Steve W. Berman (*pro hac vice*)
Craig R. Spiegel (SBN 122000)
Emilee N. Sisco (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steveb@hbsslaw.com
craigs@hbsslaw.com
emilees@hbsslaw.com

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

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

Class Counsel for Jenkins and Consolidated Action Plaintiffs

[Additional counsel listed on signature page]

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

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

Class Counsel for Jenkins and Consolidated Action Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	**Case No. 4:14-md-2541-CW** **PLAINTIFFS' CLOSING ARGUMENT REPLY**
This Document Relates to: ALL ACTIONS EXCEPT *Jenkins v. Nat'l Collegiate Athletic Ass'n*, Case No. 14-cv-02758-CW	

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I. INTRODUCTION

It is beyond dispute that, with each passing year, Defendants' national cartel causes significant anticompetitive injury to tens of thousands of Class Members. The Court granted summary judgment on this basis. And, now, following trial, it is clear that Defendants' ostensible "proof" that the challenged compensation restraints improve consumer welfare is in fact bereft of evidentiary support. The trial exposed the NCAA's concept of "amateurism" as sheer pretext, a chameleon-like principle that constantly changes colors with the whim of whatever the NCAA's majority says it means. Indeed, the record demonstrates that Defendants themselves obliterated their ever-shifting amateurism line after *O'Bannon* without harm to consumer demand or integration. Defendants' Closing Brief ("Defs. Cl.")[1] willfully ignores most of this evidence, reading as though Defendants attended a different trial.

Defendants' evidence falls far short of proving that the challenged compensation restraints actually ***cause*** either improved consumer demand or better academic integration. Wake Forest University President Hatch exemplifies their approach: he didn't need economic studies or other empirical proof to validate his lay opinions, relying instead on his "deep sense."[2] Defendants' failure to even consider demand or integration impact is borne out by the testimony of NCAA Vice President Lennon, who admitted that, in more than thirty years at the NCAA, he never once heard members so much as discuss consumer demand when enacting their compensation restraints (but they did often discuss controlling costs, which is not a legal justification).[3] Defendants' Closing confirms that their purported evidence of procompetitive justifications boils down to nothing more than:

- The NCAA's own bylaws and related propaganda (*i.e.*, the cartel rulebook);
- Six handpicked and non-representative witnesses who—relying on ***large swaths of un-cross-examined hearsay statements***—offer worthless lay opinions that consumers of college sports do not want college athletes to get more compensation;
- An economist (Elzinga) who did not analyze any economic data or perform any statistical modeling or testing, and based his core opinion on a ***single piece of speculative deposition testimony*** that increased conference competition would cause "negative externalities";
- A survey expert (Isaacson) who admitted that ***he did not design his survey*** to test whether

[1] ECF No. 1128.
[2] *See* Trial Tr. (Hatch) 2018:4-2020:15 (conducted no studies), 2017:4-20 (relying on "deep sense").
[3] Trial Tr. (Lennon) 1317:11-22, 1550:25-1551:18.

increased compensation would affect consumers' future demand behavior; and

- An economist (Heckman) who admitted that college athletes ***would be better off*** if allowed to receive more compensation or benefits.

This evidence does not come close to meeting Defendants' burden to prove a procompetitive justification, and is thus dispositive on liability. Plaintiffs have nonetheless shown multiple less-restrictive alternatives, each of which would afford individual conferences "ample latitude"—indeed, complete latitude—to regulate athlete compensation without undermining any claimed procompetitive benefit and without significantly increasing administrative costs. The trial evidence therefore leads to only one conclusion: striking down the challenged restraints under governing Ninth Circuit law.

II. DEFENDANTS FAILED TO PROVE THAT THE CHALLENGED RESTRAINTS *CAUSE* EITHER OF THEIR CLAIMED PROCOMPETITIVE JUSTIFICATIONS

Just as Plaintiffs were required to prove the restraints *cause antitrust injury in fact*, Defendants had to prove that the challenged restraints *cause procompetitive effects*. They carry no lesser burden regarding causation at step two than Plaintiffs bore at step one. Defendants' invocation of a negligible causation standard—that their restraints must merely "play[] some role" (Defs. Cl. 8) in causing demand-enhancing effects or integration—is wrong. A "some role" standard has no legal or economic meaning. In *O'Bannon*, for example, the Ninth Circuit held that, regardless of the degree of the NCAA's historical commitment to amateurism, the NCAA "would still need to show that amateurism brings about some procompetitive *effect* in order to justify it under the antitrust laws."[4] In other words, it is insufficient if amateurism served "some role" in Defendants' enactment of their compensation rules. The relevant antitrust inquiry is whether the challenged rules *bring about—i.e.,* cause—the claimed procompetitive effect. Otherwise, defendants could rely on pretextual justifications in lieu of

[4] *O'Bannon v. NCAA*, 802 F.3d 1049, 1073 (9th Cir. 2015) (bold added, italics original) ("*O'Bannon*"); *see also Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) ("Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. ***Instead, it focuses directly on the challenged restraint's impact on competitive conditions.***") (emphasis added); *Procaps S.A. v. Patheon Inc.*, 141 F. Supp. 3d 1246, 1288 (S.D. Fla. 2015), *aff'd* 845 F.3d 1072 (11th Cir. 2016) ("While it is true that [*Broadcast Music, Inc. v. Columbia Broadcasting System*] broadly states that the court should consider whether the practice at issue 'increase[s] economic efficiency and render[s] markets more, rather than less, competitive,' ***the [Supreme Court] is clearly referring to the*** *restraint* ***as the cause of the efficiency and increased competitiveness. Thus, the Court must determine if the procompetitive effects on the marketplace are actually attributable to the alleged restraint.***") (original alterations included, emphasis added).

bona fide procompetitive effects.[5] But, as the Ninth Circuit has held, the "amateurism rules' validity must be proved, not presumed." *O'Bannon*, 802 F.3d at 1064.

A. Defendants Have Not Met Their Burden to Prove That the Challenged Restraints Cause Increased Consumer Demand

Plaintiffs proved that every time the NCAA's members have increased athlete compensation and thereby altered what they said it means to be an "amateur," there was no harm to consumer demand (or integration).[6] The NCAA has conceded this indisputable point through the 30(b)(6) testimony of Lennon and Lewis.[7] And it has been corroborated by the post-*O'Bannon* evidence showing that even as athletes now receive thousands of dollars above COA, total revenues continue to rise.[8] This includes the increased revenues from significant broadcast contracts that Defendants entered into *after O'Bannon*.[9] The pretextual nature of amateurism has been further laid bare by the trial revelation that the NCAA, its conferences, and member schools never so much as tested—or even discussed—the potential impact on demand at any time before making or permitting their countless compensation changes.[10] Defendants have shown nothing more than that the NCAA majority sets compensation limits based upon their ever-changing feelings about what "caps" are correct—unless it is the SAF and AEF funds, which have no cap at all.[11] This real-world evidence, and the admissions of defense witness after witness, exposes amateurism's relationship with demand as a charade.

1. The speculative, anecdotal opinions of a few hand-selected lay witnesses offer no probative support that amateurism "promote[s]" demand

Speculative lay opinions—based on untestable hearsay statements from anonymous college sports fans—do not constitute a substitute for credible economic evidence assessing the relationship between the restraints on Class Member compensation and consumer demand. Imagine if, in a price-

[5] *See* Pls. Opening Argument ("Pls. Op.") (ECF No. 1014) 10, 10 n.17.
[6] Pls. Closing Argument ("Pls. Cl.") (ECF No. 1099) § II.B.
[7] 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.
[8] Pls. Cl. § IV.A.1; *id.* 28 nn.179-188; P0137; P0139.
[9] *See, e.g.*, P0045-0002 (2016 Multimedia Agreement between Turner/CBS and NCAA); *id.* (2017 Amended and Restated Telecast Agreement between Big Ten Conference and Big Ten Network); *id.* -0003 (2017 Sublicense Rights Agreement between The Big Ten Conference and Big Ten Media Properties); *id.* (2016 Amended and Restated Multi-Media Agreement between ESPN and ACC).
[10] Pls. Cl. 14-16.
[11] Pls. Cl. §§ II.B-C.

fixing case, defendants' economist testified about demand effects based upon having talked to a bunch of unidentified and unrepresentative people about their personal preferences and did not review or test any economic data. ***That is Elzinga's testimony***. Compounding the unreliability, the people Elzinga talked to were cherry-picked by defense counsel and benefit from the challenged restraints.[12]

Defendants try to salvage the inherent lack of probative value in their lay-witness speculation by claiming that some of it is "supported by formal consumer studies."[13] This is a canard. Defendants cite only to consumer studies that are either (1) not in evidence,[14] or (2) in evidence, but not admitted for the truth of the matters asserted.[15] The surveys themselves are all hearsay, and as such, this Court has already held that Defendants may not rely on them as affirmative evidence to try to satisfy their burden of proof.[16] The surveys additionally lack probative value because they surveyed nothing relevant. Defendants' witnesses could not recall a single survey or economic assessment which even purported to test the impact on consumer demand if, *e.g.*, conferences could set their own compensations rules, or if athletes could receive any additional benefits (such as education-related benefits) short of unlimited salaries.[17] Perhaps most tellingly, Defendants' witnesses could not identify even one study, or ***one discussion***, about consumer demand in conjunction with any of the myriad compensation rule changes that have been implemented over the years.[18] Instead, the NCAA's 30(b)(6) witness "heard ***cost considerations*** as it related to ***all the rules***."[19]

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[12] Pls. Cl. § II.A.1.

[13] Defs. Cl. at 11.

[14] *See* Defs. Cl. 12 nn.58, 63 (citing Aresco/Scott testimony re: unidentified survey not in evidence).

[15] *See* Defs. Cl. 12 (citing D0683, 2009 Big Ten Exploratory Quantitative Research on Consumer Perceptions of Major College Conferences); *id.* 13 (citing D0541, Pac-12 Reputation & Key Issue Benchmark Study); *id.* 15 (citing D0239, 2009 Big Ten Exploratory Quantitative Research on Consumer Perceptions of Major College Conferences). These studies were admitted for a limited purpose, and ***not*** for truth of matters asserted. Trial Tr. (Scott) 1161:22-25; *id.* (Smith) 1415:2-22.

[16] Plaintiffs address this survey evidence in Appendix A.

[17] *See e.g.*, Trial Tr. (Scott) 1181:5-1182:8 (Scott has not seen, and Pac-12 has not conducted, any economic assessment of consumer demand impact if conferences set rules or if athletes could receive GPA or graduate school bonuses); Trial Tr. (Smith) 1466:24-1477:14; 1468:10-1469:5 (same).

[18] 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; *id.* 1557:1-11; 1650:12-22 (could not recall the justification memo for a proposed rule ever discussing consumer demand).

[19] Trial Tr. (Lennon) 1551:13-18.

Furthermore, to the extent that Defendants' witnesses base their lay opinions regarding consumer demand on purported "frequent and substantial interactions with constituencies of college sports" (Defs. Cl. 11), those interactions are not relevant for the same reasons as with the surveys. No defense witness discussed with their anonymous "constituents" the potential impact of conference autonomy, or how they would react to conferences permitting, *e.g.*, additional education-related compensation. Instead, Defendants' lay-witness opinions are based on purported discussions with unknown people about a hypothetical world with no conference regulation of compensation.[20] But not one university or conference witness indicated that she or he would ever advocate for unlimited pay-for-play or to "professionalize" college athletes.[21]

Moreover, to the extent Defendants rely on the alleged truth of the content of what witnesses claimed they were told by constituents, that is beyond the purpose for which the testimony was allowed.[22] The Court repeatedly held that it would allow such testimony about out-of-court discussions only to the extent it laid "the foundation for [the witness's] lay opinion"; the Court expressly did *not* "take [the testimony] for the truth of whether [the constituents] said it or what they said as being true."[23] Nonetheless, to offer one example, Defendants write: "[Larry] Scott explained that the Pac-12's third-party broadcast partners, ESPN and FOX, have discussed ***the appeal of amateurism*** in the context of contract negotiations, after deals closed, and during regular meetings with the Pac-12."[24] Not only *would* this testimony be inadmissible if it existed, what Scott actually said was that "there's been nothing about those conversations [with ESPN and FOX] that suggested we should veer from amateurism,"[25] which is hardly the same thing as admissible evidence that "veering" from amateurism would hurt demand, or that amateurism has specific appeal.[26]

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[20] Pls. Op. 13-14.
[21] Pls. Cl. 31-33; *id.* nn.206-07.
[22] Appendix A provides examples where Defendants rely on inadmissible hearsay for truth.
[23] Trial Tr. (Scott) 1125:8-15; *accord id.* (Smith) 1406:19-22, 1405:25-1406:22, 1452:19-1453:1.
[24] Defs. Cl. 13 (citing Trial Tr. (Scott) 1167:11-1168:16) (emphasis added).
[25] *See* Trial Tr. (Scott) 1167:11-1168:16.
[26] *Id.* 1167:25-1168:5. Defendants likewise misrepresent Rascher's testimony (Defs. Cl. 10): he never testified that there is evidence of consumer disenchantment sufficient to satisfy Defendants' burden—he said disenchantment was hypothetically possible at some point. *See* Trial Tr. (Rascher) 65:7-66:15. Defendants take this kind of liberty with the record throughout their Closing Argument.

Defendants' dire warnings about "professional athletes playing" for colleges (Defs. Cl. 12) is another strawman. If the proposed injunction were entered, the NCAA would still be able to promulgate and enforce rules limiting college athletics to ***enrolled students who meet academic eligibility standards***.[27] Defendants' lay testimony simply does not support their contention that national compensation rules are needed to preserve consumer demand.[28]

2. Neither Elzinga's nor Isaacson's testimony provides probative evidence that the challenged rules cause increased consumer demand

There is little that needs to be said about Elzinga's testimony beyond his admissions that he did not study any economic data or perform any economic analysis; he simply offers speculation based upon a handful of interviews with lay witnesses cherry-picked for him by defense counsel.[29]

Defendants' only other expert testimony purporting to show the relationship between the challenged rules and consumer demand is Isaacson's. But he admitted that, "unlike the Poret survey, ***my survey does not attempt to measure future behaviors***, but rather asks respondents if they are in favor or against the benefits described under each scenario."[30] This Court previously held that such an inquiry about preferences—rather than future behavior—is "not relevant."[31] Isaacson himself punctuated the point: "I could not reliably and therefore did not measure future [consumer] behavior. . . ."[32] The Isaacson survey also ignored five of the eight Poret Test Scenarios for increased compensation[33] and offers no opinion that introducing any of them would negatively impact consumer demand. And, even for the three Poret Test Scenarios that Isaacson did test, he admitted that he is

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[27] *Cf.* Defs. Cl. 17.

[28] The fact that being a student—not being an uncompensated student—is the essence of what fans would understand about the NCAA's amateurism principle is evidenced by the NCAA's own statements of "The Principle of Sound Academic Standards" and "The Principle of Amateurism." J0024-00016 (Art. 2.5, Art. 2.9); *see also* J0024-0013 (Art. 1.3.1) ("A basic purpose of [the NCAA] is to maintain . . . the athlete as an integral part of the student body . . ."). *See also* Defs. Cl. 37 (citing Trial Tr. (Lennon) 1622:3-7) (agreeing with President Emmert that the principle of amateurism is about "young men and women playing these games while they are students at their universities.")

[29] *See* Pls. Cl. 6-8, 32.

[30] Trial Tr. (Isaacson) 1891:7-150 (emphasis added) (confirming).

[31] *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 975 (N.D. Cal. 2014).

[32] Isaacson Decl. ¶ 2.

[33] Healthcare Fund, Graduate School Tuition, Work-Study Payment, Post-Eligibility Undergraduate Scholarship, and Post-Eligibility Study Abroad. *See* Poret Decl. ¶ 139.

"not providing an opinion on whether or not opposition to a particular benefit relates to amateurism."[34]

Furthermore, despite promising that Defendants would prove amateurism to be "***the*** defining feature of college sports" (Defendants' Opening 3) ("Defs. Op."),[35] Defendants' Closing abandons this promise entirely. They do not dispute the admissions of senior NCAA officials that amateurism is not a fixed or "sacrosanct" concept that has to be preserved,[36] and retreat to an incoherent defense of the Isaacson "and/or" question as purportedly showing that a "significant percentage of consumers" (actually—less than one-third) care about amateurism, as one of just many reasons that they selected for watching or attending college sports. Defs. Cl. 18. Even assuming that the incomprehensible "and/or" question was understandable, this would not come close to meeting Defendants' burden to prove that the challenged compensation restraints preserve consumer demand, because Isaacson never asked consumers how any compensation increase would actually impact their future behavior.

B. Defendants Have Not Met Their Burden to Prove That the Challenged Restraints Cause "Integration" of Class Members

Even in *O'Bannon*, at a different time, under different rules, and on a different record, the Ninth Circuit merely found that compensation rules "play a ***limited role*** in integrating student-athletes with their schools' academic communities."[37] This Court should now find that Defendants have not met their burden, on this record, of proving that the challenged NCAA rules cause the integration of Class Members into academic or campus life.

Defendants' main integration argument is premised upon the unremarkable point that college athletes benefit from attending college.[38] Defendants chiefly rely upon Heckman's opinion that "'student-athletes have received substantial academic and labor-market benefits ***under the*** Collegiate Model,'"[39] but ignore just how irrelevant this testimony is to the issues before the Court. Receiving

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[34] Trial Tr. (Isaacson) 1912:3-18.
[35] ECF No. 923.
[36] Pls. Cl. § II.B. In fact, the NCAA rules themselves expressly provide for numerous "Exceptions to [the] Amateurism Rule." *See* J0024-0078-80 (Bylaw 12.1.2.4 *et seq.*).
[37] *O'Bannon*, 802 F.3d at 1072 (emphasis added); *see also id.* at 1059-60 ("most of the benefits of academic and athletic 'integration' are not the result of the NCAA's rules restricting compensation").
[38] Defs. Cl. 22-25. Defendants also ignore the fact that athletes benefit in spite of (not because of) Defendants' "athletics-first, school-second" approach to scheduling games and restricting athletes' class schedules, majors, and access to extra-curriculars. *See, e.g.*, Pls. Cl. § III.A.
[39] Defs. Cl. 25 (quoting Heckman Decl. ¶ 26).

benefits "under" NCAA compensation rules does not provide any evidence that these rules caused, or even contributed to, the benefits any more than the fact of receiving benefits under a blue sky demonstrates that blue skies cause education benefits. The undisputed facts are that Heckman has offered no evidence that the NCAA compensation rules cause any positive integration benefit because his regression data did not include any information about the level of scholarship or compensation received by the student in his outdated surveys, and therefore he did nothing to test the relationship between NCAA compensation caps and academic or life success.[40]

Moreover, Defendants completely ignore the fact that Heckman conceded at trial that he did not conduct any "empirical, econometric, or quantitative analysis" to support Defendants' claim that increased compensation would be harmful to Class Members.[41] Rather, he admitted college athletes would be "clearly better off [if they could receive greater benefits]. No question about it."[42]

Defendants' lay-opinion testimony about purportedly adverse "equilibrium effects" on integration is equally unhelpful for meeting their burden of proof. Chancellor Blank's vague "worry" that above-COA compensation tied to academic performance would incentivize athletes to take the purportedly "easy" classes at the University of Wisconsin[43] is pure speculation that is contrary to the actual fact record of schools offering various academic performance incentives to both college athletes and coaches and administrators with no adverse effects.[44] Similarly, although Hatch speculated that above-COA compensation would lead to a "divorce" between walk-ons and athletes who received above-COA funds,[45] Defendants have offered no explanation for why such a wedge does not already exist (1) between walk-ons and other athletes who receive full COA scholarships plus SAF funds, incidental participation benefits, *etc.*;[46] (2) between scholarship athletes with no outside income and

[40] Trial Tr. (Heckman) 559:5-24; *id.* (Noll) 367:9-20; Noll Rebuttal ¶¶ 31-32. Tellingly, this Court found this same defect with Dr. Heckman's work in *O'Bannon*. *See* Pls. Cl. 21-22. In fact, graduation rates have improved as compensation has risen above COA. *Id.* 23 n.143.
[41] Trial Tr. (Heckman) 606:24-607:4.
[42] *Id.* 596:4-597:6.
[43] Defs. Cl. 28-29 n.160.
[44] Pls. Cl. 23. Defendants also fail to explain how this "worry" could not be dealt with by tying such funds to the successful completion of "challenging" classes.
[45] Trial Tr. (Hatch) 2000:13-2001:2.
[46] *Id.* (Alston) 682:8-15.

those who are millionaires due to outside income;[47] and (3) between non-athlete students from poor and wealthy families.[48]

In sum, "integration" should be rejected as a social-policy objective that has no proven factual connection to the challenged restraints and no legal validity under the rule of reason.[49]

III. PLAINTIFFS PROVED MULTIPLE LESS-RESTRICTIVE ALTERNATIVES

Defendants continue to conflate the element of less-restrictive alternatives—Plaintiffs' need to establish *one* such alternative if Defendants first prove a procompetitive justification—with Plaintiffs' proposed injunctive relief. Defs. Cl. 37-40. But putting that threshold error aside, Defendants' entire rejoinder to Plaintiffs' showing of less-restrictive alternatives is based on fundamental mischaracterizations of the evidence presented at trial.

A. The Trial Record Is Replete with Evidence of "What Would Happen" Under Plaintiffs' Less-Restrictive Alternatives

Defendants' assertion that "Plaintiffs' [e]xperts" failed to "put forth an analysis that informs what would result from Plaintiffs' proposals" (Defs. Cl. 41) is false. Plaintiffs' economists each testified about what would ensue within the relevant markets if conference autonomy (or the modified versions thereof) took the place of the challenged NCAA compensation restraints. Rascher provided evidence to show that each individual conference would act in its economic self-interest to "target their incentives towards a beneficial outcome, such as academic achievement" and "pay will only rise as high as consumer demand will allow."[50] Noll offered similar expert testimony—based on well-established economic principles, a study of Defendants' economic data, and the NCAA's history[51]—that, as rational economic actors, conferences would adopt rules that would not "erod[e]" the "popularity of FBS football and Division I basketball."[52]

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[47] *See* Pls. Cl. 24 (Jenkins's relationship with college teammate Kyle Parker did not change even after Parker received a seven-figure signing bonus from the Colorado Rockies).
[48] *See* Trial Tr. (Blank) 920:20-921:10.
[49] *See* Pls. Cl. 24 n.154; Pls. Op. 10, 40-41.
[50] Rascher Rebuttal ¶¶ 56, 70; *see also* Rascher Decl. ¶¶ 154, 200-203, 205-207 (explaining that permissible benefits would be determined by "market acceptance").
[51] Pls. Cl. §§ IV.A-B; Noll Decl. ¶ 207 (Defendants could adopt rules "encourag[ing] academic integration" and permitting compensation for "wide variety of benefits related to being a student").
[52] Pls. Cl. § IV.B.

The fact that neither Rascher nor Noll conducted an econometric analysis to model the world with less-restrictive alternatives is irrelevant. They were able to apply well-established economic theory to the record evidence—including the substantial evidence on how conferences have historically set individual compensation rules without harming demand or integration—to demonstrate that conferences can fulfill any regulatory role that is necessary to preserve demand and integration.[53] Moreover, the expert testimony of Rascher and Noll on how conferences would exercise autonomy in the long-term interests of conference members was consistently supported by ***Defendants'*** own witnesses, ***all*** of whom admitted that their institutions and conferences would not support—and that they could not identify a ***single*** other school or conference that would support—the adoption of conference-based rules that would harm demand or integration.[54] This defense testimony both corroborated Noll and Rascher's expert opinions on "What Would Happen if the Requested Relief Were Granted" (Defs. Cl. 41) and eviscerated Elzinga's wholly speculative opinions about purported negative externalities that would supposedly cause conferences to ignore consumer demand.[55] What Elzinga derides as an externality is actually demand enhancing ***competition***.[56]

Moreover, Poret's survey showed that, if, in the future, conferences were granted the autonomy to permit additional benefits, there are myriad such benefits that could be offered without harm to consumer demand.[57] Poret further testified that if any conference wanted to know "what would happen" if it offered a particular benefit, it could conduct a consumer survey just like Poret's.[58] Indeed, the trial established that each time the NCAA permitted an increase in the benefits available to athletes,

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[53] *Id.* 3-4 nn.20-21.

[54] *Id.* 32 nn.206-207. The only witness who speculated that some schools would act contrary to their economic interests was Hatch, but he did not actually identify any such school. Pls. Cl. 7, 7 nn.42-44. And while Defendants fantasize that "numerous defense witnesses" testified that some schools would permit "significantly more compensation" if allowed, they cite no such *evidence*. Defs. Cl. 47.

[55] Pls. Cl. §§ II.A.1, IV.B-C, VI.

[56] *See* Rascher Rebuttal ¶ 34 ("The point is that individual conferences, if freed from the NCAA's national restraints, would adopt rules embodying whatever they believed to be the demand-maximizing level of compensation, consistent with their own philosophies of why they produce college sports, and there is no evidence this would cause any adverse externalities to other conferences or schools who adopted different compensation models.")

[57] Pls. Cl. § IV.A.2; Poret Decl. ¶¶ 17, 21, 24, 59, 131; P0141. And unlike Isaacson's survey, Poret's contained results based on a methodology that this Court has held is relevant to its analysis: measuring the impact on future demand of new player benefits. *O'Bannon*, 7 F. Supp. 3d at 975-76.

[58] Pls. Cl. 11 nn.68-69.

there was no adverse impact on consumer demand or integration,[59] further supporting the conclusion that there is ample room for individual conferences to permit greater benefits, *e.g.*, additional education- and health-related benefits, as a less-restrictive alternative.[60]

B. The Trial Record Is Replete with "Real World" Analogies That Support Plaintiffs' Less-Restrictive Alternatives

Defendants falsely assert that there is "no real world analogue to establish what would result in the but-for-world" of conference autonomy.[61] In fact, the trial record shows that in the "real world," conferences are quite capable of setting their own rules. Rascher and Noll testified about how each conference already operates as an individual sports league that sets its own schedules, enters into its own commercial agreements, enacts its own rules (including compensation rules), and maintains its own compliance infrastructure.[62] Further, they testified about how, prior to 1957, conferences set all of their own compensation rules without harm to demand or integration, and how the Power Five conferences have been able to adopt new compensation rules since *O'Bannon* with no adverse impact.[63] Defendants' remaining responses to Plaintiffs' less-restrictive alternatives are equally divorced from the trial record:

1. Uniform conference compensation rules do not exist now. Defendants assert that "national rules are essential for amateur intercollegiate athletics"[64]—but the trial established that the NCAA *already permits* "five distinct [compensation] rule variations" across conferences.[65]

2. Rules aside, uniform compensation to Class Members does not exist now. Defendants decry that conference autonomy could lead to different athletes receiving different compensation and

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[59] *Id.* 8, 30-31.
[60] Pls. Cl. § IV.A.2.
[61] Defs. Cl. 43.
[62] Pls. Cl. §§ IV.B-C; *see also, e.g.*, Rascher Decl. ¶¶ 167-180; Noll Decl. ¶ 43; J0002-J0003, J0005-J0013; P0045-P0046, P0049.
[63] Pls. Cl. 30-31.
[64] Defs. Cl. 45-47. Defendants trumpet the Supreme Court's statement in *Board of Regents* that "the integrity of 'the product' [amateur intercollegiate athletics] cannot be preserved except by mutual agreement" (*id.* 46), but neglect to explain why members of individual conferences could not provide that "mutual agreement" and do not address the Supreme Court's actual holding: that the NCAA's *national* rules restricting broadcast rights *violated* the Sherman Act. 468 U.S. 85 (1984).
[65] Pls. Cl. § IV.C; Rascher Decl. ¶¶ 96-103; Defs. Cl. 46.

that this would damage demand and integration.[66] But Defendants do not dispute that there are significant compensation differences ***now***.[67] Instead, they argue that compensation diversity—*e.g.*, a $740,000 Olympic payment, a $60,000 loss-of-value insurance premium, a million-dollar-plus signing bonus from a professional baseball team, thousands of dollars in "gift suites," Nebraska's PEO postgraduate scholarship program, and the differences between full COA and the many walk-on athletes who receive no compensation at all—is not "systematic" or "uncapped" and thus "shed[s] no light" on conference autonomy.[68] This is wrong on all counts: the NCAA ***systematically*** permits ***all*** of this compensation, does ***not*** cap SAF (or AEF), and yet there is no harm to demand or integration.[69]

3. There already is a significant "gap between the so-called haves and have nots" (Defs. Cl. 48). Defendants cite self-serving speculation from Scott and others about how conference autonomy would disrupt the "competitive playing field" by enabling better-resourced schools to attract "better players."[70] But, as Big 12 Commissioner Bowlsby testified: "The concept of competitive equity is largely a mirage"; "[the Power 5 conferences] win more than 90 percent of the national championships [], and it's been that way for a very long time."[71]

4. Existing "Power Five" autonomy supports the less-restrictive alternative of conference-based rulemaking. While Defendants try to dismiss the analogue of Power Five autonomy, the trial established that these conferences were able to promulgate rule changes to provide additional benefits to athletes that many other conferences prohibit without any adverse impact on demand or integration.[72] This is strong evidence that even those conferences with the greatest economic resources can be expected to adopt rules which benefit their athletes while preserving demand, integration, and other values. Indeed, the stated premise of Power Five autonomy was that the conferences with greater resources should have the right and flexibility to do more for their athletes.[73]

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[66] *See, e.g.*, Defs. Cl. 47-53.
[67] Defs. Cl. 48-49; Rascher Decl. ¶¶ 96-103; Robert Bowlsby Tr. 38:17-39:5.
[68] Defs. Cl. 49-50.
[69] Pls. Cl. §§ VI, IV.
[70] Defs. Cl. 48-50.
[71] Bowlsby Tr. 38:17-39:14; *see also* MSJ Order 23 n.7 (ECF No. 804) (rejecting competitive balance).
[72] *Compare* Defs. Cl. § III.D *with* Pls. Cl. § IV.B.
[73] Pls. Cl. 33.

5. Historical conference autonomy further supports the less-restrictive alternatives. Defendants have no substantive response to the fact that college sports thrived "during the first half of the 20th Century, when each conference had its own compensation rules," so they move to strike this undisputed evidence as inadmissible.[74] Plaintiffs will show this motion is meritless.

6. Plaintiffs' less-restrictive alternatives are no more susceptible to "perversion" or evasion than existing NCAA compensation rules. Defendants argue that the Alternative and Modified Injunctions would constitute only nominal restrictions on the payment of "untethered" cash sums and incidental-to-participation benefits (respectively) because they could be evaded.[75] But this argument—that the lines drawn by such rules would either be arbitrary or could be circumvented—applies with equal force to all of the existing NCAA compensation rules, where, *e.g.*, $400 Visa gift cards for a team that wins its homecoming game are prohibited, but the same gift cards become permissible participation benefits when the team wins a postseason contest;[76] and where academic incentive payments and extra money for clothes are prohibited, unless paid under the auspices of the SAF, in which case the same exact benefits become permissible.[77]

C. Plaintiffs' Less-Restrictive Alternatives Would Not Increase Administrative Costs

Defendants do not dispute that eliminating NCAA compensation rules alone would not impose any increased administrative costs. And their claim that conference autonomy would increase enforcement costs is negated by Plaintiffs' showing that future enforcement under conference autonomy can be accomplished by some combination of the extant NCAA and conference enforcement infrastructure, reallocation of existing enforcement costs from the NCAA to the conferences, and the new third-party enforcement regime announced by the NCAA in response to the recommendations of the Rice Commission.[78] Defendants' protestation that the NCAA would still have many rules to enforce (Defs. Cl. 52) is a non-sequitur—the point is that there would be ***savings***

[74] Defs. Cl. 9-10 n.41.
[75] Defs. Cl. 40.
[76] Brad Hostetter Tr. 185:7-24, 190:13-191:22 (awards allowed for postseason achievement).
[77] Pls. Cl. 16, 16 n.99, 25-26, 41, 41 n.271.
[78] Pls. Cl. § IV.C.

from having many ***fewer*** NCAA rules to enforce and more efficient conference regulation.[79] And Defendants' shrill warning about conference autonomy possibly causing realignment is not only conjecture, it ignores the proof that frequent conference realignment is already a fact of life in D-I.[80]

D. Plaintiffs' Less-Restrictive Alternatives Provide "Ample Latitude"

Finally, Defendants continue to beat the drum of the *Board of Regents* statement that the NCAA should be afforded "ample latitude to superintend college athletics." Defs. Cl. 35. But they never address that conference autonomy is the antithesis of "micromanag[ing] organizational rules." *Id.* And the fact that conferences and schools—rather than the NCAA—would be the organizations afforded such "ample latitude" is a distinction without a difference because the NCAA is nothing more than a "membership organization" already driven by the decisions of these same members.[81]

IV. BALANCING IS REQUIRED UNDER THE RULE OF REASON

As all the cases Defendants cite to argue against "balancing" find,[82] the rule-of-reason test is, and always has involved,[83] weighing anticompetitive and procompetitive effects of a restraint to determine its overall impact on competition. Defendants have not cited a single case holding that courts should employ the three-step burden-shifting analysis to *replace*,[84] rather than, as described in their Opening, "to guide and effectuate," that ultimate inquiry. Nor do Defendants have an answer to the clear Ninth Circuit law requiring this Court to conduct a final fourth-step balancing if Plaintiffs

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[79] To the extent the Court believes that Plaintiffs' proposed injunction language would prohibit the NCAA from merely serving as an enforcement arm for autonomous conference rules (*see* Defs. Cl. 52 n.295), Plaintiffs would propose alternative language to clearly permit this.

[80] Defs. Cl. 53; Rascher Decl. ¶ 189 (eighty-four realignment moves since 2010).

[81] *See, e.g.*, Trial Tr. (Smith) 1462:23-1463:14; *id.* (Lennon) 1552:3-1553:16, 1556:12-25.

[82] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("The rule of reason requires courts to conduct a fact-specific assessment . . . to assess the restraint's actual effect on competition.") (citation omitted); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects") (citation omitted); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) ("Under the rule of reason, the fact-finder . . . determines whether the restraint's harm to competition outweighs [its] procompetitive effects.") (citing *Bahn v. NME Hosp., Inc.*, 929 F.2d, 1404, 1413 (9th Cir. 1991)).

[83] *See, e.g.*, *Bd. of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 238 (1918); *Bd. of Regents*, 468 U.S. at 104; *Prof. Eng'rs*, 435 U.S. at 692.

[84] In fact, since *Hairston* and *Tanaka*, the Ninth Circuit has resolved multiple rule-of-reason cases employing a balancing analysis, without referencing the three-step burden-shifting framework. *See, e.g.*, *Cal. Dental Ass'n v. FTC,* 224 F.3d 942, 947 (9th Cir. 2000); *Gorlick Distrib. Ctrs, LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1024 (9th Cir. 2013).

prevail at step one (as they have already done here) but are not found to prevail at the other two steps. Notwithstanding Defendants' claim that this precedent is merely "dicta," the Ninth Circuit explicitly "reach[ed] the balancing stage" to determine whether the "anticompetitive harm [was] offset by the procompetitive effects" in *County of Tuolumne*.[85]

And, contrary to Defendants' assertion that balancing requires that competitive effects be reduced to measurable units, this Court has all the evidence it needs to determine the harm of this "paradigmatic"[86] antitrust violation: ***a horizontal agreement of competitors fixing all prices in the market*** versus Defendants' threadbare, anecdotal evidence of any small procompetitive benefit.[87]

V. *O'BANNON* DOES NOT SUPPORT, LET ALONE REQUIRE, A DEFENSE VERDICT

This Court has repeatedly rejected Defendants' persistent, but ever-evolving, position that *O'Bannon* compels a defense verdict.[88] No matter how many ways Defendants try to spin *O'Bannon*, it does not help them in this litigation, which "raise[s] new antitrust challenges to conduct, in a different time period, relating to rules that are not the same as those challenged in *O'Bannon*."[89]

First, Defendants' feign amnesia as to the Ninth Circuit's holdings that the NCAA "amateurism rules' validity must be proven, not presumed" and that the NCAA violated the antitrust laws. 802 F.3d at 1064. *O'Bannon* did not "affirm" a single NCAA compensation restraint.

Second, unlike in *O'Bannon*, there is no basis in this record to conclude that Defendants have shown that their compensation rules, in fact, preserve amateurism or integration (*supra* § II.A-B). Instead, this record demonstrates that consumer demand and integration were not even points of discussion when Defendants enacted the challenged restraints (but costs were) (*supra* § II.A).

Third, the less-restrictive alternatives and injunctive relief sought in this case—grounded in conference autonomy—were not presented in *O'Bannon*.[90] Thus, while the Ninth Circuit criticized the $5,000 NIL payment for depriving the NCAA of "'ample latitude' to superintend college athletics" (802 F.3d at 1079), the

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[85] *Cty. of Tuolumne v. Sonora Comm. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).
[86] *Bd. of Regents*, 468 U.S. at 107.
[87] *See e.g.*, *id.*; Areeda ¶ 1507.
[88] *See, e.g.*, Order Denying Mot. for J. on the Pleadings 5-6 (ECF No. 459); MSJ Order 9-15.
[89] MSJ Order 7 (emphasis added).
[90] MSJ Order 26-30.

injunctive relief proposed here would afford conferences and their schools (*i.e.*, the NCAA's membership) this very latitude. And, Plaintiffs' alternative injunction is designed to be consistent with the *O'Bannon dicta* relied upon by Defendants because it would permit the NCAA to continue to enforce rules concerning the payment of "cash sums untethered to educational expenses" (*id.* at 1078). What is, in fact, inconsistent with the *O'Bannon dicta* is Defendants' persistent restriction of myriad forms of "education-related compensation" (*id.* at 1078 n.24).[91]

Fourth, contrary to Defendants' strawman, Plaintiffs do not base their arguments about the inapplicability of the *O'Bannon dicta* on a contention that "[SAF] payments, incidental benefits, and Pell Grants" comprise "new categories of benefits."[92] Rather, Plaintiffs' point is that—***collectively***—these categories of compensation, ***on top of*** full COA scholarships, have resulted in at least ***four thousand*** Class Members receiving total compensation substantially exceeding COA,[93] all without harming consumer demand.[94] There was no such evidence in the *O'Bannon* trial record.

The *O'Bannon* court referred in a footnote to the possibility that a Pell Grant plus a GIA scholarship might yield compensation above COA, but there was no consideration of the new facts presented here about the extent to which a combination of full COA, Pell Grants, SAF and AEF payments, gift suites, gift cards, loss-of-value insurance, and many other types of incidental-to-participation benefits (which Lennon admitted do not relate to the principle of amateurism) have resulted in vast numbers of Class Members receiving thousands, or even tens of thousands, of dollars of compensation in excess of COA. And, all of this compensation has—as admitted by the NCAA's 30(b)(6) witnesses and shown by Rascher and Noll—had no adverse impact on consumer demand or integration.[95] Indeed, it is safe to assume that the *O'Bannon* majority would have been stunned by the trial record here, revealing *permitted* compensation many thousands of dollars above COA including, *e.g.*, a $58,914 payment for loss-of-value insurance, a $740,000 Olympic payment, widespread SAF cash payments for items such as dresses and car repairs and unspecified "expenses," and

[91] *See, e.g.*, Pls. Op. 29-31; Pls. Cl. 24-29.
[92] Defs. Cl. 3-4.
[93] *See, e.g.*, Pls. Op. 22; Pls. Cl. 24-29.
[94] *See, e.g.*, *id.*
[95] *E.g.*, NCAA (Lewis) Tr. 79:1-21, 112:2-16; NCAA (Lennon) Tr. 63:21-64:1, 316:4-25; *see also* NCAA (Lennon) Tr. 85:5-23, 92:18-93:10, 119:20-122:22; Trial Tr. (Lennon) 1331:7-22 (admitting additional benefits are unrelated to the principle of amateurism).

hundreds of dollars in gift suites and gift cards (even Visa gift cards—the functional equivalent of cash) for team or individual athletic achievement (*i.e.*, pay-for-play), all without harming demand. Pls. Cl. 24-29.

Fifth, Plaintiffs' claim does ***not*** "boil[] down to the assertion that Defendants violated the antitrust laws by implementing the very relief ordered by *O'Bannon*."[96] The *O'Bannon* injunction stopped the NCAA from denying schools the option to provide a full COA scholarship. It did not require any school to offer COA, let alone to do so by paying thousands of dollars in unrestricted "miscellaneous expense" cash stipends, and to then additionally provide thousands of dollars in other types of benefits. Nor do Plaintiffs contend that Defendants "loosening their[]anticompetitive rules" was unlawful.[97] Defendants' conduct simply demonstrates that even substantial compensation above COA does not hurt consumer demand or integration, and that, contrary to what Defendants argued in *O'Bannon*, there is no sacrosanct line that delineates amateurism as a fixed principle.

Finally, Defendants have deserted their prior representation that there are only three relevant rules changes since *O'Bannon*[98] in favor of a new argument that the ten post-*O'Bannon* compensation rule amendments identified by Plaintiffs are "minor" (Defs. Cl. 5), and that the myriad post-*O'Bannon* waivers and interpretations used by schools to provide even more benefits are merely "anecdotal" (*id.* 6 n.26). But there is nothing "minor" or "anecdotal" about, *e.g.*, now permitting payment of thousands of dollars in family travel expenses for the hundreds of athletes participating in the Final Four or College Football Playoff, permitting Nebraska to recruit athletes by offering $7,500 postgraduate stipends, or permitting athletes to accept payments for meals and transportation from agents. Pls. Cl. 39-41. And even if some of the compensation changes—such as the waiver of enrollment fees or increasing *per diems*—may alone be monetarily small, they are part of the ***total*** change in permitted compensation above COA that can reach tens of thousands of dollars.[99] Most fundamentally, Defendants offer no response to address that determining the proper application of *O'Bannon* to this case hinges on the many factual changes in the relevant markets, not just in the NCAA's rulebook.

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[96] Defs. Cl. 5.
[97] *Id.* 6.
[98] Defs. Joint Mots. in *Limine* 1 (ECF No. 861); *see also* Defs. Op. 12-15.
[99] Defendants have literally no explanation for how a $740,000 payment would not undermine amateurism or integration if much smaller payments to Class Members would do so, nor why the fact that the payment comes from a source other than the NCAA or a conference or school would create any less risk of "professionalization" or a "wedge" if those concerns were real.

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HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Steve W. Berman
STEVE W. BERMAN (*pro hac vice*)

Craig R. Spiegel (SBN 122000)
Emilee N. Sisco (*pro hac vice*)
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steveb@hbsslaw.com
craigs@hbsslaw.com
emilees@hbsslaw.com

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

PEARSON, SIMON & WARSHAW, LLP

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

Class Counsel for Jenkins and Consolidated Action Plaintiffs

Respectfully submitted,

WINSTON & STRAWN LLP

By /s/ Jeffrey L. Kessler
JEFFREY L. KESSLER (*pro hac vice*)

David G. Feher (*pro hac vice*)
David L. Greenspan (*pro hac vice*)
Joseph A. Litman (*pro hac vice*)
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
jlitman@winston.com

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

Class Counsel for Jenkins and Consolidated Action Plaintiffs

By */s/ Elizabeth C. Pritzker*

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

Additional Class Counsel

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

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

/s/ Jeffrey L. Kessler
Jeffrey L. Kessler

APPENDIX A: IMPROPER DEFENDANT CITATIONS

1. Citations to Survey Evidence Admitted Only for Limited Purpose or Not at All

No.	Defs. Cl. Brief Citation re Survey Evidence	Limitation on Admission of Cited Evidence
1	• Page 12: "Commissioner Scott's understanding about the appeal of amateurism is supported by studies he commissioned or received." • n.63: "Tr. 1149:14-23, 1151:21-23, 1152:19-1153:14. One such study was provided to Commissioner Scott by Big Ten Commissioner Jim Delany. See Tr. 1147:10-1149:23; D0683. This was an abbreviated version of the same study about which Ohio State AD Gene Smith testified, D0239, described in detail infra at 15."	• Trial Tr. (Scott) 1149:24-1151:3; 1161:15-25 (admitting D0683 for limited purpose and not for truth of matter asserted). • Trial Tr. (Smith) 1413:24-1416:3 (admitting D0239 for limited purpose and not for truth of matter asserted).
2	• Pages 12-13: "In 2014, for example, he had the Pac-12 survey one thousand consumers about their perceptions of the conference and of amateurism, to help develop policies and marketing approaches. Nearly three-fourths of respondents, 71%, opposed paying student-athletes and agreed they "should remain amateurs," with only 29% saying that student-athletes "should be allowed to earn money" playing college sports. Opposition to pay-for-play ranged from 60% (among the biggest fans) to 74% (among other fans). But every demographic group evaluated, whether by geography or intensity of interest, showed greater opposition to paying student-athletes than support." • n.64: "Tr. 1153:22-1155:1; D0541-0002. As Mr. Scott explained, the survey was not designed to reach any particular result. Tr. 1165:1-1166:2." • n.65: "D0541-0009." • n.66: "D0541-0009. So-called "Big Fans" were slightly more likely to watch college sports on television than so-called "Somewhat Fans" (70% vs. 63%) and marginally more likely to attend games live (14% vs. 13%). D0541-0013." • n.67: "D0541-0009; *see also id.* at 0003 (reporting that "all audiences prefer student athletes to remain amateurs")."	• Trial Tr. (Scott) 1155:20-1161:25 (admitting D0541 for limited purpose and not for truth of matter asserted).
3	• Pages 15-16: "In addition to his direct conversations with fans and sponsors, Smith testified that his views were confirmed by a consumer-demand study The Big	• Trial Tr. (Smith) 1413:24-1416:3 (admitting D0239 for

No.	Defs. Cl. Brief Citation re Survey Evidence	Limitation on Admission of Cited Evidence
	Ten Conference commissioned to inform conference leaders about the fan base for college sports. The participants in that study "indicated a clear preference for college over pro sports." That preference "is driven by the purity of the game and the passion of the athletes," as demonstrated by their "playing for the love of the sport" and not "play[ing] for pay." The Big Ten study further provided a detailed comparison of the "Perceptions of College vs. Pro Sports": [CHART WITH CITATIONS TO EX. D0239 OMITTED]. These contrasting perceptions highlight not only the importance of amateurism in distinguishing college sports from professional sports, but also that "a connection between the fan and the student" is *promoted* by the non-professional character of the student-athlete's participation in college sports." • n.79: "Tr. 1412:15-1413:23, 1418:4-20, 1419:18-22, 1416:24-1417:3. The study consisted of six focus groups conducted in three major markets across the country, specifically chosen because they were representative of multiple major conferences. D0239-0003. Only fans who regularly attended or watched college sports participated in the focus groups. *Id.*" • n.80: "*Id.* at 0004." • n.81: "*Id.*" • n.82: "*Id.* at 0011." • n.83: "Tr. 1419:23-1420:12 (Smith); *see also* D0239-0011 (fans have a "greater sense of connection to college athletics" in part because student-athletes "seem to develop more personal connections with the university and community")."	limited purpose and not for truth of matter asserted).
4	• Page 21: "These results—showing roughly 70% of respondents opposing a scenario where there were no rules limiting what a college could pay student-athletes—reinforced testimony by Commissioners Scott and Aresco, whose views on amateurism had been shaped by additional survey data likewise demonstrating around 70% opposition to paying student-athletes." • n.117: "Tr. 1167:6-10, 1172:6-17 (Scott) (Pac-12 survey consistent with his views on amateurism); D0541-0009 (Pac-12 Survey) ("Most of the general population (71%) thinks that college athletes already receive enough benefits and should not be paid."); Tr.	• Trial Tr. (Scott) 1155:20-1161:25 (admitting D0541 for limited purpose and not for truth of matter asserted). • Unidentified study raised by Aresco but not in evidence.

No.	Defs. Cl. Brief Citation re Survey Evidence	Limitation on Admission of Cited Evidence
	1044:9-12 (Aresco) ("I have seen a study that showed that 71 percent . . . of the public does not believe players should be paid.")."	
5	• Page 12: "[Aresco's] view has been confirmed by a survey he received of consumers' attitudes toward college sports, which showed that 71% of the public does not believe players should be paid." • n.58: "Tr. 1037:1-8, 1044:9-12."	• Unidentified study raised by Aresco but not in evidence.
6	• Page 21: "These results—showing roughly 70% of respondents opposing a scenario where there were no rules limiting what a college could pay student-athletes—reinforced testimony by Commissioners Scott and Aresco, whose views on amateurism had been shaped by additional survey data likewise demonstrating around 70% opposition to paying student-athletes." • n.117: "Tr. 1167:6-10, 1172:6-17 (Scott) (Pac-12 survey consistent with his views on amateurism); D0541-0009 (Pac-12 Survey) ("Most of the general population (71%) thinks that college athletes already receive enough benefits and should not be paid."); Tr. 1044:9-12 (Aresco) ("I have seen a study that showed that 71 percent . . . of the public does not believe players should be paid.")."	• Unidentified study raised by Aresco but not in evidence. • Trial Tr. (Scott) 1155:20-1161:25 (admitting D0541 for limited purpose and not for truth of matter asserted).
7	• Page 24, n.133: "Results from the NCAA Study of College Outcomes and Recent Experiences (SCORE) similarly confirm that the vast majority of former student-athletes are satisfied with their collegiate experiences. For example, 82% of respondents indicated that they were satisfied or completely satisfied with their overall experiences, 68% with their athletic experiences, 69% with their academic experiences, and 77% with their social experiences. Trial Tr. (Petr). 1828:15-24."	• Trial Tr. (Petr) 1850:21-1851:5 (admitting limited portions of SCORE study and not for truth of matter asserted).

2. Citations to Out-of-Court Statements

No.	Defs. Cl. Brief Citations to Out-of-Court Statements	Examples of Court Ruling That Out-of-Court Statements Not Admitted for Truth
8	• Page 12: "Those consumers have made clear to Commissioner Scott that "amateurism promotes consumer demand for college sports."	• Trial Tr. (Scott) 1125:8-13 ("Well, if we need a foundation for his lay

No.	Defs. Cl. Brief Citations to Out-of-Court Statements	Examples of Court Ruling That Out-of-Court Statements Not Admitted for Truth
	• n.60: "Tr. 1167:6-10, 1172:6-17."	opinion, then he has to be able to say what the foundation is for his lay opinion. I guess I . . . won't take it for the truth of whether they said it or what they said as being true.") • Trial Tr. (Smith) 1406:18-22 ("[Objection] [s]ustained. You've asked the foundational questions as to how he gets the information. What the information is would be hearsay. His lay opinion after whatever it might have been formed by might be admissible.").
9	• Page 12: " . . . some [consumers] said 'they would not attend football and basketball games or watch them on TV if there were professional athletes playing.'" • n.61: "Tr. 1243:20-22."	
10	• Page 14: "In fact, whereas "plenty" of fans have expressed their desire to Lewis that student-athletes not be provided more than a scholarship and that college sports not become a minor professional league, none has ever expressed a desire to pay student-athletes." • n.72: "Lewis 30(b)(6) Tr. 65:20-66:7."	
11	• Pages 14-15: "Based on his interactions with collegiate donors and fans of college football and basketball, he testified that a "super majority are opposed to pay-for-play." • n.77: "Tr. 1406:24-1408:14."	
12	• Page 16: "In almost none of her conversations with alumni or community members has anyone expressed support for paying student-athletes." • n.88: "Tr. 1978:25-1979:8, 1991:5-1993:13."	
13	• Pages 48-49: "With respect to March Madness in particular, there was significant evidence that the value of that tournament, the principal source of revenues for the NCAA and many conferences, would be damaged if pay-for-play were allowed. Commissioner Scott testified that a system of conference-level rulemaking "would significantly increase the gap between the so-called haves and have nots," negatively impacting the competitive playing field of the tournament and undermining a "key attribute" of popularity—the "Cinderella stories" where schools with fewer resources have the chance to advance in the tournament." • n.279: "Tr. 1145:4-1146:6."	