennon) Tr. 71:5-72:15; Trial Tr. (Lennon) 1544:20-1545:12.
[12] *Id.* (Elzinga) 392:6-21.
[13] *Id.* (Heckman) 606:24-607:4 (discussing his Declaration).

benefits were permitted.[14] And Defendants failed to call a single media or sponsorship partner to testify about any purported relationship between compensation for players and consumer demand. Defendants simply offered no evidentiary rejoinder to the undisputed fact that their revenues have continued to skyrocket since 2015, when it became commonplace for Class Members to receive compensation significantly in excess of COA and untethered to education.[15]

As for Defendants' repetitive lay-opinion witnesses, each one admitted on cross-examination that she or he had not so much as discussed the option of conference autonomy with anyone—not students, not faculty, not alumni, not fans, and not media partners—as a basis for their wholly speculative opinions that conference autonomy would cause the sky to fall.[16] To be sure, one thing that has not changed since *O'Bannon* (or *White*) is Defendants' tried-and-untrue parade of horribles that would supposedly ensue from increased compensation but never comes to pass.[17] The post-*O'Bannon* natural experiment—ubiquitous payments above COA—has proven that increased compensation does not negatively impact consumer demand or integration.[18] Revenue *and* academic success rates keep going up.[19] Although the Court was willing to receive Defendants' lay-opinion testimony for limited purposes, it has been exposed as unsupported and self-serving. As a result, the Court should find that these speculative lay opinions merit no evidentiary weight.

Because Defendants did not meet their burden to prove either of their claimed procompetitive justifications, the rule-of-reason analysis ends, and judgment should be entered for Plaintiffs. But even if the Court were to proceed to consider less-restrictive alternatives, it should find that Plaintiffs prevail at this step, too. Specifically, the trial evidence—including the evidence documenting the successful history of the Power Five's limited autonomy to increase Class Member compensation, and the historical evidence documenting the undisputed popularity of college sports when conferences

[14] *Id.* (Isaacson) 1891:6-15 (quoting Isaacson Rebuttal Report); *id.* 1889:15-1890:1.
[15] Noll Decl. ¶¶ 113-23; Rascher Decl. ¶¶ 223-34; Trial Tr. (Rascher) 21:5-22; *id.* (Noll) 290:23-292:2, 294:24-298:18; P0123; P0139-0001.
[16] *See infra* § II.A.4.
[17] *See, e.g.*, Rascher Decl. ¶¶ 113-14.
[18] *See infra* §§ II.A.1, IV.A; *see also* NCAA (Lewis) Tr. 79:1-21, 112:2-16; NCAA (Lennon) Tr. 63:21-64:1, 316:4-25; Rascher Decl. ¶¶ 44, 47-91.
[19] Trial Tr. (Petr) 1865:2-25, 1883:13-1885:5; Noll Decl. ¶¶ 144-46, 148.

individually set all rules on athlete compensation[20]—established that even if the challenged restraints offered any procompetitive benefits, individual conference rulemaking could achieve such benefits in a less-restrictive and more-efficient manner.[21] Every single conference and school witness freely admitted that she or he would advocate that their conference preserve any benefits of amateurism and integration in deciding future conference rules.[22] And there is no evidentiary basis to doubt that individual conferences—producers and brand managers of a multi-billion-dollar industry populated by the same schools that make up the NCAA's D-I—would not be able to determine for themselves which rules to implement (*e.g.*, by conducting their own consumer surveys) in the best interests of their conference members.[23] The Poret Survey is just one of many pieces of evidence presented by Plaintiffs proving that there are numerous and varied additional benefits that conferences could permit above COA without harming demand.[24] Such evidence demonstrates that the challenged restraints are more restrictive than reasonably necessary.

Moreover, the trial evidence proves that there would not be any significant increase in administrative costs to implement conference autonomy. Most fundamentally, this less-restrictive alternative merely ***eliminates*** NCAA compensation rules, which necessarily ***reduces*** the current (exorbitant) costs of enforcing those rules. This should be the beginning and end of the analysis about the cost of implementing the conference-autonomy alternative. To the extent conferences ***choose*** to implement their own compensation restraints, that is an exercise of discretion, not an inherent cost of the less-restrictive alternative. And, even so, conferences could: (i) decide to leave in place the current NCAA enforcement apparatus to enforce any new conference rules; (ii) avail themselves of the new third-party enforcement process being adopted in response to the NCAA Commission on College Basketball ("Rice Commission"); (iii) utilize their already-existing compliance infrastructures; or (iv) add to conference enforcement resources with reallocated NCAA enforcement funds.[25] No matter

[20] Trial Tr. (Noll) 297:17-299:14; Rascher Decl. ¶ 178; Noll Decl. ¶¶ 30-31.
[21] *See, e.g.*, Rascher Decl. ¶¶ 152-89.
[22] *See infra* § IV.B; *id.* n.206, 207.
[23] *E.g.*, Trial Tr. (Rascher) 69:22-70:15, 73:20-74:15; *id.* (Poret) 1774:6-14; Rascher Decl. ¶¶ 152-89.
[24] Trial Tr. (Poret) 1790:14-20; Poret Decl. ¶ 57-61; P0141-0001.
[25] P0060-0010-12, -0039-45 (Rice Commission); P0144-0012, -0015 (same); Brad Hostetter Tr. 40:24-41:6 (existing infrastructure); Trial Tr. (Smith) 1503:10-1505:19 (same); *id.* (Blank) 893:10-894:18 (same).

how the Court looks at the issue of implementation costs, neither of Plaintiffs' proposed less-restrictive alternatives would impose any significant increase in implementation costs.[26]

Finally, if necessary, the Court also should find for Plaintiffs because, on balance, the trial evidence demonstrates that any small procompetitive effects of the challenged restraints would be far outweighed by the significant anticompetitive effects found by the Court on summary judgment. The Ninth Circuit mandates such balancing to determine "reasonableness" when Plaintiffs have proven anticompetitive harm yet the other steps of the rule of reason have not established a violation.

II. THE COURT SHOULD FIND AS A MATTER OF FACT THAT DEFENDANTS FAILED THEIR BURDEN TO PROVE THAT THE CHALLENGED RESTRAINTS PRESERVE CONSUMER DEMAND BY PROMOTING "AMATEURISM"

The Court has already decided on summary judgment that the challenged restraints inflict significant anticompetitive harm in the relevant markets.[27] But unlike in *O'Bannon*, Defendants here have not carried their burden of proof to establish *any* procompetitive justification for the restraints. Defendants' "heavy burden" required them to "competitively justif[y their] apparent deviation from the operations of a free market,"[28] and showing a small procompetitive effect does not suffice.[29] Nor can Defendants meet their burden with unsupported belief or social-welfare goals.[30] Defendants had to introduce substantial *economic* or other probative evidence that their restraints "actually promote [] competition in a relevant market."[31] They have not met this burden as a matter of fact.

A. Defendants Offered No Credible Evidence That Eliminating the Challenged Restraints and Permitting Individual Conferences to Determine Whether to Permit Increased Compensation Would Harm Consumer Demand

1. Defendants Offered No *Economic* Evidence to Meet Their Burden

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[26] Rascher Decl. ¶¶ 211-44.

[27] Order Granting in Part and Denying in Part Cross-Mots. for Summ. J. ("MSJ Order"), ECF No. 804, at 18-19, 34-35.

[28] *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984) (citing *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-696 (1978)).

[29] *In re S.E. Milk Antitrust Litig.*, 739 F.3d 262, 272 (6th Cir. 2014) ("procompetitive effects" must be "sufficient to justif[y] the otherwise anticompetitive injuries.") (citations omitted); Areeda & Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Areeda"), ¶ 1507a, "Tentative sequence of evaluation" (there must be "strong evidence").

[30] *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); *Prof'l Eng'rs*, 435 U.S. at 692; Areeda ¶ 1504a, "Definition; motive or effect" ("The defendants' mistaken belief, no matter how sincere, that their collaboration improves competition should be immaterial to the tribunal's decision whether to enjoin it as an unreasonable trade restraint.").

[31] *In re NCAA Student-Athlete Name & Likeness Litig.*, 37 F. Supp. 3d 1126, 1150 (N.D. Cal. 2014).

It is undisputed that Defendants offered no economic evidence to meet their burden to prove the challenged compensation restraints preserve consumer demand for D-I basketball and FBS football. Elzinga readily admitted he "never [conducted] an analysis of any of the financial data for any school," "any conference," nor the "the financial data of revenues [and] expenses for the NCAA."[32] Elzinga also "never constructed an econometric statistical model."[33] The failure to conduct or identify any studies of economic data or empirical support for his "theories" about a consumer-demand impact render Elzinga's testimony incompetent support for Defendants' burden of proof.

As Noll testified, Elzinga "did not study consumer demand" "because there is no information in any of his reports or testimony to reflect having studied it."[34] To study consumer demand, an economist would "want to look at the revenues and expenditures. You may want to look at attendance. You may want to look at audience ratings" because "there's a standard set of measures of demand in a market and what the demand relationship is between revenues or attendance and television viewing and the institutional structures of the sports."[35] But Elzinga "did not look at any data at all that an economist would view as a proxy for empirical data on consumer demand."[36]

Instead, Elzinga relied on "narrative" evidence,[37] which primarily consisted of five interviews with school presidents or athletic directors. By Elzinga's own admission, Defendants' lawyers handpicked these interviewees, and they were not intended to be a representative sample of constituents relevant to the economics of college sports.[38] He did not speak to any fans, broadcasters, enforcement personnel, coaches, or athletes.[39] And in the interviews he conducted, no one ever told Elzinga that, if allowed to do so, any particular school would choose to pay athletes significant sums

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[32] Trial Tr. (Elzinga) 392:6-17.
[33] *Id.* 392:18-21.
[34] *Id.* (Noll) 285:21-286:3.
[35] *Id.* 286:7-16.
[36] *Id.* 287:4-6; *see also id.* 348:25-349:5; Rascher Rebuttal ¶¶ 19-22 (Elzinga ignored testimony from, *e.g.*, NCAA 30(b)(6) designee Mark Lewis and ACC Commissioner John Swofford that increased benefits under COA change had not harmed demand).
[37] Trial Tr. (Elzinga) 477:18-23.
[38] *Id.* 447:15-19 ("**Q.** And so you identified the type of people and then defense counsel went and selected those people for you, correct, sir? **A.** That's my understanding."); *id.* 448:1-5 (Elzinga agreeing he does not "know whether defense counsel spoke to the potential witnesses and pre-screened the information that they may provide.")
[39] *Id.* 446:1-21.

as pay-for-play without regard for the impact on consumer demand.[40] In sum, these five unrepresentative interviewees simply articulated their personal opinions that paying athletes more—in Wake Forest President Nathan Hatch's case, "unrestrained" compensation[41]—would be bad for college sports. This is not a reliable basis for an expert's opinion.

Indeed, the statements from these five cherry-picked interviews (out of more than 350 D-I schools) were readily contradicted by other market participants whom Elzinga did not interview. For example, as the foundation for his opinion that conference-based decision-making might cause "negative externalities," Elzinga relied upon Hatch's speculation that, without the current compensation restraints, schools that elected not to provide greater benefits for their athletes would no longer compete against schools that did offer greater benefits and, as a result, conferences would "fracture" and the NCAA basketball tournament "would have to be . . . completely recast."[42] But Hatch admitted on cross-examination that, in fact, not a single school president or employee has ever told him that their institution would pay the type of higher compensation in excess of COA that he condemned.[43] And he admitted he would not pursue such a course for Wake Forest.[44]

Further, Hatch's statements were directly contradicted by the current NCAA Vice President of Women's Basketball, Lynn Holzman (whom Elzinga did not interview), who testified that, if the rules were changed and, for example, some schools started offering $10,000 graduation incentives to their athletes, it would not adversely affect the March Madness tournament.[45] As another example, when confronted with the statements of America East Conference Commissioner Amy Huchthausen (whom Elzinga also did not interview) that greater compensation would not harm her conference, Elzinga acknowledged that these statements are inconsistent with his "externality" theory that removing the challenged restraints would harm these non-autonomy conferences: "I think she may have said the opposite, that there may have been a ***good*** effect on her conference."[46] Elzinga did not, however,

[40] *Id.* 449:23-450:9.
[41] Elzinga Decl. ¶ 147.
[42] *Id.* ¶¶ 145-46.
[43] Trial Tr. (Hatch) 2017:8-13.
[44] *Id.* 2022:20-22.
[45] *See* Lynn Holzman Tr. 128:22-130:9.
[46] Trial Tr. (Elzinga) 499:6-20 (emphasis added).

consider this or any other evidence to test the validity of his "externality" theory.[47]

In addition to having failed to perform *any* economic analysis relating to consumer demand, Elzinga could not identify a single, specific compensation increase or benefit change that would harm consumer demand if allowed. For example, Elzinga had no idea if demand would be harmed if Class Members received participation awards valued above current NCAA limits or were permitted to sell participation awards for cash.[48] Likewise, Elzinga could not provide any economically supported consumer-demand justification for the NCAA's rule limiting postgraduate scholarships at another institution to two $10,000 awards.[49] Nor did Elzinga have any basis to opine that there has been a negative consumer-demand impact from the University of Nebraska's postgraduate internship program, which Dr. Daniel Rascher testified was another natural experiment showing consumer demand was not diminished when additional compensation above COA is permitted.[50]

Further, Elzinga had to admit that never once has consumer demand suffered when the NCAA has relaxed its rules repeatedly over time to permit more compensation. For example, Elzinga found no adverse impact to consumer demand when the NCAA allowed a combination of COA scholarships, Pell Grants, Student Assistance Fund ("SAF") money, and incidental benefits to exceed COA.[51]

Finally, Elzinga admitted to *the* inescapable economic truth of this case: to the extent it is against a school's or conference's economic self-interest to pay college athletes any given amount because it would hurt consumer demand, these individual economic decision-makers will act rationally and not allow it.[52] This critical point is not just economic theory—it was confirmed by the numerous school and conference witnesses who testified that they would recommend that their conferences forbid any compensation that they believed would harm consumer demand.[53]

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[47] *Id.* 446:14-16, 479:10-25.
[48] *Id.* 422:23-426:17.
[49] *Id.* 432:4-433:12.
[50] *Id.* 434:15-18, 437:23-438:3.
[51] Elzinga Decl. ¶ 73; *see also* Trial Tr. (Elzinga) 417:2-22 (discussing prior changes).
[52] Trial Tr. (Elzinga) 443:15-444:8.
[53] *See infra* § IV.B; *see also* Rascher Rebuttal ¶ 57 ("[e]conomic theory does not support the assertion that schools will act irrationally if permitted to compete at the conference level. Instead, a claim that economic competition among the conferences would be destructive is not a procompetitive justification – it is an argument that competition itself is undesirable and has no support in accepted economic theory.").

2. Defendants Offered No Survey Evidence Testing the Impact on Consumer Demand if Conferences Could Increase Compensation

a. Dr. Isaacson "D[id] Not Attempt to Measure Future Behavior"

In his expert report, Defendants' survey expert, Isaacson, admitted in no uncertain terms that, "Unlike the Poret survey, ***my survey does not attempt to measure future behaviors***, but ***rather*** asks respondents if they are in ***favor of or against*** the benefits described under each scenario."[54] Isaacson confirmed this at trial.[55] And, although Isaacson's direct trial testimony states that his "survey provides significant evidence concerning how consumers would behave if the scenarios I tested were implemented," ***in the very same sentence***, Isaacson concedes that "I could not reliably and therefore did not measure future behavior."[56] This undisputed fact renders the Isaacson testimony incapable of helping Defendants meet their burden of proof.

The ***only*** substantive question Isaacson asked respondents about the few increased-compensation scenarios he tested was whether they "favored" or "opposed" the increased compensation described.[57] But the Court ruled in *O'Bannon* that such questions about "opposition"—not changes in future consumer behavior—are irrelevant to determining the consumer-demand issue:

> The NCAA relies heavily on the fact that sixty-nine percent of respondents to Dr. Dennis's survey expressed opposition to paying student-athletes while only twenty-eight percent favored paying them. ***These responses, however, are not relevant to the specific issues raised here and say little about how consumers would actually behave if the NCAA's restrictions on student-athlete compensation were lifted***.[58]

Indeed, as Poret explained and Isaacson conceded, consumer ***opposition*** to a compensation change does not equate to a respondent reducing consumption if the change were implemented.[59]

Not only did the Isaacson survey fail to measure future consumer behavior, he also ignored five of the eight Poret Test Scenarios for increased compensation and offers no opinion that

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[54] Trial Tr. (Isaacson) 1891:7-10 (emphasis added) (quoting Isaacson Rebuttal Report).
[55] *Id.* 1891:6-15; *see also id.* 1889:15-24 (his survey "d[id] not attempt to measure future behavior").
[56] Isaacson Decl. ¶ 2.
[57] Trial Tr. (Isaacson) 1891:25-1893:3.
[58] *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 975 (N.D. Cal. 2014) (emphasis added).
[59] Poret Decl. ¶¶ 27-28; Poret Rebuttal Decl. ¶¶ 2-3, 5; Trial Tr. (Isaacson) 1893:9-13. Even if "oppose" and "favor" results *were* relevant, the Poret Survey shows that the number of respondents "favoring" every one of his increased compensation Test Scenarios substantially exceeds the number of respondents "opposing" them. *See* P0142.

introducing any of them—Healthcare Fund, Grad School Costs, Work-Study Payment, Post-Eligibility Undergrad Scholarship, or Post-Eligibility Study Abroad—would negatively impact consumer demand.[60] And even for the three of eight Poret Test Scenarios that Isaacson did test, he admitted that he is "***not providing an opinion on whether or not opposition to a particular benefit relates to amateurism***."[61] This fatal admission further underscores Isaacson's categorical failure to provide any probative support for Defendants' burden to prove that the challenged restraints preserve consumer demand for their products by promoting their latest definition of "amateurism."[62]

b. Dr. Isaacson's Survey Does Not Support Defendants' Contention That Amateurism Is "the Defining" Feature of College Sports

In their Opening Statement, Defendants claimed that amateurism is "***the*** defining feature of college sports."[63] Isaacson's own survey exposes this claim as more Defendant fiction. Despite using the confusing phrase "and/or" to artificially inflate (and hopelessly bias) the number of respondents who would select the "amateur and/or not paid" response (which made it impossible to determine whether respondents choosing this response did so merely because they liked the fact that the athletes are students without regard to whether they are also "paid"),[64] still only ***31.7%*** of respondents selected this option as one of their multiple reasons for watching or attending college sports.[65] Defendants could not possibly satisfy their promise to show that amateurism is "the" defining feature of college sports for consumers when, despite their survey expert's gerrymandered question, ***68.3%*** of respondents indicated that whether athletes are "amateurs and/or not paid" (whatever that means) does not matter to their consumption of college sports.

Further, the 31.7% of respondents who did select the "amateur and/or not paid" option also selected, on average, 3.4 additional reasons, and Isaacson has no idea whether these other responses

[60] Trial Tr. (Isaacson) 1900:4-6.
[61] *Id.* 1912:3-18 (emphasis added).
[62] Isaacson's failure to show any relationship between amateurism and opposition to additional compensation is devastating to Defendants' case because consumers might oppose additional compensation for all sorts of reasons that have nothing to do with Defendants' amateurism justification. Poret Decl. ¶¶ 148, 184 n.34; Trial Tr. (Isaacson) 1914:11-15.
[63] Defs. Opening Statement, ECF No. 923, at 3 (emphasis added).
[64] Trial Tr. (Isaacson) 1907:1-7 ("I didn't measure amateur independent of the phrase 'not paid.'").
[65] Isaacson Decl. ¶ 153, Table 4.

were more or less important.[66] Isaacson Table 4 does show, however, that a higher percentage of all respondents selected that they "like it when certain colleges win or lose" and "my friends or family watch games, or attend games in person" than selected the "amateur and/or not paid" option; more women's basketball fans selected "follow[ing] certain players or coaches"; and more football fans selected that they like that games are "played on Saturday or other convenient days or times."[67] In short, Defendants' own survey—despite its biases—undermines, rather than supports, their burden.

c. Defendants Never Conducted Any Consumer Survey to Determine Whether to Adopt or Modify the Challenged Restraints

If Defendants' compensation restraints were actually tied to impact on consumer demand, one would expect Defendants to have conducted consumer surveys or other market research concerning whether additional forms of compensation provided to Class Members would, in fact, negatively impact consumer demand.[68] As Poret testified, Defendants could have researched the impact on consumer demand for any and every type of compensation they restrict.[69]

Yet, time and time again—both at trial, and in their depositions—Defendants admitted that they never conducted any consumer survey (or other type of market research) about the relationship between compensation restraints, or proposed changes to compensation restraints, and consumer demand.[70] This telling admission further demonstrates why Defendants cannot meet their burden of

[66] Trial Tr. (Isaacson) 1902:18-24, 1904:10-19.
[67] Isaacson Decl. ¶ 153, Table 4.
[68] Poret Decl. ¶¶ 135, 142, 144-150; Trial Tr. (Poret) 1774:6-14; *id.* 1783:15-1784:16.
[69] Trial Tr. (Poret) 1774:6-14.
[70] *See, e.g.*, *id.* (Lennon) 1550:25-1551:12 ("**Q.** Do you ever recall any economic study of any type ever being presented at a single NCAA meeting where they set various caps for benefits to determine whether or not there would be an adverse effect on consumer demand by setting a particular cap limit? **A.** I don't recall any."), *id.* 1650:19-22; *id.* (Petr) 1873:11-23 ("**Q.** Am I correct your research department has never been asked to do any consumer survey relating to the impact that a specific benefit change to players would have on consumer demand? That's not something your department has ever done? **A.** No."); *id.* (Blank) 898:14-899:1 ("**Q.** Has anyone at Wisconsin conducted a formal survey about participants' views of what would happen to their willingness to watch football if the conferences were free to set their own rules? **A.** We have not."); *id.* (Aresco) 1044:13-15 (*see infra* § II.A.3); *id.* (Smith) 1466:24-1647:4 ("**Q.** . . . has [Ohio State] said, okay, we want to take a formal survey and we're going to ask fans what would happen to their willingness to watch football, Ohio State football, if the conferences were free to set their own compensation limits? **A.** We have not."); *id.* (Hatch) 2018:21-25 ("**Q.** . . . With respect to your opinion on erosion [of demand], Wake Forest has not conducted any study on that subject? **A.** We have not conducted a formal study."); Big 12 (Bowlsby) Tr. 85:7-17 ("**Q.** I'm asking a little bit of a different question, which is: Does the Big 12 promote the fact that its players 'don't get paid'? . . . **A.** No, not specifically. **Q.** Okay. Has the Big 12 ever conducted any type of study or analysis of amateurism as a driver of revenue? A. No."); MAC (Steinbrecher) Tr. 14:1-4 ("**Q.** Does the MAC have any tangible evidence that consumers place a

proving that their compensation restraints preserve consumer demand.[71]

3. Defendants Offered No Testimony from Media Partners, Sponsorship Partners, or Broadcasting Experts That Increased Compensation Would Hurt Consumer Demand

Unlike in *O'Bannon*, where the NCAA offered testimony from a media-rights expert about purported adverse effects on demand that would be caused by changes to compensation rules, Defendants offer no such expert testimony here. Nor did they offer any such testimony from their network-television or sponsorship partners.[72] Instead, for purported evidence of a broadcaster perspective, Defendants relied on a single, self-interested fact witness—Mike Aresco, the commissioner of Defendant American Athletic Conference ("AAC").

Aresco was not qualified as an expert in this case. Moreover, his individual experience in sports broadcasting ended in 2012, and much of his testimony focused on experience so old (going back to the 1980s and 1990s) as to be irrelevant.[73] In any event, Aresco could not recall ever discussing with anyone at ESPN or CBS "the issue of how demand for college football would be negatively impacted or positively impacted" if college athletes could receive additional forms of compensation, like graduate school tuition.[74] Aresco's self-interested lay opinions and recitation of decades-old facts provided no probative evidence of what broadcasters would do today if individual conferences, as opposed to the NCAA, were responsible for compensation rules. Indeed, the ***only*** testimony from a ***current*** broadcaster in the trial record is from Jay Bilas—who has worked in college-sports

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premium on the amateur nature of MAC sports? **A.** I have no knowledge of that."); C-USA (MacLeod) Tr. 126:21-126:24 ("**Q.** Does the conference specifically promote the concept of amateurism? . . . **A.** I don't believe so, no.").

[71] At trial, Defendants introduced into evidence two surveys produced by the Pac-12 and one survey produced by the Big Ten that asked consumers about their views of college sports. Putting aside the fact that these surveys were not admitted for the truth of their contents (Trial Tr. (Scott) 1161:22-25; *id.* (Smith) 1412:15-16, 1415:2-6), they also failed to address any specific NCAA compensation restraints, additional compensation that could be provided, the alternative of conference regulation, or any proposed rule changes. And there is no claim that these surveys were ever considered by NCAA membership when voting to adopt or change any of the NCAA's compensation rules.

[72] In fact, Defendants' media agreements contain contingencies for specific rules changes that would impact broadcaster concerns, such as [redacted], but they are silent about the specific subject of [redacted]—evidence showing that broadcasters are not particularly concerned about this. *See, e.g.*, P0046, P0049; *see also, e.g.*, J1502 (contains specific provision governing [redacted]).

[73] Trial Tr. (Aresco) 1005:24-1006:2; *see, e.g.*, *id.* 984:17-985:2.

[74] *Id.* 1041:6-13.

broadcasting at ESPN for over twenty years—and he testified that he never once heard that consumers watch college sports because the athletes are not paid.[75]

Regarding Aresco's claim that during his time at CBS years ago, the network wanted to keep college sports from being associated with professional sports, such testimony is irrelevant to any effort to justify the challenged compensation restraints today, not only in light of the alternative of conference autonomy, but also because it is refuted by other evidence in the record. In a 2011 email—when Aresco worked at CBS—Conference USA's then-Commissioner Britton Banowsky wrote: "At the highest level, college sports is a business and the products are packaged and sold in virtually the same way as they are in professional sports."[76]

Finally, Aresco's testimony did not address the explosion in media revenues that continued for Defendants after 2014, when thousands of Class Members began to receive compensation well above COA.[77] And he admitted that—like every other defense witness—he has no evidence to offer on the relevant question of whether demand by broadcasters would be impacted if conference autonomy were implemented. The AAC has not analyzed this issue, and during Aresco's time at CBS and ESPN, neither network discussed or conducted a survey regarding the effect on demand if conferences were free to set their own compensation rules.[78]

4. Defendants' Lay-Opinion Speculation That Increased Compensation Would Hurt Consumer Demand Is Entitled to No Weight

Defendants' self-serving, repetitive, and entirely speculative lay opinions from a handful of school and conference witnesses should be afforded no weight. Notably, not one of Defendants' lay witnesses had a single relevant conversation with administrators, fans, alumni, faculty, or media personnel about what would happen to consumer demand if individual conferences were permitted to determine which compensation rules to adopt. Instead, Defendants' lay-witness opinions were based on, at most, discussions about hypothetical scenarios in which no rules exist or discussions of athlete

[75] Jay Bilas Tr. 12:12-22, 198:21-199:9, 199:25-200:5.
[76] P0081-0001. The parties have agreed to admit P0043, P0081, P0076 (excerpts), P0147, P0148, and several other exhibits in a stipulation pending before the Court (*see* ECF No. 1090).
[77] *See, e.g.*, P0045-0002-4; P0123.
[78] Trial Tr. (Aresco) 1040:22-25, 1041:14-17; *see also id.* 1040:14-21, 1041:6-13.

pay as an amorphous concept, neither of which has anything to do with the relief Plaintiffs seek.[79]

When asked, every defense witness stated that he or she was unaware of any attempt by the NCAA, a conference, or a school to conduct a survey of what would happen to consumer demand if conferences were allowed to decide whether to offer additional forms of compensation to college athletes (*supra* n.70). Further, none of these witnesses testified that they have ever had any conversations with students or fans about the possible impact of individual conference rulemaking.[80] There also is no evidence that these witnesses ever discussed what the impact would be if any particular forms of additional compensation were permitted. For example, Scott testified that his conference never studied, nor even considered, the effect of allowing athletes to earn GPA incentive payments; no Pac-12 sponsor has ever discussed a study of what would happen if conferences were free to set their own rules; and no booster has ever said she or he would stop watching college football if conferences allowed GPA incentive payments.[81] Similarly, Ohio State University Athletic Director Gene Smith testified that his university has not conducted any study of the impact on fan interest if conferences could set their own compensation rules or if schools could offer athletes graduate school tuition or GPA incentive payments.[82]

As the Court has already noted,[83] this type of non-representative lay-opinion testimony from a handful of witnesses cherry picked by Defendants is not highly probative. Indeed, based on this trial record, in which the witnesses did not discuss with anyone the conference-autonomy alternative, the Court should enter a factual finding that their personal opinions about this subject merit no weight.

B. Defendants' Ever-Changing Definition of Amateurism Is Arbitrary, Contradictory, and Not Based on Any Study of Impact on Consumer Demand

The essential premise of Defendants' "amateurism" justification is that the challenged restraints rest on a fixed principle of "purity" that preserves consumer demand for their sports. But as shown in § II.A above, Defendants have produced no credible evidence to support this claim. To the

[79] *See e.g.*, Trial Tr. (Blank) 891:20-892:3; *id*. (Aresco) 1016:6-21, *id*. (Scott) 1243:15-22; *id.* (Smith) 1408:15-19.
[80] *See, e.g.*, *id.* (Smith) 1467:15-1468:2.
[81] *Id.* (Scott) 1181:20-25; *id.* 1182:24-1183:5; *id.* 1186:12-17.
[82] *Id.* (Smith) 1466:24-1647:4; *see also id.* 1467:5-14.
[83] July 19, 2018 Pretrial Hr'g Tr. ("Pretrial Tr.") 15:22-16:14.

contrary, Defendants are well aware that consumers harbor no such fantasy: ***the NCAA's own polling*** in 2017 showed that "79 percent of Americans said, big universities put money ahead of their student athletes."[84] Likewise, the trial evidence shows that outside the litigation context, the most senior NCAA executives have acknowledged that the NCAA's assertion of "amateurism" is "simply" "a definition . . . not steeped in any sacred absolute principle that ha[s] to be preserved," that is decided "by the schools themselves, through a complicated representative bureaucracy that . . . makes all the rules and . . . evolve[s] that definition," and that has "undergone quite a few philosophical adjustments."[85] Emmert admitted that he shares the view with "most of the member universities" that "some of th[e] rules have simply been written for a different age."[86] Indeed, rather than imposing compensation restraints calibrated by a consumer-demand analysis, Defendants' rules are a constantly moving target—with many new forms of benefits permitted for Class Members since 2015 alone.[87]

For example, binding 30(b)(6) testimony establishes that the NCAA has adopted numerous rules providing "incidental-to-participation benefits" in excess of COA that have no relationship to principles of amateurism;[88] that the "primary rationale" for these rules is supposed to be "student athlete well-being"—not amateurism;[89] and that the meaning of what is "pay-to-play" and who is an "amateur" under the NCAA rules is determined solely by its D-I Council and Board of Governors according to their own constantly changing view of where the line should be drawn.[90] Indeed, the NCAA bylaws expressly provide for "***Exceptions to Amateurism Rule***,"[91] and the NCAA, through

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[84] P0076-0003-4.

[85] P0065-0002; P0077-0006; P0145-0001. It is thus no surprise that the NCAA chose not to call any of these senior executives to testify at trial.

[86] P0077-0016.

[87] *See, e.g.*, Noll Decl. ¶¶ 52-56, 69-71, 73-77, 86-92 (examples of new compensation beyond previously drawn amateurism lines); Rascher Decl. ¶¶ 30-91 (same); Trial Tr. (Elzinga) 403:6-404:4 (admitting that none of his analyses show negative impact on consumer demand as the amateurism line is redrawn), 405:25-406:14 (admitting that NCAA's definition of pay in Bylaw 12.02.9 is circular because "it comes from the organization that defines amateurism"); Holzman Tr. 132:9-134:2 (acknowledging her statement from 2007 that $4,000 above COA would constitute pay-for-play even though such amounts are permitted in various forms now).

[88] NCAA (Lennon) Tr. 85:5-23, 92:18-93:10, 119:20-122:22.

[89] Trial Tr. (Lennon) 1331:7-22.

[90] *See, e.g.* Trial Tr. (Lennon) 1320:3-22 ("[O]ur membership at any time . . . can agree to change the rule to permit [additional benefits] without violating the principle of amateurism."); *id.* 1358:12-1359:2; NCAA (Lennon) Tr. 71:23-73:2.

[91] J0024-0078-80 (Bylaw 12.1.2.4) (emphasis added).

Lennon, admitted that that there are numerous benefits permitted for Class Members that have nothing to do with educational costs or amateurism.[92]

Underscoring the absence of any economically meaningful historical relationship between the NCAA's "amateurism" claims and consumer demand, Lennon testified that in his thirty years at the NCAA, he does not recall that any compensation cap was selected on the basis of any type of consumer-demand analysis, or that consumer demand was ever discussed in the written justification for any new NCAA compensation rule.[93] But Lennon does recall that D-I members discussed "***cost . . . as it relates to all the rules***."[94] This telling focus by the D-I members on cost—as opposed to consumer-demand impact—underscores the fact that the ever-changing NCAA compensation rules have nothing to do with consumer demand (and everything to do with cartel members' cost controls, which, of course, are not a procompetitive justification).[95] The NCAA's long history of changing the compensation cutoff without any adverse impact on consumer demand confirms these admissions.[96]

Trying to evade his binding 30(b)(6) admissions, Lennon manufactured an attempted escape route. He testified that while it was true that incidental-to-participation benefits were unrelated to principles of amateurism, the "caps" were somehow based on amateurism principles.[97] But in short order, Lennon admitted that individual SAF benefits are not capped, and the NCAA does not regulate these individual student amounts at all.[98] As a result, schools like Michigan State University can, for example, provide more than $50,000 to purchase insurance for lost professional earnings for individual athletes.[99] And Lennon further admitted that the caps were not based on any consumer-demand studies, but instead decided by the whims of NCAA membership.[100]

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[92] *See e.g.* Trial Tr. (Lennon) 1334:19-24 (prize money); *id.* 1337:5-12 (payment based on team performance); *id.* 1340:3-1341:17 (loss-of-value insurance).
[93] Trial Tr. (Lennon) 1550:25-1551:12, 1557:1-11.
[94] *Id.* 1551:13-18 (emphasis added).
[95] *E.g.*, *id.* 1315:7-17 (". . . I think cost is certainly one of many reasonable factors to consider"), 1317:11-17 ("Do I agree that some members consider cost when they're looking at legislation? Yes.")
[96] Noll Decl. ¶¶ 26-56 (portions of ¶¶ 50-51 excluded); *see also* Rascher Decl. ¶¶92-114.
[97] *E.g.*, Trial Tr. (Lennon) 1276:25-1277:8.
[98] *Id.* 1347:6-17.
[99] *Id.* 1340:3-9; *see also* Noll Decl. ¶ 73. For other examples of uncapped SAF payments to individual students, *see, e.g.*, Rascher Decl. ¶¶ 55-56, 61-66, 76-83.
[100] *E.g.*, Trial Tr. (Lennon) 1570:24-1571:23, 1305:2-21; *see also* Hostetter Tr. 218:18-219:24, 267:1-268:15, 269:2-16 (no rationale for the NCAA's caps on participation benefits other than they are determined by the NCAA's D-I members).

For example, the NCAA permits two "senior scholar athlete[s]" to receive postgraduate awards worth $10,000.[101] Lennon testified that he did not recall "any consumer demand study . . . presented to the membership or discussed as to why" only two postgraduate awards could be given (and not, for example, five), and he could not explain how it would "violate the principle of amateurism for there to be five senior scholars getting this $10,000 when it doesn't violate the principle of amateurism for two senior scholars to get this award."[102] Instead, he testified that this arbitrary determination to permit only two $10,000 benefits reflected nothing more than a "delicate balancing that the membership has engaged in," adding that "[i]t [is] hard for me to identify exactly what the number of right student athletes would be when people would then be concerned about a program similar to that."[103] This testimony exposes Defendants' consumer-demand justification as factually baseless and reinforces the economic premise of antitrust law: market competition optimizes the "correct" equilibrium price to maximize consumer demand—not a monopolistic cartel agreeing to whatever its members think is the "correct" price for sellers to receive in a market.

C. Defendants Rely on Irrelevant Evidence and Argument

Defendants spent much of the trial adducing evidence that is legally (and economically) irrelevant to whether the challenged restraints have procompetitive effects. For example, Lennon testified that "costs" were considered by the NCAA membership in setting all the compensation caps.[104] But as the Tenth Circuit held in *Law v. NCAA*, where the NCAA violated the Sherman Act by capping the salaries of assistant coaches, "cost-cutting by itself is not a valid procompetitive justification."[105] Further, several of Defendants' witnesses testified about the supposed "purity" of college sports and asserted that Defendants' compensation restraints promote ***philosophical or educational*** objectives.[106] The Supreme Court has made clear that only economic justifications relating to the enhancement of competition—not social or other public policies—are relevant to the

[101] J0024-0240 (Bylaw 16.1.4.1.1).
[102] Trial Tr. (Lennon) 1551:19-1553:1; *id.* 1548:7-19.
[103] *Id.* 1551:19-1553:16.
[104] *See supra* § II.B.
[105] *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998).
[106] *See e.g.*, Trial Tr. (Scott) 1094:12-1095:7; *id.* (Smith) 1393:15-1394:11; *id.* (Aresco) 1004:10-22 (college sports seen as "purer form of competition" free from intrusions of money and contracts).

rule of reason, however.[107]

Defendants also rely on lay-opinion speculation that removing the challenged restraints might adversely impact the "output" of intercollegiate sports—that schools would be unable to continue funding all of their sports programs.[108] In addition to the complete lack of credibility in these threats, Defendants' output-reduction argument was already rejected in the Court's summary judgment decision.[109] And, in ruling on the parties' motions *in limine*, this Court instructed that it would "not allow evidence of output to the extent it is being introduced to support the output procompetitive justification that is no longer a part of this case."[110]

III. THE COURT SHOULD FIND AS A MATTER OF FACT THAT DEFENDANTS HAVE NOT MET THEIR BURDEN TO PROVE THAT THE COMPENSATION RESTRICTIONS *CAUSE* "INTEGRATION"

Just as there is no fixed principle of "amateurism" which Defendants could prove preserves consumer demand, there is no principle of "integration" that Defendants could articulate, let alone prove, as a procompetitive benefit caused by the challenged restraints. The Court wondered at the pretrial conference ". . . what is the integration?"[111] Defendants provided no credible answer at trial. Instead of showing that integration is an economic benefit derived from their compensation caps, Defendants addressed topics irrelevant to their burden, such as the benefits inherent to graduating from college.[112] Defendants have done nothing to prove their integration justification.

A. Defendants Did Not Even Prove That D-I Basketball and FBS Football Players Are Currently Well-Integrated

Defendants did not deliver on their promise to prove their "commitment to integrating student-

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[107] *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); *Nat'l. Soc'y. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

[108] *See e.g.*, Trial Tr. (Blank) 892:4-14 (asserting that Wisconsin might consider dropping sports). But this was baseless speculation: immediately after Blank testified, Wisconsin publicly disavowed it and said that the school would expect to participate in a conversation with the Big Ten Conference about how to proceed were NCAA compensation rules eliminated. P1343-0003.

[109] *See* MSJ Order at 23-24.

[110] *See* Order Regarding Mots. in *Limine*, ECF No. 965, at 3; *see also O'Bannon*, 7 F. Supp. 3d at 981-82 (rejecting as "not credible" NCAA's argument that removing the NIL restraints challenged in that case would push schools to leave D-I basketball and FBS football), *aff'd in part, vacated in part*, 802 F.3d 1049, 1072 (9th Cir. 2015) (accepting district court's "factual finding[]").

[111] Pretrial Tr. 85:22-25; *id., generally*, 83:19-97:4.

[112] *See, e.g.*, Noll Decl. ¶¶ 143-46, 148; Rascher Decl. ¶¶ 130-149, 151.

athletes in academic programs."[113] Although it was not Plaintiffs' burden to *dis*prove this, Defendants did not come close to overcoming Plaintiffs' trial evidence that Defendants place Class Members' academic interests in the backseat, requiring them to give priority to the enormous demands of their sports, which amount to a full-time job.

To begin with, Defendants do not dispute that, on average, Class Members are required to put in roughly a forty-hour workweek playing sports during the season, and often more time during the offseason. Their own data show this.[114] Former Clemson University football player Martin Jenkins, for example, spent "around 45 to 50" hours per week on football commitments during the season, and "a lot of the times [he] felt like [the time remaining] was not enough time to devote to studies."[115] Former University of California basketball player Justine Hartman recounted how "[i]t was probably about 80 percent basketball . . . and the other 20 percent was wherever we could fit in academics."[116] And, as former West Virginia football player Shawne Alston testified:

> **Q.** And when you got there and were actually in the system, did you find you had enough time to do both football and academics?
>
> **A.** I don't think that we had enough time, no.
>
> **Q.** And why do you say that, sir?
>
> **A.** I think that when I got there, the primary focus was football.
>
> **Q.** Primary focus by whom?
>
> **A.** Everybody on the team. Like the coaches, they warned us about football, football, football.[117]

Defendants likewise failed to overcome the fact that the conferences have entered into television contracts that grow D-I basketball and FBS football revenues at the expense of academics and campus-life integration. The evidence showed that Defendants sell out their putative integration goals by surrendering control over scheduling games to broadcasters.[118] As Big 12 Commissioner

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[113] Defs. Opening 35.
[114] P0059-0016-20; Trial Tr. (Petr) 1880:6-1881:22; *see also, e.g.*, J0014-0006.
[115] Trial Tr. (Jenkins) 752:9-753:1.
[116] *Id.* (Hartman) 797:8-14.
[117] *Id.* (Alston) 670:12-21; *see also id.* 673:17-18 (spent "[a]bout 40" hours a week on football).
[118] P0045; *see also, e.g.*, P0066-0001 (discussing SEC "efforts to kill playing and practice season" limits because SEC was "about to make a media contract killing and need[ed] flexibility.")

Bob Bowlsby admitted, Defendants' "stated beliefs [about promoting integration] and [their] actions are too often inconsistent with one another" due to revenue-driven broadcast conditions like "[late] 9:48 tip off[s]" on school nights, "three days of competition in a row,"[119] and a host of other concessions that place TV broadcasters' needs ahead of athletes'.[120] Bowlsby is right: "you can't play college football on Tuesday nights"—as, *e.g.*, the Mid-American Conferences does—"and say you care about education."[121]

Indeed, according to the NCAA's own data, athletic commitments prevented 51% of women's D-I basketball players, 50% of FBS football players, and 34% of men's D-I basketball players from *enrolling* in classes they wanted (let alone succeeding in them).[122] D-I programs routinely tell their football and basketball players not to schedule classes or select majors that conflict with athletics.[123] And for the classes that Plaintiffs can take, they "miss[] significant class time due to travel and competition."[124]

The grueling athletic demands also negatively impact the integration of these 18-to-21-year-olds outside of the classroom. Class Members do not have time for part-time jobs;[125] miss the opportunity to pursue study abroad programs, internships, or clubs that interest them;[126] and, in many cases, only live with other athletes[127] and suffer from sleep deprivation.[128] Defendants offered zero

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[119] Bowlsby Tr. 36:3-18.
[120] *See* P0045.
[121] Big 12 (Bowlsby) Tr. 106:3-106:16; MAC (Steinbrecher) Tr. 39:4-40:14.
[122] P0059-0006.
[123] Alec James Tr. 245:1-246:1 (University of Wisconsin had a rule that football players could not have class past 2:30 to accommodate practice); J0014-0016 ("[a]cademic sacrifices" and athletes being "forced to change their majors due to practice and competition schedules . . . .").
[124] *See* J0014-0016; Trial Tr. (Hartman) 797:15-25 ("sometimes practice would go [until] right before I had a class and I'd literally have to run to make it to class, or sometimes it would be pointless if we got out and class had another 20 minutes left, and I hadn't showered or eaten."); *id.* (Alston) 674:22-25 ("[E]very time that we had an away game . . . we were excused from class on Fridays"); *id.* (Jenkins) 751:24-752:5 (missed classes "multiple times throughout the year" because of football).
[125] Trial Tr. (Hartman) 810:14-15 ("No. We don't have the time for that.").
[126] J0014-0016 ("[S]tudent-athletes find it very difficult to attend labs, participate in required internships [and] study abroad."); Trial Tr. (Jenkins) 791:3-20 (Jenkins was not able to remain part of Clemson's entrepreneurship club because of "football time requirements" and "felt disappointed because it was something that I saw could help me for my future").
[127] James Tr. 242:9-11 ("**Q.** Have you ever had a roommate here at school that is not a football player? **A.** No."); Trial Tr. (Jenkins) 758:10-11 (same).
[128] *See* J0014-0006 ("The number-one thing time demands keep them from doing is getting adequate sleep . . . ."); MAC (Steinbrecher) Tr. 162:17-163:19 (Tuesday and Wednesday night football games can require athletes to return to campus around 2 a.m. during school week).

evidence to substantiate their fantasy that Class Members live the same college experience as other students. Instead, the trial evidence showed that "there is a clear separation" and a "divide" between athletes and non-athletes.[129] Many Class Members live in housing designed specifically for athletes,[130] eat in athlete-segregated dining halls,[131] study in separate athlete-only academic facilities, and work out in segregated athletic facilities.[132] These facilities are designed to promote recruiting and competitive success—not integration.[133] Universities ***tout*** the fact that their housing and athletic facilities permit Class Members to ***avoid*** interacting with non-athletes.[134] These "segregated athlete village[s]" harm athletes, "limit[ing] the amount of interaction [they] can have with nonathletes" and "reducing the chances of developing important relationships outside of the team family."[135]

B. Defendants Have Also Not Satisfied Their Burden to Prove That the Challenged Compensation Restraints *Cause* Integration

In a futile effort to prove a causal link between the compensation caps and any purported "integration" of Class Members on college campuses, Defendants rely on the expert testimony of Heckman. But Heckman's unremarkable conclusion and regression studies that show that a college education yields lifetime benefits simply does not address whether Defendants' compensation restraints cause or enhance such benefits. Heckman did not (and could not) address this critical issue because his regression data did not include any information about the level of compensation each individual received.[136] Heckman had no idea who in his data set was a walk-on with no scholarship, who received a partial scholarship or full scholarship, and he did not conduct any analysis to test the

[129] Trial Tr. (Hartman) 810:3-11, 804:19-805:8; *id.* (Jenkins) 765:8-20 ("[W]e were already not integrated. . . . So that divide was already there.").
[130] *See, e.g.*, Rascher Decl. ¶ 138(c) (University of Kentucky men's basketball team lives in sole male-only dorm on campus, with capacity limited to thirty-two—the team and minimal non-athletes).
[131] Trial Tr. (Jenkins) 741:16-743:10 (the Clemson football team ate meals at "football-only cafeteria" in Clemson's West End Zone); James Tr. 147:24-148:21 (similar).
[132] Trial Tr. (Jenkins) 750:7-21; *id.* 763:3-764:2 (discussing Clemson's $55 million-dollar football-only complex).
[133] *See* Bowlsby Tr. 39:15-40:8 (colleges and universities engage in a "facilities arms race" and "the only thing worse than being in the arms race is not being in the arms race").
[134] For example, a Clemson University athletic department spokesman explained that Clemson's football complex "[will] be their home on campus, when they're not in class." Rascher Decl. ¶ 138.
[135] Rascher Decl. ¶ 141 (quoting Karen Weaver & Jordan Tegtmeyer (2018) Big Time Athletic Villages—Gated Communities Emerging on Campus, *Change: The Magazine of Higher Learning*).
[136] Trial Tr. (Heckman) 559:5-12.

relationship between compensation and academic or life success.[137] This fatal flaw is *O'Bannon* redux:

> For support, the NCAA relies on evidence showing that student-athletes receive both short-term and long-term benefits from being student-athletes. One of its experts, Dr. James Heckman, testified that participation in intercollegiate athletics leads to better academic and labor market outcomes for many student-athletes as compared to other members of their socioeconomic groups. . . . ***However, none of this data nor any of Dr. Heckman's observations suggests that student-athletes benefit specifically from the restrictions on student-athlete compensation that are challenged in this case.***[138]

Heckman speculated in his direct testimony about how NCAA rule changes "***could*** have" a host of potentially negative equilibrium effects.[139] When cross-examined on this, however, Heckman confirmed that this testimony was pure conjecture, admitting that he did not conduct any "empirical, econometric, or quantitative analysis" on the topic.[140]

Furthermore, Heckman responded to the Court's questioning about the post-injunction world by admitting that individual college athletes would be ***better off*** with respect to the outcomes that Heckman examined if above-COA compensation is permitted:

> **The Court:** So I'm not asking about the system, I'm asking whether there's any expert economic evidence that the outcome for student-athletes in the measures that you talk about, college, graduation, future income, all of that, if the athlete got everything that they got plus some additional amount of money. Now if your answer depends on whether it's a thousand, 10,000, 50,000, a hundred thousand, then tell me where your answer changes. But that's my question.
>
> * * *
>
> **The Witness:** Clearly, if you just give the student alone the money, just give the student another dollar, another penny, ***another $10,000*** and you don't account for what could be large systematic adjustments if everybody gets those, ***then the student is clearly better off. No question about it***.[141]

Heckman's admission is confirmed by his own contribution to the well-established academic literature finding that "higher family income and greater financial aid lead to higher enrollment and

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[137] *Id*. (Noll) 367:9-20; Noll Rebuttal ¶¶ 31-32.
[138] *O'Bannon*, 7 F. Supp. 3d at 979-81 (emphasis added); Heckman Decl. ¶ 20 ("I have recently reviewed my testimony from *O'Bannon* and find that it is ***entirely consistent*** with the primary conclusions reached following my analysis in this matter.") (emphasis added).
[139] Heckman Decl. ¶ 74 (emphasis added).
[140] Trial Tr. (Heckman) 606:24-607: 4.
[141] *Id.* 596:4-597:6 (emphasis added).

graduation rates (*i.e.*, greater persistence)."[142] It is also supported by the admission of the NCAA's research director, Todd Petr, that since 2015—when above-COA compensation became widespread—the NCAA's own graduation success rate ("GSR") data reveal better academic performance for Class Members.[143] This is unsurprising. Greater compensation alleviates financial pressures and facilitates focus on academics (and integrating). For example, Alston testified that "if you gave people more money, that they would probably focus on athletics the same, but they would also focus on other things, ***and you would be like comfortable, less stress . . . . So I don't think giving them more money would make them more focused on football***."[144]

If Defendants were truly concerned that above-COA payments would cause athletes to focus less on academics, then they could tie such compensation to grades and/or graduation. Heckman's speculation that such academic incentives would be destructive is factually unsupported. The NCAA already distributes revenue to schools based on those schools' academic performance,[145] it already permits schools to offer large cash bonuses to coaches and administrators whose athletes perform well academically,[146] and Defendants already permit schools to provide limited academic-achievement awards to athletes.[147] There is no evidence such financial incentives have had any negative effects on Class Members' academic performance.[148]

Finally, Defendants offered no evidence to prove that additional compensation would create a "wedge" separating "student-athletes and the broader school community."[149] To the contrary, Defendants have admitted that college athletes' receipt of above-COA compensation did not harm

[142] Noll Decl. ¶ 143; *see also* Trial Tr. (Noll) 366:16-367: 7 ("[Heckman] actually has a really nice published paper about how the magnitude of a scholarship you receive affects your persistence in college, your college attainment.").
[143] J0018-0026-29; *see also* Trial Tr. (Petr) 1884:2-1885:5.
[144] Trial Tr. (Alston) 679:16-680:5; *see also id.* (Hartman) 800:8-22; *id.* (Jenkins) 764:18-765:3.
[145] *See* D0533.
[146] *See, e.g.*, Trial Tr. (Smith) 1493:14-22, 1499:1-6; P1085-0002-4
[147] *See, e.g.*, J0024-0240 (Bylaw 16.1.4.1.1 permits postgraduate scholarships up to $10,000); J0011-0033 (SEC Male and Female H. Boyd McWhorter Scholar Athlete-of-the-Year award recipients each receive a $15,000 postgraduate scholarship); J0021-0004 (Academic Enhancement Fund ("AEF") distribution guidelines permit schools to use the funds to provide "academic achievement" awards).
[148] Noll Rebuttal ¶¶ 23-45, 48; Trial Tr. (Noll) 2065:22-2069:19.
[149] Defs. Opening 39 (footnote omitted).

integration.[150] As Alston testified, Class Members would have ***more*** interactions with non-athletes if they were to receive greater compensation because it would be more feasible to go out and socialize.[151] Nor is there any evidence that existing differences in levels of compensation ***within*** a team—*e.g.*, the difference between walk-ons with no scholarships and players with partial and full scholarships—create a wedge.[152] For example, Jenkins testified about his relationship with his former Clemson teammate Kyle Parker, who—while still playing college football—received a signing bonus from the Colorado Rockies for "north of a million dollars": "It didn't change anything. . . . Personally [Jenkins] felt happy for him."[153] To the extent academic integration is a legally cognizable procompetitive justification (it's not),[154] Defendants have not proved it.

IV. IF THE COURT WERE TO REACH LESS-RESTRICTIVE ALTERNATIVES, PLAINTIFFS HAVE CARRIED THEIR BURDEN

A. Plaintiffs Proved the Challenged Restraints Are Overbroad, and It Would Be a Less-Restrictive Alternative to Permit Additional Benefits and Compensation That Would Not Adversely Impact Consumer Demand or Integration

The evidence demonstrates that the challenged restraints are far more restrictive than necessary, as they prohibit numerous forms of additional compensation and benefits—including many forms of education-related benefits—that would not harm consumer demand or integration. And it is fundamental market economics that economic actors (here, the conferences) will not act against their self-interests by creating compensation rules that would harm consumer demand or integration.

1. The COA-Scholarship Cap Is More Restrictive Than Necessary

As Rascher explained, "Prior to the injunction in *O'Bannon*, few athletes received athletic aid even up to the COA limit. So testing market impact of widespread above-COA compensation was extremely difficult, if not impossible; there just weren't enough testable data in evidence."[155] However, "[s]ince *O'Bannon*, extensive new evidence shows that the COA line has been crossed,

[150] *See, e.g.*, NCAA (Lennon) Tr. 316:4-15; *see also* John Swofford Tr. 67:21-68:9 (move to COA "certainly not a negative effect" on integration); Rascher Decl. ¶¶ 134-149, 151 (no wedge evidence).
[151] Trial Tr. (Alston) 680:16-681:2; *see also id.* (Hartman) 810:3-11 ("I believe that there is a clear separation . . . I didn't have much money to go out and spend quality time with people").
[152] *See, e.g.*, *id.* (Alston) 682:8-15.
[153] Trial Tr. (Jenkins) 735:14-736:11, 736:18-738:4-7.
[154] Pls. Opening 40-41; Pls. Mot. for Summ. J, ECF No. 657 ("Pls. MSJ"), at 25; Pls. Reply Mem. ISO Pls. Mot. for Summ. J, ECF No. 714, at 44-45.
[155] Rascher Decl. ¶ 54.

repeatedly, with zero impact on demand."[156] For instance, the trial evidence shows that, since the implementation of rules allowing full COA scholarships, thousands of Class Members have received substantial compensation and benefits—untethered to education and in excess of COA—without any resulting harm to demand or integration.[157] This evidence demonstrates that additional benefits above COA could be permitted, and that the challenged restraints are unnecessarily restrictive.

The total compensation Defendants already permit Class Members to receive in excess of COA—that has exploded in amounts and scope since 2015—includes:

Unregulated cash "stipends." The manner in which schools have implemented COA scholarships since *O'Bannon* is to provide thousands of dollars in "miscellaneous-expense" cash stipends. The amounts are determined by individual schools without NCAA or government supervision; such stipends typically range from $3,000 to over $6,000 per student; and the amounts have trended upward year over year.[158] The NCAA rules do not regulate how students use these cash payments,[159] and Plaintiffs have demonstrated that this cash is often spent in ways that have nothing to do with being a student, *e.g.*, buying videogames and pets, investing, sending money to family.[160]

Uncapped SAF payments. The SAF is funded by revenue distributions from the NCAA's March Madness and NIT basketball contracts, and its purpose is to provide additional financial support to athletes.[161] Plaintiffs demonstrated at trial that the SAF has, over time, evolved from an emergency fund for students-in-need to what is in essence an unregulated pool of money from which individual schools can provide whatever additional financial benefits to athletes they determine are appropriate (none of which are considered to violate the principle of amateurism because . . . Defendants say so). Notably, there is no cap on the amount of SAF money an individual athlete can receive from a school,

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[156] *Id.* ¶ 54; *see also* Noll Decl. ¶¶ 8, 16, 115-116; NCAA (Lewis) 79:1-21, 112:2-16 (designee for consumer demand); NCAA (Lennon) 63:21-64:1, 316:4-15.

[157] *See e.g.*, Rascher Decl. ¶¶ 52, 142.

[158] Joint Stipulation of Facts Concerning Cost of Attendance ("COA Stipulation"), ECF No. 1093, at ¶ 3 (federal government does not regulate how schools calculate miscellaneous-expense amounts); Trial Tr. (Noll) 2123:12-21; Noll Decl. ¶¶ 64-66.

[159] NCAA (Lennon) Tr. 35:7-16 (NCAA does not monitor how athletes spend COA stipends); *id.* 38:4-24 (same); Trial Tr. (Lennon) 1353:6-15 (same); Hostetter Tr. 85:13-86:20 (neither NCAA nor ACC regulates how COA stipends are administered by schools or spent by athletes); Noll Decl. ¶¶ 59-60.

[160] Rascher Decl. ¶ 88; Noll Decl. ¶ 61-63; Hostetter Tr. 90:5-20, 94:18-23, 96:18-97:5 (acknowledging that athletes may just pocket the cash if stipend amount exceeds actual costs).

[161] Rascher Decl. ¶ 58.

and SAF payments are not included in the calculation of an athlete's COA.[162] Moreover, there is no requirement that SAF funds be used for costs that are related to education.[163] Defendants have made no showing why other sources of funds could not be used the same way to provide uncapped benefits.

For example, in 2014-15, Florida State provided its star quarterback with $58,914 in SAF money to purchase professional loss-of-income insurance.[164] Similarly, in 2015-16, six Ohio State athletes received payments for loss-of-value insurance, ranging from $7,324 to $31,296 ($101,906 in total) while another five received payments for disability insurance, ranging from $3,300 to $10,387.50 ($32,729 in total).[165] Other SAF payments to Ohio State athletes in 2015-16 included things like vehicle repairs, parking tickets and utility bills.[166] In the same year, 75% of the scholarship players on the University of Florida men's basketball team received SAF money—with payments ranging up to more than $1,800—on top of their COA scholarships.[167] Moreover, some schools are providing SAF payments on top of COA in identical amounts to all or nearly all members of a team, without tying that money to *any* specific expense. In 2015-16, for example, athletes at North Carolina State University who received COA scholarships also received $650 supplements from the SAF.[168]

Benefits incidental to participation. Class Members also receive significant benefits "incidental to participation" which are unrelated to educational costs on top of COA. The NCAA, again through Lennon, testified that these benefits include apparel, equipment and supplies, transportation and lodging for families to attend athletic contests, entry fees and facility usage, expenses in connection with national championship events, the Olympics and national team tryouts, fees for conditioning activities (*i.e.* yoga classes), and loans against future earnings as a professional athlete to purchase loss of professional value insurance.[169]

Another category of participation-benefits compensation is awards and gifts for playing in

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[162] *Id.*
[163] *Id.* ¶¶ 58-66, 82 (SAF funds for rehab programs, disability and loss-of-value insurance, travel home, medical, dental and vision expenses, court fees, iPads, car repairs, living expenses, and gas money); *see also* Noll Decl. ¶ 70.
[164] Rascher Decl. ¶ 62.
[165] *Id.* ¶ 80; *see also* P0104-P0105.
[166] Rascher Decl. ¶ 80.
[167] *Id.* ¶ 66.
[168] *Id.* ¶ 61. *See also* P0106.
[169] NCAA (Lennon) Tr. 60:3-10, 71:7-22, 73:4-7, 86:17-87:13, 88:6-24, 127:4-129:3.

bowl games, conference championships and national championships, and individual athletic achievements (*e.g.*, MVP-type awards).[170] For example, as of 2016-17, NCAA rules allowed an FBS football player to receive up to $5,620 in merchandise (like videogames, jewelry, and electronics) and retail gift cards or pre-paid Visa credit cards based on athletic success.[171] Big 12 Commissioner Bowlsby testified that while participation gifts "were all ***previously*** geared toward being mementos of the [] games," it's since taken "another turn, and the gift cards are representative of that."[172] Defendants' witnesses admitted that incidental-to-participation benefits are not tethered to education and not related to the principle of amateurism.[173] Instead, Class Members receive such benefits in conjunction with their ***athletic*** participation and in recognition of their ***athletic*** accomplishments.[174] Having crossed the line into what—literally—constitutes "pay-for-play," the NCAA's compensation restraints are completely unprincipled and thus more restrictive than necessary to preserve demand.

Pell Grants. Defendants have allowed athletes to receive COA scholarships plus the full value of a Pell Grant, which even a few years ago was as much as $5,775.[175] The result is that athletes may be paid twice for many of the same expenditures—exactly what defense witnesses have described as prohibited "pay-for-play" in other contexts.[176]

Plaintiffs have demonstrated that the foregoing categories of compensation—substantially exceeding COA for thousands of Class Members since *O'Bannon*—have had no adverse impact on consumer demand.[177] Revenues for schools, conferences, and the NCAA from D-I basketball and FBS football have all grown substantially since 2015. The Big 12 revenues, for example, have increased by over [redacted] since the move to COA.[178] The AAC, Big Ten Conference, Mid-

[170] *Id*. 119:18-122:22; J0001-0043-0044 (Figures 16-1 through -3); P0086 (examples of gifts).
[171] Rascher Decl. ¶ 72; Hostetter Tr. 226:7-227:6.
[172] Big 12 (Bowlsby) Tr. 160:9-161:7 (emphasis added).
[173] *See e.g.*, NCAA (Lennon) Tr. 71:23-73:2; 88:6-24; 122:1-22.
[174] *See e.g.*, Trial Tr. (Smith) 1479:25-1480:20.
[175] *See* Rascher Decl. ¶ 64-66 (2014-15 maximum Pell Grant was $5,775); *see also* COA Stipulation at ¶¶ 9-10. In addition, NCAA rules permit certain other government scholarships to be paid to Class Members without reducing COA. J0024-0216 (Bylaw 15.2.5.1, "Exempted Government Grants").
[176] *See* James Tr. 131:18-132:10 (testifying about using Pell Grant for savings and sending home to family); Hostetter Tr. 243:9-21 (receipt of aid twice for same expenses is pay-for-play).
[177] *See e.g.*, Trial Tr. (Scott) 1184:2-6 (Pac-12 has not seen any decrease in demand since move to COA); NCAA (Lewis) Tr. 112:2-16 (COA change has not harmed consumer demand); Big 12 (Bowlsby) Tr. 68:9-13 (move to COA has not had a negative impact on revenues).
[178] P0032-0001-2.

American Conference, Mountain West Conference, Pac-12 Conference, Southeastern Conference, Sun Belt Conference, Western Athletic Conference, and the NCAA have also each experienced substantial increases in revenues since the implementation of COA.[179] In 2015-16, the Power Five schools generated [redacted] through basketball and football, compared to [redacted] in 2014-15.[180] In 2016, the NCAA extended its media rights agreement with CBS and Turner for an additional eight years to last through 2032—paying the NCAA an average annual rights fee of [redacted], which is over [redacted] more than the (pre-COA) predecessor agreement.[181]

Plaintiffs further demonstrated major revenue increases since 2015 at the school level for all segments of D-I.[182] For example, Auburn University, an SEC school, announced a $15 million surplus of revenue in the 2015-16 athletics season, while Arizona State, a Pac-12 school, reported an increase of over $10 million in athletic revenue for 2016.[183] Scott testified that, last year, the Pac-12 distributed about $31 million dollars to each of its twelve members and that "at least 80 percent of that is coming from television."[184] Each of the fourteen schools in the Big Ten receive somewhere in the realm of $51 million dollars per year from the conference's six-year media deals with ESPN, Fox, and CBS which were signed in 2017.[185] At one Big Ten school, the University of Wisconsin, these revenues contribute to a nearly $150 million annual athletics budget that is fully funded from its revenues.[186]

Sponsorship revenues also have increased since 2015. In 2015, for instance, Nike reached a multi-year contract worth $250 million in cash and apparel with Ohio State and another in 2016 worth $125 million with the University of Michigan.[187] Also in 2016, UCLA and Under Armour entered into a deal worth $280 million, which at the time was the richest deal ever entered into between a school and its apparel partner.[188]

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[179] *See* Rascher Decl. ¶ 47; P0030, P0033-P0039, P0048-P0049; P0137.
[180] Rascher Decl. ¶ 47.
[181] P0045.
[182] *See* Trial Tr. (Petr) 1865:2-25; *id.* (Noll) 297:17-299:14; J0017-13; P0139.
[183] Rascher Decl. ¶ 49.
[184] Trial Tr. (Scott) 1108:23-1109:11.
[185] *Id.* (Blank) 928:22-930:24.
[186] *Id.* 871:18-24, 931:1-5. Other schools have approached $200 million in revenues. *Id.* (Petr) 1864:10-14.
[187] Rascher Decl. ¶ 50
[188] *Id.*

No matter which way the Court looks at the economic data, Plaintiffs have proven that there has been no adverse impact on consumer demand as Class Members' compensation went from GIA-capped scholarships, to full COA scholarships, to compensation totaling many thousands of dollars untethered to education in excess of COA. Every time Defendants add such an above-COA benefit for Class Members, there has been no harm to consumer demand,[189] proving that the COA-scholarship cap is more restrictive than necessary.

2. Numerous Additional Benefits Could Be Offered without Harming Consumer Demand

Plaintiffs have further proven that the challenged restraints are more restrictive than necessary because there are numerous benefits, *e.g.*, education- and health-related, that the current NCAA rules prohibit, but would not cause any adverse impact on consumer demand. Indeed, Lennon testified about seventeen different examples of such prohibited education- and health-related benefits that NCAA rules block the schools from offering to Class Members.[190]

Through their survey expert, Poret, Plaintiffs presented the *only* consumer survey evidence at trial that measures whether conferences or schools allowing Class Members to receive various types of currently prohibited benefits would cause consumers to watch or attend D-I basketball or FBS football less often.[191] Poret presented 3,000 respondents with eight test scenarios about a variety of new forms of benefits for Class Members that conferences or colleges could offer.[192] Poret's survey—unlike Isaacson's—asked the questions the Court found to be relevant in *O'Bannon*: not whether respondents favor or oppose a new benefit, but whether conferences permitting schools to offer the new benefit would change respondents' future behavior with respect to viewership or attendance.[193] The results of Poret's survey enabled him to opine with a high degree of scientific certainty that conferences or schools could offer a wide variety of additional forms of compensation without

[189] Trial Tr. (Lennon) 1544:20-1545:6; NCAA (Lewis) 112:2-16.
[190] NCAA (Lennon) Tr. 197:16-198:10 (postgraduate scholarship at another institution), 198:11-199:17 (vocational school payments), 201:23-202:13 (academic incentive funds), 213:14-214:9 (health care funds). For a complete list, *see* Pls. MSJ, App'x B: Benefits Not Allowed.
[191] *See generally* Poret Decl.
[192] *Id.* ¶¶ 17, 21, 24 (Scenarios included the ability to offer: healthcare fund, $10,000 academic incentive payment, $10,000 graduation incentive payment, post-eligibility undergraduate scholarship, work study payment, off-season expenses, graduate school tuition and post-eligibility study abroad).
[193] *Id.* ¶¶ 19-20, 22-54; *O'Bannon*, 7 F. Supp. 3d at 975-76.

harming consumer demand.[194] Specifically, Poret found that:

(1) Even with respondents' tendency to *overstate* the degree to which they might watch or attend less often, the baseline rate of such responses was very low, with most of the results in the range of 2% to 5%;

(2) After applying controls to account for the tendency of some respondents to overstate the degree to which new compensation might cause them to watch or attend less often, the net results show virtually zero negative impact on consumer viewership/attendance across almost all scenarios; and

(3) The rates of respondents answering that they would watch or attend "less often" were typically *lower* than the rates of answering that they would watch or attend "more often"—reinforcing Poret's conclusion that the "less often" results are negligible and indicating that permitting additional benefits could, if anything, *positively* impact demand for FBS college football and D-I basketball.[195]

Poret further testified that his expert opinions are not limited to the specific compensation/benefit scenarios tested in his survey.[196] More broadly, his survey supports his expert opinion that compensation and benefits ***of the type he tested*** would not have a negative impact on consumer demand, thus demonstrating that Defendants' compensation caps, which prohibit such benefits, are more restrictive than necessary to achieve any consumer-demand objective.[197] Plaintiffs have thus proven that it would be a less-restrictive alternative for Defendants to amend the challenged restraints to permit additional education- and health-related benefits, along with other forms of increased compensation that would not adversely impact consumer demand.[198]

B. Plaintiffs Proved That Conference Autonomy Constitutes a Less-Restrictive Alternative to Achieve Any Claimed Procompetitive Benefits

Plaintiffs produced substantial evidence that conference autonomy would be a less-restrictive alternative to achieve any claimed procompetitive objective relating to the preservation of consumer demand or athlete integration. As Rascher testified, "[a] fundamental economic truth about college football and basketball is that each conference is a distinct sports league, while the NCAA is not a

[194] Poret Decl. ¶¶ 59, 131.
[195] *Id.* ¶ 4; *see also* P0141.
[196] Poret Decl. ¶ 26.
[197] *See id.* ¶¶ 26, 59, 129-131; P0141.
[198] *See* Rascher Decl. ¶¶ 195-203, 205-10.

league at all, but rather is a sanctioning body that also serves as a classic cartel."[199] The trial evidence overwhelmingly establishes that D-I basketball and FBS football conferences offer differentiated products to their consumers and would take into account the interests of their members to determine what compensation rules are desirable to maximize consumer demand and any integration benefits. In fact, from 1906-1956, the NCAA permitted individual conferences to determine compensation rules and college sports grew in popularity, with no evidence of harm to consumer demand.[200] Similarly, in 2015, the Power Five conferences obtained limited autonomy and adopted new benefits for Class Members—including unlimited meals, enhanced medical benefits, and permitting athletes to borrow against their future earnings to purchase lost-professional-value insurance—again without any adverse impact on consumer demand.[201] These natural experiments are further proof that, given greater autonomy, conferences will act rationally to preserve consumer demand and integration if they conclude those objectives are impacted by athlete compensation rules.

By definition economically, the current rules are more restrictive than necessary. This is because self-interested actors, such as the conferences, will act rationally if allowed to compete with each other when setting compensation rules. Plainly stated, a conference will not shoot itself in the foot by allowing compensation that will hurt consumer demand or integration. As Rascher testified, "[e]conomics provides non-speculative tools to assess whether schools would find it rational to 'offer unlimited cash compensation'; pay will only rise as high as consumer demand will allow."[202] In other words, "[s]chools and conferences will only choose to adopt those rules regarding compensation that are consistent with their demand assessments and objectives."[203] As Noll testified, "if a conference believed that the popularity of FBS football and Division I basketball would be eroded by increasing compensation of college athletes by even $1 more than is currently permitted, that conference independently could adopt compensation rules that are ***essentially the same as the current NCAA***

[199] *Id.* ¶167; *see also id.* ¶¶ 168-180 (identifying many ways in which conferences are discrete leagues that make their own rules and organize sports for themselves).
[200] Noll Decl. ¶¶ 30-36; Rascher Decl. ¶ 175. Although the NCAA did attempt to enforce compensation restraints as part of its 1948 "Sanity Code," widespread non-compliance resulted in the abandonment of those restraints after only three years. Noll Decl. ¶ 35.
[201] *See, e.g.*, *infra* § VI; Rascher Decl. ¶¶ 46, 52-54, 75-76.
[202] Rascher Rebuttal ¶ 56.
[203] *Id.* ¶ 57.

rules as long as each conference adopts these rules unilaterally."[204] Likewise, Noll explained that, under well-established economic theory, it would be irrational for conferences not to make decisions with the long-term interests of their members in mind.[205] The trial record confirms this fundamental economic principle: every conference- and school-related witness that was asked admitted that she or he would not advocate for their conference to adopt rules that would hurt consumer demand or the long-term interests of their conferences and schools.[206] And no witness identified a single school that would pay an amount that would hurt consumer demand.[207]

In this regard, as Noll testified, there is no factual support for Elzinga's speculation that individual schools would act only in their short-term interests and pursue destructive behavior because of externalities which would inflict harm on other conferences.[208] Elzinga did not conduct any analysis of conference or other economic data to support his externality theory or even consider conference autonomy as an alternative when he wrote his expert report, and Elzinga did not cite to any economic evidence of adverse impact when the Power Five conferences used their limited autonomy to permit new benefits for athletes that other conferences did not adopt.[209]

Rascher, on the other hand, demonstrated how conference autonomy would be more economically efficient in allowing individual conferences with different economic resources and priorities to "target their incentives towards a beneficial outcome, such as academic achievement if they find this to be desirable, and thus could choose to incentivize students to devote more time to academics through increased compensation."[210] As Rascher pointed out, there is no economic basis

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[204] Noll Decl. ¶ 185 (emphasis in original).
[205] Trial Tr. (Noll) 2078:24-2080:17.
[206] *See e.g.*, Trial Tr. (Scott) 1206:6-24 (Scott would take a long-term strategic view as to how to respond if Court strikes down current rules); *id.* (Smith) 1466:6-10 (similar); *id.* (Hatch) 2022:12-19 (similar); *id.* (Aresco) 1053:21-1054:10 (would not advocate for rules that harm consumer demand).
[207] *See e.g.*, *id.* (Hatch) 2017:8-13 (no university president or employee has indicated they would pay more if allowed to do so); *id.* (Scott) 1185:8-1187:24; 1217:2-9 (similar); *id.* (Smith) 1475:5-8 (similar); *id.* (Blank) 900:24-901:4 (would not advocate to start paying athletes a lot of money if rules changed). *See also generally id.* (Huchthausen) 2061:24-2602:8.
[208] *Compare* Elzinga Decl.¶ 37-38 *and* Trial Tr. (Elzinga) 457:9-458:10 *with id.* (Noll) 299:2-300:8.
[209] Trial Tr. (Elzinga) 392:6-21 (no analysis of data), 472:10-473:16 (no analysis of conference-level rulemaking), 478:18-479:9 (post-report discussion of conference autonomy was not based on any quantitative or economic analysis of any market data), 488:15-23 (did "no study at all" regarding Power Five autonomy); *see also id.* (Noll) 300:9-301:1 (criticizing Elzinga).
[210] Rascher Rebuttal ¶ 70; *see also* Rascher Decl. ¶¶ 154, 163-168, 181-183, 248.

for Elzinga's assumption that schools or conferences would abandon their stated interests and enact compensation rules which would undermine consumer demand or integration.[211] The trial record established that individual conferences already negotiate their own broadcast agreements and sponsorships, set their own schedules (to the extent not ceded to the broadcasters), and operate their own conference championships without NCAA control.[212] When the Power Five conferences received limited autonomy in 2015, they expressly argued that they should be able to deploy their greater economic resources to benefit athletes even if other individual conferences did not have the ability to match, and they have done so without harming consumer demand.[213] Further, ten FBS football conferences and Notre Dame compete for a "national championship" wholly apart from the majority of D-I schools that are part of the FCS conferences, and without any NCAA role in organizing their FBS playoff.[214] There is no reason to believe that, given complete autonomy over compensation rules, the individual conferences could not continue to effectively promulgate rules (as they do now) in a manner that preserves any claimed procompetitive objectives.[215]

All of this conference-autonomy evidence also supports Plaintiffs' other less-restrictive alternative—where conferences have autonomy but the NCAA may, in addition, continue to prohibit cash compensation untethered to education.[216] Under this alternative, NCAA compensation regulation could persist only with respect to "cash sums untethered to educational expenses"—what the *O'Bannon* court, on a different record, stated to be a detriment to amateurism.[217]

C. Plaintiffs Proved That Conference Autonomy Would Not Significantly Increase Defendants' Administrative Costs

Defendants concede that the relevant "costs" of Plaintiffs' proposed less-restrictive alternatives are *administrative implementation* costs—not the cost of any additional compensation and benefits due to lessening the restraints.[218] Plaintiffs have demonstrated that there would be no significant

[211] Rascher Rebuttal ¶¶ 70-72.
[212] Trial Tr. (Rascher) 174:24-175:21; *id.* (Scott) 1199:13-1200:24; *id.* (Smith) 1510:19-1511:8. Conferences also have rulemaking and compliance infrastructures. J0002-J0003, J0005-J0013.
[213] P0056-0002; *e.g.*, NCAA (Lewis) Tr. 79:1-21, 112:2-16; Trial Tr. (Lennon) 1558:8-1559:3.
[214] *E.g.*, Trial Tr. (Scott) 1207:9-1208:8, 1215:17-18.
[215] J0024-0045-47; Trial Tr. (Lennon) 1572:25-1577:13, 1583:4-12.
[216] Rascher Decl. ¶¶ 195-203; Pls. Opening 7-8, 46.
[217] Rascher Decl. ¶¶ 200-203, 205-210; *O'Bannon*, 802 F.3d at 1078-79.
[218] Defs. Opening 45.

increase in such administration costs.

For starters, all that Plaintiffs' less-restrictive alternatives require is eliminating all NCAA compensation rules (or, in the alternative, eliminating all such rules other than a prohibition on "cash sums untethered to education"). Eliminating the NCAA's byzantine compensation rules would, on its face, dramatically *reduce*—not increase—existing enforcement and compliance costs. This fact, alone, should end the analysis, as there is nothing about the proposed less-restrictive alternatives that would require any increase in administrative costs.

If the individual conferences were to decide to erect new compensation restraints, that would be their *choice*—not a requirement (or cost) of Plaintiffs' less-restrictive alternatives. Nevertheless, even if the Court were to consider the costs of ensuring compliance with any new conference compensation rules to be relevant, the trial evidence shows that individual conferences ***already*** enact and enforce differing compensation rules: *e.g.*, the Ivy League does not permit any athletic scholarships; other conferences permit GIA scholarships; still others permit full COA plus additional benefits; and the Power Five conferences enact their own compensation rules to permit certain additional benefits and leave it for other conferences to decide if they will follow suit.[219] Accordingly, there need not be any increased administrative costs if individual conferences decide to permit various new benefits in addition to those added under Power Five autonomy.

For example, conferences could decide to add some new benefits, such as academic-incentive payments or additional health benefits, while continuing to avail themselves of the NCAA's enforcement apparatus, which already applies to a system where conferences follow differing compensation rules. And as the evidence shows, a new enforcement regime for major violations will be implemented by the NCAA in conjunction with independent third parties following the Rice Commission recommendations; this new mechanism could be made available to enforce regulations adopted by individual conferences; and even if conferences decided on their own enforcement of new rules, the cost savings from reducing or eliminating NCAA compensation restraints could fund any

[219] *See* Rascher Decl. ¶¶ 96-103 (discussing the "five distinct compensation rule variations" currently in existence within D-I today).

increased conference enforcement costs with no increase in total expenditures.[220] Recognizing that their "institutions have a more significant stake in the enforcement process," the Power Five conferences have already concluded that "[t]here are other models for enforcing regulatory regimes" that would allow conferences to operate autonomously, such as through outsourcing.[221]

Furthermore, because the NCAA has imposed a "principle of institutional responsibility" to comply with and self-report violations of NCAA rules, conferences and institutions ***already*** have substantial compliance and enforcement infrastructures.[222] ACC schools, for instance, collectively employ at least 100 full-time compliance personnel and the conference has a five-person compliance team with a $1.5 million budget.[223] Rascher testified about how enforcement and compliance would be more efficient (and thereby less costly) at the conference level. As he explained:

> "the system of national rules creates an inefficient and duplicative extra layer of bureaucracy. As it is now, each conference and each school has employees engaged in compliance. Layered on top is the NCAA, which has multiple people employed in compliance as well. If there were no national cap rules, and thus no need for employees to enforce those national cap rules, the cost of compliance would tend to decrease."[224]

Rascher further explained that:

> "eliminating the 'complex and costly' enforcement at the national level by the NCAA will result in cost savings—not cost increases—as the conferences will not just duplicate current NCAA enforcement mechanisms. Moreover, the individual conferences are in a better position to determine how best and most efficiently to enforce conference-appropriate compensation rules against their own members through more locally directed enforcement measures."[225]

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[220] P0060-0010-12, -0039-45; P0144-0015; Trial Tr. (Lennon) 1607:7-1612:23.

[221] P0056-0005.

[222] Hostetter Tr. 38:15-39:5; J0001-0004 (Bylaw 2.8.1 "Responsibility of Institution"); J0024-0026 (Bylaw 3.3.4.4 "Compliance Program"), -0012 (Bylaw 20.9.1.5 "Commitment to Institutional Control and Compliance"), -0055 (Bylaw 6.01.1 "Institutional Control" requires "control and responsibility for the conduct of intercollegiate athletics [to] be exercised by the institution itself and by the conference(s), if any, of which it is a member."); *see also, e.g.*, J0011-0030-32 (SEC Constitution and Bylaws contains comprehensive "Compliance and Enforcement" provisions).

[223] Hostetter Tr. 35:25-38:13, 39:7-41:6. *See also e.g.*, Trial Tr. (Rascher) 113:4-11; *id.* (Lennon) 1583:16-1584:13 (NCAA rules require conferences to maintain "a comprehensive compliance program"); *id.* (Blank) 893:10-23, 936:17-938:2 (describing University of Wisconsin's compliance and enforcement staff); *id.* 1204:2-15 (similar and noting that schools "sometimes [] hire outside law firms to" conduct self-investigations); *id.* (Smith) 1503:10-1504:24 (discussing the role of Ohio State's 12-person compliance department).

[224] Rascher Decl. ¶ 187.

[225] Rascher Rebuttal ¶ 75; Trial Tr. (Noll) 262:19-24 ("the more you relax the rules, the less bureaucracy and regulation you need").

The bottom line is, no matter how the Court decides to analyze the issue of implementation costs, Plaintiffs have demonstrated that their proposed less-restrictive alternatives could be implemented without any significant increase in the total cost of enforcing less-restrictive compensation restraints.

V. "BALANCING" PRO- AND ANTICOMPETITIVE EFFECTS WOULD FURTHER SHOW THAT THE CHALLENGED RESTRAINTS ARE UNREASONABLE

The parties agree that "most cases [are] resolved" within the first three stages of the rule-of-reason analysis.[226] But if a court reaches the less-restrictive alternatives stage and does not find that Plaintiffs have proven one, the Ninth Circuit mandates that the court "***must*** weigh the harms and benefits to determine if the behavior is reasonable on balance."[227] Defendants nonetheless argue that this Court should ignore controlling Ninth Circuit law, citing "*American Express* . . . [which] refer[s] to a three-step test, so no reference to this fourth step."[228] But in *American Express*, the dissenting justices explained that the "third step" discussed by the majority may be conducted by identifying a less-restrictive alternative ***or*** by balancing: "Third, if the defendant successfully bears this burden [of demonstrating procompetitive justifications], the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps ***by showing that the legitimate objective does not outweigh the harm that competition will suffer, i.e., that the agreement 'on balance' remains unreasonable***."[229] Indeed, even Defendants have conceded that the requisite "balancing" has to take place at some point in the rule-of-reason process.[230]

If the Court reaches the balancing test, it should find that the net balance of any pro- and

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[226] Defs. Opening 9 n.31 (citing Areeda ¶ 1502).

[227] *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) (emphasis added) (citing Areeda ¶ 1502); *Cty of Toulomne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (citing Areeda ¶ 1507b) ("Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage. [] We must balance the harms and benefits of the privileging criteria to determine whether they are reasonable."); *id.* ¶ 1507d ("A few decisions describe [] rule of reason's burden-shifting framework itself as a sort of 'balancing,' but they are hardly the same thing.").

[228] Pretrial Tr. 80:5-7.

[229] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2291 (2018) (Breyer, J., dissenting) (emphasis added) (internal quotations omitted) (quoting Areeda ¶ 1507a); *see also* Pretrial Tr. 80:8-11 (*Amex* does not change Ninth Circuit precedent). The Supreme Court has long held that the rule of reason requires the factfinder to weigh "all of the circumstances" (*Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)); "including specific information about the relevant business . . . and the restraint's history, nature, and effect" (*State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

[230] Defs. Opening 9.

anticompetitive effects tilts decisively toward finding that the challenged restraints are unreasonable. As explained in Areeda, "[m]any cases will be determined by the element of the reasonableness equation that stands out as clearest in quantity or greatest in magnitude. Harm alone or benefit alone may appear significant. . . . [I]t is easy to condemn the restraint likely to harm competition substantially where the benefit, though plausible, appears minor in quality or quantity or easily achieved by a substantially less restrictive alternative."[231] Here, the "undisputed evidence" establishes that "the challenged restraints produce ***significant anticompetitive effects***" and, in the absence of the cartel's price fix, "greater compensation and benefits would be offered in the recruitment of student-athletes."[232] Indeed, the challenged restraints completely eliminate price competition for Class Members' services and are so anticompetitive as horizontal price agreements that they would be *per se* unlawful in most contexts.[233] By contrast, even ***if*** Defendants had proven any procompetitive effects caused by the challenged restraints, such effects would ***at most*** be tiny in comparison to the substantial anticompetitive effects that the Court found.[234]

VI. PLAINTIFFS HAVE SHOWN FUNDAMENTAL AND WIDESPREAD FACTUAL CHANGES IN THE RELEVANT MARKETS SINCE *O'BANNON*

Defendants contend that *O'Bannon* requires a defense verdict because "[o]f the 41 NCAA rules Plaintiffs purport to challenge in this case, only three were enacted since *O'Bannon*."[235] This assertion is legally incorrect, factually misleading, and, in any event, proven false by the trial record. The evidence shows that there have been widespread changes in the relevant markets since the record closed in *O'Bannon*, changes which strongly support Plaintiffs' claims in this case and render inapposite the dicta about "cash sums untethered to education" constituting a "quantum leap."[236]

The proper application of *O'Bannon* to this case turns on numerous material changes in the

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[231] Areeda ¶ 1507d, "Balancing and alternatives."
[232] MSJ Order 18-19 (emphasis added).
[233] *Nat'l Macaroni Mfrs Assn. v. FTC*, 345 F.2d 421, 427 (7th Cir. 1965) ("The Supreme Court has held 'that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil….'") (quoting *U.S. v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956)).
[234] *See supra* §§ II and III.
[235] Defs. Joint Mots. in *Limine*, ECF No. 861, at 1; *see also* Defs. Opening 12-15.
[236] *O'Bannon*, 802 F.3d at 1070.

factual record before the Court—not just changes in the NCAA's rulebook.[237] As the Court has held: "Plaintiffs raise new antitrust challenges to conduct, in a different time period, relating to rules that are not the same as those challenged in *O'Bannon*"; "[t]he Court must consider the '***conduct of parties*** since the first judgment' and ***other factual matters*** in the new cause of action."[238] Indeed, even according to Defendants, to "take[] this case out from under the *O'Bannon*" "quantum leap" statement, "Plaintiffs must prove ***either*** (1) an actionable new antitrust violation that occurred after *O'Bannon*, ***or*** (2) a fundamental, material change in the factual basis for the Ninth Circuit's decision. . . ."[239] Plaintiffs have done both.

Defendants' myopic focus on NCAA bylaw changes ignores the relevant, changing factual picture. Defendants urge the Court to consider a redline between the 2018-19 and 2013-14 NCAA Manuals limited only to the ***challenged*** restraints,[240] while sweeping under the rug the record facts that: (i) since *O'Bannon*, ***thousands*** of Class Members have received compensation and benefits above COA without any harm to consumer demand or integration; (ii) since *O'Bannon*, the Power Five conferences have gained limited autonomy, leading to new compensation increases provided to Class Members in some conferences (but not all), again without any harm to consumer demand or integration;[241] (iii) since *O'Bannon*, numerous other new benefits have been provided to Class Members without any adverse impact on consumer demand or integration;[242] and (iv) since *O'Bannon*, in the face of the ever-increasing commercialization of D-I basketball and FBS football and the further exploitation of these athletes, Plaintiffs' survey expert has demonstrated that consumer attitudes are positive about introducing various forms of new compensation and benefits to Class Members.[243] These are critical factual differences from the *O'Bannon* record. Moreover, as the Court noted, the

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[237] MSJ Order 11-12 (citing *Harkins Amusement Enters., Inc. v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989) (quoting 2 P. Areeda & D. Turner, Antitrust Laws § 323c (1978)); *see also Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 579 (1925); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000).

[238] MSJ Order 12, 15 (emphases added) (citations omitted).

[239] Defs. Opening 10 (emphasis added).

[240] *See* D0680.

[241] *Supra* §§ III.B and IV.A.1; *supra* § IV.C.

[242] *E.g.*, NCAA (Lewis) Tr. 79:1-21, 112:2-16; NCAA (Lennon) Tr. 63:21-64:1, 316:4-25; Trial Tr. (Lennon) 1558:8-1559:3.

[243] Increased commercial exploitation of Class Members, and attendant corruption, was a focus of the NCAA's Rice Commission on college basketball. *See, e.g.*, P0060-0002; *supra* § IV.A.

less-restrictive alternatives of conference autonomy proposed here were not analyzed in *O'Bannon*, presenting additional, critical differences from the record in that case.[244]

In addition to these numerous, fundamental factual differences that have arisen since when the *O'Bannon* record closed, there also ***have*** been a number of significant amendments to the NCAA's bylaws regarding compensation. For example, post-*O'Bannon* rule changes: permit Class Members to borrow against their future professional earnings to buy loss-of-value insurance;[245] permit unlimited sports federation payments to international athletes;[246] permit schools to provide medical coverage for sports injuries post-eligibility;[247] permit schools to waive their enrollment fees for athletes;[248] permit schools to provide certain transportation expenses for the families of FBS football recruits;[249] permit schools to provide certain meal and lodging expenses for the families of FBS recruits;[250] permit D-I basketball players to miss class and accept travel expenses from NBA teams in connection with professional tryouts;[251] increase the permissible daily stipend for athletes when hosting recruits;[252] permit agents to pay for transportation and meals for men's basketball players and their families;[253] and permit essentially unlimited meals and snacks provided by the schools[254]—all without any adverse

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[244] MSJ Order 27-30.

[245] *Compare* J0024-0078 (2018-19 NCAA Division I Manual) (Bylaw 12.1.2.4.4 "Exception for Insurance Against Disabling Injury or Illness, or Loss of Value") *with* J0025-0048 (Excerpts of 2013-14 NCAA Division I Manual) (Bylaw 12.1.2.4.4 "Exception for Insurance Against Disabling Injury or Illness"). *See also* NCAA (Lennon) Tr. 127:4-10; Hostetter Tr. 74:14-75:3.

[246] J0001-0018 (Excerpts of 2018-19 NCAA Division I Manual) (Bylaw 12.1.2.1.4.1.3 "Incentive Programs for International Athletes" "Adopted 1/17/15"). *See also* NCAA (Lennon) Tr. 108:6-109:10 ("Yes. Prior to this date [August 1, 2015] international athletes who [sic] were not able to receive it"); Hostetter Tr. 59:13-60:1, 61:23-62:15 ("there's not an NCAA limit").

[247] Trial Tr. (Scott) 1147:3-9.

[248] J0001-0025 (Bylaw 13.2.2 "Institutional Pre-Enrollment Fees" "Adopted 1/15/16"); *see also* Hostetter Tr. 82:10-83:4 (confirming).

[249] J0001-0025 (Bylaw 13.5.2.6.2 "Exception—Transportation Expenses for Prospective Student Athlete's Family Members—Bowl Subdivision Football." "Adopted 4/28/16"); *see also* Hostetter Tr. 81:16-82:9 (confirming).

[250] J0001-0026 (Bylaw 13.6.7.1.1.1 "Meals and Lodging in Transit for Family Members—Bowl Subdivision Football" "Adopted 4/28/16"); *see also* Hostetter Tr. 79:4-25 (confirming).

[251] J0001-0022 (Bylaw 12.2.1.3.2 "Exception—Men's Basketball" "Adopted 1/14/16); *see also* Hostetter Tr. 66:13-67:4 (confirming).

[252] *Compare* J0001-0027 (Bylaw 13.6.7.5(a) "Student Host," $75 daily maximum) *with* J0025-0090-91 (Bylaw 13.6.7.5(a) "Student Host," $40 daily maximum).

[253] P0144-0007.

[254] *Compare* J0001-0036 (Bylaw 15.2.2.1.6 "Meals Incidental to Participation" "Revised 4/24/14 effective 8/1/14), *and id.* -0048 (Bylaw 16.5.2.5 "Snacks" "Revised 8/7/14, 10/20/14") *with* J0025-0181 (Bylaw 15.2.2.1.6 "Training Table Meals") *and id* -0206 (Bylaw 16.5.2(g) "Nutritional Supplements" and Bylaw 16.5.2(h) "Fruit, Nuts, Bagels"); *see also* Hostetter Tr. 63:15-64:13 (confirming).

impact on consumer demand or integration.[255] Yet, focusing only on these post-*O'Bannon* ***bylaw changes*** tells just part of the story about the fundamental changes to permitted compensation for Class Members since 2014.

Interpretations. As testified by Brad Hostetter, the ACC's associate commissioner for compliance and governance, "[k]nowledge of [NCAA] interpretations is *necessary* to an accurate understanding of the [NCAA's] rules."[256] The NCAA has *thousands* of such interpretations and issues new ones every year.[257] As one example, in January 2015—after *O'Bannon*—the NCAA announced that it would permit the College Football Playoff to pay up to $3,000 for each participating FBS football player's family members to travel to the game.[258] This substantial new benefit was made possible through *interpretations*—the NCAA never amended any bylaw.[259]

Waivers. New benefits may also become available through bylaw waivers. For example, following *O'Bannon*, the NCAA granted itself a waiver to pay up to $4,000 for each participating D-I basketball player's family to travel to the Final Four—no bylaw was changed.[260] The NCAA publishes a "Previously Approved Waivers Checklist"—twenty pages of circumstances under which schools may ***self-apply*** waivers.[261] These waivers permit schools to *e.g.*, pay for athletes' families to attend Senior Night, pay for athlete travel during vacation periods, and pay for financial aid to attend another school,[262] all without harming consumer demand or integration. These waivers have changed regularly since *O'Bannon*.[263]

Benefits pegged to non-NCAA rules. Compensation allowed for Class Members has also changed post-*O'Bannon* by virtue of changes to ***non***-NCAA rules. For example, NCAA bylaws permit eligible athletes to accept whatever payments the U.S. Olympic Committee chooses to award pursuant to Operation Gold.[264] In 2016, the U.S.O.C. increased Operation Gold payments by 50%,

[255] *E.g.*, Trial Tr. (Lennon) 1558:8-1559:3.
[256] Hostetter Tr. 105:6-11.
[257] *Id.* 125:3-9, 109:21-111:22, 112:24-113:3.
[258] P0148-0001.
[259] Hostetter Tr. 155:22-156:23.
[260] *See id.* 156:11-157:3; P0148.
[261] P0147.
[262] *Id.* 14-15.
[263] *E.g.*, P0147.
[264] Hostetter Tr. 175:5-17; J0001-0018 (Bylaw 12.1.2.1.4.1.2).

meaning that, among other things, allowable payments for D-I basketball players could increase 50% without any change to the NCAA bylaws.[265] Similarly, many financial aid offices have used their discretion to increase the "miscellaneous-expense" COA cash stipend paid since *O'Bannon* by thousands of dollars without the need for any bylaw change.[266]

Schools increase compensation within existing bylaws, interpretations, and waivers. Finally, even if there had not been a single bylaw change, interpretation, waiver, or relevant non-NCAA rule change since July 2014, the trial record would still be replete with examples of institutions exercising their discretion (and creativity) to provide new types and amounts of compensation to Class Members above COA that were not before the Court in *O'Bannon*. For example, since *O'Bannon*, the evidence shows schools for the first time: providing Visa gift cards—*pre-paid credit cards* accepted *anywhere* that takes Visa—as participation awards for bowl games and basketball tournaments;[267] using the SAF to, for example, pay between $10,000 and $60,000 for lost earnings insurance for different students and to distribute $650 to every member of a football team for unspecified "living expenses";[268] providing increasingly lavish overseas trips;[269] and offering unprecedented promises of post-eligibility scholarships.[270] And since *O'Bannon*, the NCAA has increased its SAF and AEF distributions to schools by nearly $30 million, while leaving it to the individual schools to determine how they distribute these funds without any caps.[271]

VII. ALTERNATIVE INJUNCTIONS

Plaintiffs continue to propose two alternative injunctions: (1) an injunction against the challenged restraints or any future NCAA compensation rules that are substantially similar (to prevent circumvention of the injunction's effect), with individual conferences free to adopt their own

[265] Hostetter Tr. 164:21-166:1; *see also* https://www.teamusa.org/News/2016/December/13/US-Olympic-Committee-Significantly-Increases-Payments-To-Athletes-For-Olympic-World-Medals (pursuant to Fed. R. Evid. 201, the court may take judicial notice of the U.S.O.C.'s official announcement—which was confirmed by Hostetter).
[266] Noll Decl. ¶¶ 55, 64-66.
[267] Hostetter Tr. 226: 7-227:6; P0090-0005 (examples of bowl gifts, including Visa gift cards).
[268] Rascher Decl. ¶¶ 61, 82.
[269] *See, e.g.*, Trial Tr. (Hartman) 827:4-16 (discussing trip to China).
[270] *See, e.g.*, Rascher Decl. ¶ 206 (discussing Nebraska's Post-Eligibility Opportunities Program); Trial Tr. (Rascher) 19:17-20:1.
[271] P0039-0001. At least one conference, the MAC, uses SAF money to furnish academic achievement awards. *See* P0043-0001.

compensation rules so long as they do not collude with one another or with the NCAA;[272] and (2) a narrower injunction that mirrors the first while additionally permitting the NCAA to prohibit payment of cash sums untethered to educational expenses, but not to cap the amounts of those incidental-to-participation benefits that the NCAA's 30(b)(6) witness has identified as being primarily for student welfare and unrelated to principles of amateurism.[273]

Plaintiffs submit that the first proposed injunction is, by far, the most appropriate relief because Defendants have not proven any procompetitive justification for their restraints, the injunction would be simple to administer (the need to craft the injunction to prevent circumvention is well known in the courts),[274] and the individual conferences can best determine for themselves whether and which compensation rules are warranted to preserve consumer demand or integration.[275]

Plaintiffs' alternative injunction would only be a proposed substitute if the Court were to determine that there was a proven justification for the NCAA continuing to impose a national rule prohibiting cash compensation untethered to education outcomes. Under this alternative, conferences would, for example, be able to permit their schools to adopt any new education- or healthcare-related benefits without NCAA interference, such as the list of seventeen education-related benefits that Lennon testified are prohibited by current NCAA restraints.[276]

In response to the Court's question about other injunctive-relief options,[277] Plaintiffs believe

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[272] Pls. Opening App'x D.

[273] *Id.* App'x E (listing specific participation benefits that could not be capped).

[274] "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *Prof'l Eng'rs v. United States*, 435 U.S. at 698 (internal citation and quotation marks omitted). An injunction "may also contemplate and forbid conduct that is different from the conduct that was actually condemned." Areeda ¶ 325c, "Forward-looking relief: scope, modification"; *see also Fed. Trade Comm'n v. Nat'l Lead Co.*, 352 U.S. 419, 430 (1957); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461 (1940); *Local 167 of I.B.T. etc. v. United States*, 291 U.S. 293, 299 (1934) (an antitrust injunction "should be broad enough to prevent evasion").

[275] During the July 19 Pretrial Conference, there was a discussion as to whether the NCAA might, in the future, adopt a rule requiring that all compensation or benefits provided to Class Members be equally available to each member of a given team. Pretrial Tr. 97:11-98:14. The trial record has since established that the NCAA does not currently require any such equal treatment across all athletes, or within teams. *See, e.g.*, Trial Tr. (Noll) 356:11-358:9. There is also no evidence that such unequal treatment has undermined consumer demand or integration. *Id.*; *see also id.* (Smith) 1484:6-13. Plaintiffs thus propose that this "equal treatment" issue be left to the determination of the individual conferences.

[276] Trial Tr. (Lennon) 1559:13-1572:24.

[277] *Id.* (Court) 1925:14-1926:4.

that full conference autonomy is by far the most appropriate relief and best option for Class Members and the public interest, which favors competition. That said, one additional possibility would be to modify Plaintiffs' alternative injunction to eliminate the prohibition on the NCAA capping incidental-to-participation benefits. Plaintiffs believe this prohibition on NCAA caps should be included in the alternative injunction because, as discussed in § II.A.2.c (*supra*), the caps are based on anticompetitive cost-control considerations, not any consideration of Defendants' ostensible procompetitive justifications. If the Court finds to the contrary, it could consider this modification to the proposed alternative injunction.

The Court also asked the parties to comment on whether a "safe harbor" injunction should be considered that identifies a permissible, specific dollar amount.[278] Respectfully, Plaintiffs urge the Court not to adopt such an injunction. In response to the Court's questions at trial, no expert witness identified an empirical basis in the record for selecting such a specific compensation amount.[279] Instead, the appropriate course is to permit the individual conferences to make their own determinations—including as to whether any such "safe harbor" amount is appropriate—as part of the competitive process. Antitrust jurisprudence counsels against courts acting as *de facto* regulatory bodies, *e.g.*, by setting a "reasonable" price in a price-fixing case. Instead, the proper role of the antitrust court is to enjoin any violations and then permit competition to establish a market-determined price outcome.[280]

[278] *Id.* (Court) 1925:21-24.

[279] *Id.* (Rascher) 110:18-111:10; *id.* (Noll) 387:3-388:7; *id.* (Elzinga) 427:2-428:14; *id.* (Heckman) 607:15-611:11.

[280] "Of course, the purpose of antitrust law is not to substitute for agency regulation but to make markets competitive and thus able to function without the need for ongoing supervision." Areeda ¶ 325a, "Generally"; Philip J. Weiser, *Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond*, 76 Antitrust L.J. 271, 283 (2009) ("On the doctrinal front, the Supreme Court has counseled courts that antitrust remedies should end the unlawful conduct, prevent its recurrence, and restore the possibility of competition in the market"); Willard K. Tom & Gregory F Wells, *Raising Rivals' Costs: The Problem of Remedies*, 12 Geo. Mason L. Rev. 389, 391 (2003); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Or. L. Rev. 147, 205 (2005).

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

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

/s/ Jeffrey L. Kessler
Jeffrey L. Kessler