

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

EDWARD O'BANNON, et al.

No. C 09-3329 CW

Plaintiffs,

FINDINGS OF FACT  
AND CONCLUSIONS OF  
LAW

v.

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION; ELECTRONIC ARTS  
INC.; and COLLEGIATE LICENSING  
COMPANY,

Defendants.

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INTRODUCTION

Competition takes many forms. Although this case raises questions about athletic competition on the football field and the basketball court, it is principally about the rules governing competition in a different arena -- namely, the marketplace.

Plaintiffs are a group of current and former college student-athletes. They brought this antitrust class action against the National Collegiate Athletic Association (NCAA) in 2009 to challenge the association's rules restricting compensation for elite men's football and basketball players. In particular, Plaintiffs seek to challenge the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage. Plaintiffs contend that these rules violate the Sherman Antitrust Act. The NCAA denies this charge and asserts that its restrictions on student-athlete

United States District Court  
For the Northern District of California

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1 compensation are necessary to uphold its educational mission and  
2 to protect the popularity of collegiate sports.

3 A non-jury trial on Plaintiffs' claims was held between June  
4 9, 2014 and June 27, 2014. After considering all of the  
5 testimony, documentary evidence, and arguments of counsel  
6 presented during and after trial, the Court finds that the  
7 challenged NCAA rules unreasonably restrain trade in the market  
8 for certain educational and athletic opportunities offered by NCAA  
9 Division I schools. The procompetitive justifications that the  
10 NCAA offers do not justify this restraint and could be achieved  
11 through less restrictive means. The Court makes the following  
12 findings of fact and conclusions of law, and will enter as a  
13 remedy a permanent injunction prohibiting certain overly  
14 restrictive restraints.

#### 15 FINDINGS OF FACT

##### 16 I. Background

##### 17 A. The NCAA

18 The NCAA was founded in 1905 by the presidents of sixty-two  
19 colleges and universities in order to create a uniform set of  
20 rules to regulate intercollegiate football. Docket No. 189, Stip.  
21 Undisputed Facts, at ¶ 6. Today, the association has roughly  
22 eleven hundred member schools and regulates intercollegiate  
23 athletic competitions in roughly two dozen sports. According to  
24 its current constitution, the association seeks to "initiate,  
25 stimulate and improve intercollegiate athletics programs for  
26 student-athletes and to promote and develop educational  
27 leadership, physical fitness, athletics excellence and athletics  
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1 participation as a recreational pursuit." Ex. 2340, 2013-14 NCAA  
2 Division I Manual, at 15.<sup>1</sup>

3 To achieve these goals, the NCAA issues and enforces rules  
4 governing athletic competitions among its member schools. Id. at  
5 4. These rules are outlined in the association's constitution and  
6 bylaws and cover a broad range of subjects. Among other things,  
7 the rules establish academic eligibility requirements for student-  
8 athletes, set forth guidelines and restrictions for recruiting  
9 high school athletes, and impose limits on the number and size of  
10 athletic scholarships that each school may provide. Id. at 3-5.

11 Since 1973, the NCAA's member schools have been organized  
12 into three divisions -- Divisions I, II, and III -- based on the  
13 number and quality of opportunities that they provide to  
14 participate in intercollegiate athletics. Stip. Undisputed Facts  
15 ¶ 27. Division I schools provide the greatest number and highest  
16 quality of opportunities to participate in intercollegiate  
17 athletics because they sponsor more sports teams and provide more  
18 financial aid to student-athletes than schools in Divisions II and  
19 III.<sup>2</sup> To qualify for membership in Division I, a school must  
20 sponsor a minimum of fourteen varsity sports teams, including  
21 football, and distribute a baseline amount of financial aid to its  
22 student-athletes. Trial Tr. 2043:13-:25 (Delany); Ex. 2340 at  
23 365, 367. Roughly three-hundred and fifty of the NCAA's eleven  
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25 <sup>1</sup> All exhibit citations in this order are to the page numbers  
26 provided by the parties at trial, which do not necessarily correspond to  
the page numbers created by the original author of the exhibit.

27 <sup>2</sup> The NCAA's bylaws define financial aid to mean "funds provided to  
28 student-athletes from various sources to pay or assist in paying their  
cost of education at the institution." Ex. 2340 at 206. The Court  
adopts this definition for the purposes of this order.

1 hundred schools currently compete in Division I. Trial Tr.  
2 1743:23 (Emmert).

3 Division I itself further is divided, for the purposes of  
4 football competition, into two subdivisions: the Football Bowl  
5 Subdivision (FBS) and the Football Championship Subdivision  
6 (FCS).<sup>3</sup> Trial Tr. 2144:9-:11 (Petr); Ex. 2340 at 364-67. FBS  
7 schools are allowed to offer up to eighty-five full scholarships  
8 to members of their football teams. In contrast, FCS schools are  
9 permitted to offer only a smaller number of full scholarships to  
10 members of their teams. Stip. Undisputed Facts ¶ 28. Because FBS  
11 schools are able to offer more football scholarships than FCS  
12 schools, the level of football competition within FBS is generally  
13 higher than within FCS. Currently, about one hundred and twenty  
14 schools compete in FBS. Id. ¶ 45.

15 In addition to the two football subdivisions, Division I  
16 schools are also organized into a number of conferences, which  
17 essentially function as smaller leagues within the NCAA. The  
18 conferences -- most of which contain between eight and fifteen  
19 schools -- typically have their own membership requirements. Most  
20 conferences also organize conference-specific games and events  
21 featuring their member schools, including regular season football  
22 games, regular season basketball games, and post-season basketball  
23 tournaments. Although the conferences are considered members of  
24 the NCAA and must comply with its constitution and bylaws, they  
25 operate independently for the most part and have the authority to

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26  
27 <sup>3</sup> Prior to 2006, FBS was known as Division I-A and FCS was known as  
28 Division I-AA. For the purposes of simplicity, this order uses "FBS"  
and "FCS" to refer to these subdivisions even when discussing student-  
athletes who played Division I football before 2006.

1 generate their own revenue and set their own rules, provided those  
2 rules are consistent with NCAA policy. Ex. 2340 at 22.

3 The rules governing participation and competition in Division  
4 I are enacted by an eighteen-member body known as the Division I  
5 Board of Directors, which typically receives proposals from the  
6 division's member schools and conferences. Trial Tr. 1744:16-  
7 1745:2 (Emmert); Ex. 2340 at 35. The Board is made up of  
8 university presidents and chancellors from eighteen different  
9 colleges or universities. Ex. 2340 at 35.

10 A school or conference that seeks to propose a new rule or  
11 rule change typically does so by submitting the proposal to a  
12 designated committee or task force appointed by the Board. Trial  
13 Tr. 1745:20-1746:15. That committee or task force then considers  
14 the proposal and, if it approves, may forward the proposal to a  
15 body known as the Division I Legislative Council, which is made up  
16 of athletics administrators from schools in each of the thirty-two  
17 Division I conferences. Id.; Ex. 2340 at 37. The Legislative  
18 Council may then forward the proposal to the Board of Directors,  
19 which has the ultimate authority to approve the proposal by a  
20 majority vote. Trial Tr. 1745:20-1746:15. Actions by the Board  
21 may only be repealed through an override process that involves a  
22 vote of sixty-two percent of the NCAA's member institutions. Id.  
23 1747:6-:20. The NCAA's current president, Dr. Mark Emmert, does  
24 not have any voting power in this process. Id. 1746:19-:24.

25 B. Electronic Arts Inc. & Collegiate Licensing Company

26 Electronic Arts Inc. (EA) is a corporation which develops and  
27 manufactures videogames. Stip. Undisputed Facts ¶ 35. It created  
28 and sold an annual NCAA-branded college football videogame every

1 year between 1997 and 2013. Id. ¶ 39. It also created and sold  
2 an annual NCAA-branded college basketball game every year between  
3 1998 and 2010. Id. ¶ 40. In order to create these games, it  
4 entered into licensing agreements with the NCAA and its member  
5 schools and paid them for permission to use their intellectual  
6 property, including their marks, in the videogames. Id. ¶¶ 37-38;  
7 Exs. 1125, 1126. Collegiate Licensing Company (CLC) is a Georgia  
8 corporation that licenses trademarks of the NCAA and several of  
9 its member schools and conferences. Stip. Undisputed Facts ¶¶ 32-  
10 34. Although Plaintiffs originally brought claims against both EA  
11 and CLC in this action, they subsequently agreed to settle those  
12 claims.

13 C. Plaintiffs

14 Plaintiffs are twenty current and former student-athletes,  
15 all of whom play or played for an FBS football or Division I men's  
16 basketball team between 1956 and the present. Some, but not all,  
17 Plaintiffs went on to play professional sports after they left  
18 college. They represent the following class, which this Court  
19 certified under Federal Rule of Civil Procedure 23(b)(2) in  
20 November 2013:

21 All current and former student-athletes  
22 residing in the United States who compete on,  
23 or competed on, an NCAA Division I (formerly  
24 known as "University Division" before 1973)  
25 college or university men's basketball team or  
26 on an NCAA Football Bowl Subdivision (formerly  
27 known as Division I-A until 2006) men's  
28 football team and whose images, likenesses  
and/or names may be, or have been, included or  
could have been included (by virtue of their  
appearance in a team roster) in game footage  
or in videogames licensed or sold by  
Defendants, their co-conspirators, or their  
licensees.

1 Case No. 09-1967, Docket No. 1025, April 11, 2014 Order, at 47-48  
2 (amending definition of previously certified class).

3 II. The Relevant Markets

4 As explained in previous orders, Plaintiffs allege that the  
5 NCAA has restrained trade in two related national markets, which  
6 they refer to as the "college education market" and the "group  
7 licensing market." Although these alleged markets involve many of  
8 the same participants, each market ultimately involves a different  
9 set of buyers, sellers, and products. Accordingly, this order  
10 addresses each market separately.

11 A. College Education Market

12 The evidence presented at trial, including testimony from  
13 both experts and lay witnesses, establishes that FBS football and  
14 Division I basketball schools compete to recruit the best high  
15 school football and basketball players. Trial Tr. 9:1-:7  
16 (O'Bannon); 114:21-117:17 (Noll); 831:8-:11 (Rascher); 1759:21-:22  
17 (Emmert); Ex. 2530. Specifically, these schools compete to sell  
18 unique bundles of goods and services to elite football and  
19 basketball recruits. The bundles include scholarships to cover  
20 the cost of tuition, fees, room and board, books, certain school  
21 supplies, tutoring, and academic support services. Trial Tr.  
22 40:2-:20 (O'Bannon); 582:6-:18 (Prothro); 1741:10-:20 (Emmert);  
23 Ex. 2340 at 207. They also include access to high-quality  
24 coaching, medical treatment, state-of-the-art athletic facilities,  
25 and opportunities to compete at the highest level of college  
26 sports, often in front of large crowds and television audiences.  
27 Trial Tr. 13:4-:12 (O'Bannon); 556:8-558:2 (Prothro); 1157:20-  
28 1158:7 (Staurowsky); 1721:3-1722:19 (Emmert). In exchange for

1 these unique bundles of goods and services, football and  
2 basketball recruits must provide their schools with their athletic  
3 services and acquiesce in the use of their names, images, and  
4 likenesses for commercial and promotional purposes. Id. 109:5-  
5 110:12 (Noll). They also implicitly agree to pay any costs of  
6 attending college and participating in intercollegiate athletics  
7 that are not covered by their scholarships. See Ex. 2340 at 207.

8       The evidence presented at trial demonstrates that FBS  
9 football and Division I basketball schools are the only suppliers  
10 of the unique bundles of goods and services described above.  
11 Recruits who are skilled enough to play FBS football or Division I  
12 basketball do not typically pursue other options for continuing  
13 their education and athletic careers beyond high school.  
14 Plaintiffs' economic expert, Dr. Roger Noll, examined the rates at  
15 which elite football and basketball recruits accept athletic  
16 scholarships to play FBS football or Division I basketball. He  
17 observed that, between 2007 and 2011, more than ninety-eight  
18 percent of football recruits classified as four- or five-star  
19 recruits (the two highest ratings available) by Rivals.com  
20 accepted offers to play FBS football. Trial Tr. 113:2-114:13; Ex.  
21 2529. None of the five-star recruits and only 0.2% of four-star  
22 recruits chose to play football at an FCS school and none chose to  
23 play at a Division II or III school during that period. Ex. 2529.  
24 Among three-star recruits, ninety-two percent of those offered a  
25 scholarship from an FBS school accepted one. Id. Less than four  
26 percent of all three-star recruits accepted an offer to play  
27 football at a non-FBS school. Id.



1 This pattern is even more stark for basketball recruits.  
2 Between 2007 and 2011, no four- or five-star basketball recruits  
3 and less than one percent of all two- and three-star recruits  
4 accepted offers to play for a non-Division I school. Id. Even  
5 among zero-star recruits, only one percent accepted offers to play  
6 basketball outside of Division I. Id. In contrast, roughly  
7 ninety-five percent of all recruits offered Division I basketball  
8 scholarships in the Rivals.com sample accepted one. Id. This  
9 data supports Dr. Noll's conclusion that "if the top athletes are  
10 offered a D-I scholarship, they take it. They do not go anywhere  
11 else." Trial Tr. 114:6-:7.

12 On cross-examination, Dr. Noll conceded that the Rivals.com  
13 data he used in his analysis came from recruits' self-reported  
14 information about the scholarship offers they received and  
15 accepted. Id. 486:7-:9. However, this fact does not render Dr.  
16 Noll's opinion unreliable. Recruits have a strong incentive to  
17 report accurate information to Rivals.com because the information  
18 is relatively easy to verify; after all, a recruit's lie about  
19 accepting a scholarship from a particular school will be  
20 discovered as soon as his name does not appear on that school's  
21 roster or list of committed recruits. In any event, the NCAA has  
22 not presented any data of its own to contradict the Rivals.com  
23 data nor any other evidence, expert or otherwise, to cast doubt on  
24 Dr. Noll's conclusion that there are no substitutes for the  
25 opportunities offered by FBS football and Division I basketball  
26 schools.

27 The only potential substitutes that the NCAA has identified  
28 are the opportunities offered by schools in other divisions,

1 collegiate athletics associations, or minor and foreign  
2 professional sports leagues. None of these other divisions,  
3 associations, or professional leagues, however, provides the same  
4 combination of goods and services offered by FBS football and  
5 Division I basketball schools. Schools in FCS and Divisions II  
6 and III all provide a lower number of scholarships than FBS  
7 football and Division I basketball schools, which results in a  
8 lower level of athletic competition. The National Intercollegiate  
9 Athletic Association (NAIA), National Junior College Athletic  
10 Association (NJCAA), National Christian Collegiate Athletic  
11 Association (NCCAA), and United States Collegiate Athletic  
12 Association (USCAA) likewise provide fewer scholarships and offer  
13 a lower level of competition. What's more, the schools in these  
14 other divisions and associations are often smaller than FBS  
15 football and Division I basketball schools, spend much less on  
16 athletics, and may not even provide opportunities to attend a  
17 four-year college. Id. 2824:14-:24, 2826:16-2827:7, 2829:17-  
18 2830:12 (Stiroh). This is why, as Dr. Noll concluded, these other  
19 schools do not compete with FBS football and Division I basketball  
20 schools for recruits.

21 Dr. Noll also analyzed the Rivals.com data to show that FBS  
22 schools almost always defeated non-FBS schools in head-to-head  
23 recruiting contests for the same football recruit between 2007 and  
24 2011. Id. 116:6-118:11, 474:23-475:14; Ex. 2530. His analysis of  
25 head-to-head recruiting contests for basketball players revealed  
26 the same discrepancy between Division I and non-Division I  
27 schools. Trial Tr. 116:6-118:11. Notably, he did not observe  
28 this discrepancy when comparing head-to-head recruiting contests

1 among FBS football schools or Division I basketball schools. Id.;  
2 Ex. 2530 at 3. Even when he compared the success of the schools  
3 within the five major Division I conferences -- namely, the  
4 Pacific 12 Conference (Pac 12), Big 12 Conference, Atlantic Coast  
5 Conference, Southeastern Conference (SEC), and Big 10  
6 Conference -- to that of schools in less prominent Division I  
7 conferences, he found that they were still in competition with  
8 each other. Trial Tr. 116:9-:13 ("And unlike the finding for  
9 other divisions and junior colleges and NAIA and all the rest that  
10 was in the first picture, what we find here is that although the  
11 major conferences win more than they lose, in competing against  
12 the lesser conferences, there is considerable competitive  
13 overlap."). Thus, the bundles of goods and services offered by  
14 schools in FCS, Divisions II and III, and other non-NCAA  
15 collegiate athletics associations are not substitutes for the  
16 bundles of goods and services offered by FBS football and Division  
17 I basketball schools.

18 Nor are the opportunities offered by the professional leagues  
19 that the NCAA has identified here. Dr. Noll noted that elite  
20 football and basketball recruits rarely forego opportunities to  
21 play FBS football or Division I basketball in order to play  
22 professionally. Neither the National Football League (NFL) nor  
23 the National Basketball Association (NBA) permits players to enter  
24 the league immediately after high school. Id. 68:17-69:6  
25 (O'Bannon). Although other professional leagues -- such as the  
26 NBA Development League (D-League), the Arena Football League  
27 (AFL), and certain foreign football and basketball leagues --  
28 permit players to join immediately after high school, recruits do

1 not typically pursue opportunities in those leagues. Id.  
2 482:11-:13 (Noll). When Dr. Noll was asked why he did not conduct  
3 an analysis of recruits who chose to play professionally in these  
4 leagues, he replied that too few had ever done so to conduct such  
5 an analysis. Id. 484:19-485:13 ("It would be hard to do an  
6 analysis of zero."). He also noted that many recruits may not  
7 even be given an opportunity to play in these leagues. Id.  
8 482:14-:17 ("The opportunity is not given to very many high school  
9 athletes to play in Europe."). What's more, none of these leagues  
10 offers the same opportunity to earn a higher education that FBS  
11 football and Division I basketball schools provide. For all of  
12 these reasons, the Court finds that there are no professional  
13 football or basketball leagues capable of supplying a substitute  
14 for the bundle of goods and services that FBS football and  
15 Division I basketball schools provide. These schools comprise a  
16 relevant college education market, as described above.

17 B. Group Licensing Market

18 Professional athletes often sell group licenses to use their  
19 names, images, and likenesses in live game telecasts, videogames,  
20 game re-broadcasts, advertisements, and other archival footage.<sup>4</sup>  
21 Plaintiffs allege that, in the absence of the NCAA's challenged  
22 rules, FBS football and Division I basketball players would also  
23 be able to sell group licenses for the use of their names, images,

24 \_\_\_\_\_  
25 <sup>4</sup> Plaintiffs presented some evidence at trial of a market for  
26 licenses to use student-athletes' names, images, and likenesses in other  
27 merchandise, such as jerseys and bobbleheads. The Court does not  
28 address this market because Plaintiffs previously abandoned all of their  
claims related to such markets. Docket No. 827, June 20, 2013 Hrg. Tr.  
54:13-:16. In addition, the evidence they presented at trial regarding  
merchandise-related licenses did not constitute proof of a market for  
group licenses but, rather, only individual licenses.

1 and likenesses. Specifically, they contend that members of  
2 certain FBS football and Division I basketball teams would be able  
3 to join together to offer group licenses, which they would then be  
4 able to sell to their respective schools, third-party licensing  
5 companies, or media companies seeking to use student-athletes'  
6 names, images, and likenesses. Plaintiffs have identified three  
7 submarkets within this broader group licensing market: (1) a  
8 submarket for group licenses to use student-athletes' names,  
9 images, and likenesses in live football and basketball game  
10 telecasts; (2) a submarket for group licenses to use student-  
11 athletes' names, images, and likenesses in videogames; and (3) a  
12 submarket for group licenses to use student-athletes' names,  
13 images, and likenesses in game re-broadcasts, advertisements, and  
14 other archival footage.

15           1. Submarket for Group Licenses to Use Student-  
16           Athletes' Names, Images, and Likenesses in Live  
17           Game Telecasts

18           The Court finds that a submarket exists in which television  
19 networks seek to acquire group licenses to use FBS football and  
20 Division I basketball players' names, images, and likenesses in  
21 live game telecasts. Television networks frequently enter into  
22 licensing agreements to use the intellectual property of schools,  
23 conferences, and event organizers -- such as the NCAA or a bowl  
24 committee -- in live telecasts of football and basketball games.  
25 In these agreements, the networks often seek to acquire the rights  
26 to use the names, images, and likenesses of the participating  
27 student-athletes during the telecast. For instance, the NCAA's  
28 1994 licensing agreement granting CBS the rights to telecast the

1 Division I men's basketball tournament every year from 1995 to  
2 2002 includes a "Name & Likeness" provision that states:

3           The Network, its sponsors, their advertising  
4           representatives and the stations carrying the  
5           telecasts of the games will have the right to  
6           make appropriate references (including without  
7           limitation, use of pictures) to NCAA and the  
8           universities and colleges of the teams, the  
9           sites, the games and the participants in and  
10           others identified with the games and in the  
11           telecasting thereof, provided that the same do  
12           not constitute endorsements of a commercial  
13           product.

14 Ex. 2104 at 16 (emphasis added). A 1999 agreement between the  
15 NCAA and CBS for the rights to telecast certain Division I  
16 basketball games contains a "Name & Likeness" provision with  
17 nearly identical language. Ex. 2116 at 17 (granting the "right to  
18 make appropriate references (including without limitation, use of  
19 pictures) to . . . the participants in and others identified with  
20 the games" (emphasis added)). An agreement between the FBS  
21 conferences, the University of Notre Dame, and Fox Broadcasting  
22 Company for the rights to telecast certain 2007, 2008, and 2009  
23 bowl games similarly provides that the event organizer will be  
24 solely responsible for ensuring that Fox has "the rights to use  
25 the name and likeness, photographs and biographies of all  
26 participants, game officials, cheerleaders" and other individuals  
27 connected to the game. Ex. 2162 at 9. Plaintiffs also provided  
28 other contracts containing similar language. See, e.g., Ex. 2230  
at 10 (granting the broadcaster "all name and likeness rights of  
all participants, officials, competing teams and any other persons  
connected with the Events that are reasonable or necessary for the  
Telecast of the Events"); Ex. 3078 at 2-3 (providing that the Big  
10 would use "reasonable commercial efforts" to obtain from any

1 non-conference opponent the "right . . . to use its respective  
2 players' names, likenesses, and that school's trademarks, logos  
3 and other items in promoting, advertising and Telecasting any such  
4 game"). These contracts demonstrate that there is a demand for  
5 these rights among television networks.

6 Plaintiffs' broadcasting industry expert, Edwin Desser,  
7 confirmed that provisions like these are common and that they have  
8 economic value to television networks. Trial Tr. 651:9-:11,  
9 699:18-700:3, 681:18-:23 ("If you're running a business like a  
10 television network, a broadcast station, you would prefer to have  
11 consents, and you would like to have somebody stand behind those  
12 consents so that you don't have to worry about somebody coming  
13 after you later with a claim."). Thus, a market for these rights  
14 exists. Plaintiffs also demonstrated that this is a market for  
15 group licenses -- not individual licenses. Mr. Desser testified  
16 that a "television sports agreement is a bundle of rights and  
17 responsibilities that are all interrelated and that, you know,  
18 create value, provide comfort, and are [] integrated into the  
19 agreement." Id. 658:14-:19. A license to use an individual  
20 student-athlete's name, image, and likeness during a game telecast  
21 would not have any value to a television network unless it was  
22 bundled with licenses to use every other participating student-  
23 athlete's name, image, and likeness.

24 The NCAA's broadcasting industry expert, Neal Pilson,  
25 testified that sports broadcasters need not acquire the rights to  
26 use student-athletes' names, images, and likenesses and that the  
27 primary reason they enter into licensing agreements with event  
28 organizers is to gain exclusive access to the facility where the

1 event will occur. Trial Tr. 720:5-:17. This testimony is not  
2 convincing. Mr. Pilson admitted that broadcasters must acquire  
3 certain rights even from visiting teams who do not control access  
4 to the event facility. Id. 803:5-804:8. He also acknowledged  
5 that broadcasting agreements -- like those quoted above --  
6 sometimes refer expressly to name, image, and likeness "rights."  
7 Id. 805:2-:16. Accordingly, the Court finds that, absent the  
8 challenged NCAA rules, teams of FBS football and Division I  
9 basketball players would be able to create and sell group licenses  
10 for the use of their names, images, and likenesses in live game  
11 telecasts.

12           2.     Submarket for Group Licenses to Use Student-  
13                     Athletes' Names, Images, and Likenesses in  
14                     Videogames

15           Like television networks, videogame developers would seek to  
16 acquire group licenses to use the names, images, and likenesses of  
17 FBS football and Division I basketball players if the NCAA did not  
18 prohibit student-athletes from selling such licenses. EA seeks to  
19 make all of its sports-themed videogames "as authentic as  
20 possible." Trial Tr. 1656:7 (Linzner). One of the company's vice  
21 presidents, Joel Linzner, explained, "We have found that it is  
22 pleasing to our customers to be able to use the real athletes  
23 depicted as realistically as possible and acting as realistically  
24 as possible." Id. 1658:3-:6; see also Ex. 2007 at 50-54  
25 (describing demand for use of student-athletes' names, images, and  
26 likenesses in videogames). To do this, the company typically  
27 negotiates licenses with professional sports leagues and teams to  
28 use their trademarks, logos, and other intellectual property in  
videogames. Trial Tr. 1656:10-1657:25. It also negotiates with



1 groups of professional athletes for licenses to use their names,  
2 images, and likenesses. Id. EA would be interested in acquiring  
3 the same rights from student-athletes in order to produce college  
4 sports-themed videogames, if it were permitted to do so. Id.  
5 1669:24-1670:24. Accordingly, the Court finds that, absent the  
6 challenged NCAA rules, there would be a demand among videogame  
7 developers for group licenses to use student-athletes' names,  
8 images, and likenesses.

9       The NCAA asserts that such demand would not exist because it  
10 has ceased licensing its intellectual property for use in  
11 videogames, making it unlikely that any developer would seek to  
12 develop a videogame using the names, images, and likenesses of  
13 student-athletes. This assertion is not supported by the trial  
14 record. Although the NCAA recently declined to renew its license  
15 with EA, it has not presented any evidence suggesting that it will  
16 never enter into such an agreement again in the future. None of  
17 its current bylaws preclude it from entering into such an  
18 agreement. Furthermore, the evidence presented at trial  
19 demonstrates that, prior to this litigation, the NCAA found it  
20 profitable to license its intellectual property for use in  
21 videogames. Indeed, it continued to renew its annual licensing  
22 agreement with EA, even as the company evaded the NCAA's rules  
23 prohibiting it from using student-athletes' images and likenesses  
24 in videogames. Throughout the late 2000s, EA's NCAA-branded  
25 videogames featured playable avatars that could easily be  
26 identified as real student-athletes despite the NCAA's express  
27 prohibition on featuring student-athletes in videogames. The EA  
28 avatars played the same positions as their real-life counterparts,

1 wore the same jersey numbers and uniform accessories, haled from  
2 the same home state, and shared the same height, weight,  
3 handedness, and skin color. Trial Tr. 27:14-28:11 (O'Bannon);  
4 568:6-569:24 (Prothro); 930:5-931:7 (Rascher). For all of these  
5 reasons, the Court finds that a submarket would exist for group  
6 licenses to use student-athletes' names, images, and likenesses in  
7 videogames if student-athletes were permitted to receive  
8 compensation for such licenses.

9           3.     Submarket for Group Licenses to Use Student-  
10                 Athletes' Names, Images, and Likenesses in Game Re-  
11                 Broadcasts, Advertisements, and Other Archival  
12                 Footage

13           Plaintiffs have shown that television networks, advertisers,  
14 and third-party licensing companies seek to use archival footage  
15 of student-athletes in game re-broadcasts, commercials, and other  
16 products. Several of the live telecasting agreements discussed  
17 above included provisions granting the television network the  
18 rights to use archival footage, as well. See, e.g. Ex. 3078 at 2-  
19 3 (granting the Big 10 Network the rights to use certain student-  
20 athletes' names and likenesses in "promoting, advertising and  
21 Telecasting" a game); Ex. 2230 at 2 (granting Fox Sports Net the  
22 "right to re-Telecast the Selected Events," the "right to  
23 distribute highlights of the Selected Events," and the specific  
24 right to use the "names and likenesses of the players" to promote  
25 certain games as well as the network itself). Tyrone Prothro, a  
26 former wide receiver for the University of Alabama, saw footage in  
27 a commercial of a famous catch that he made during a game. Trial  
28 Tr. 565:24-566:8. Finally, one of the NCAA's vice presidents,  
Mark Lewis, established that the NCAA has licensed all of its

1 archival footage from past NCAA championships to a third-party  
2 licensing company, T3Media, which acts as the association's agent  
3 in licensing that footage for use in game re-broadcasts,  
4 advertisements, and any other products. Id. 3206:13-:25.  
5 Although T3Media is not permitted to license footage of current  
6 student-athletes, it still acquires the rights to this footage  
7 while the student-athletes are in school for later use (after  
8 acquiring the student-athletes' consent). This is enough to show  
9 that demand for this footage exists. Based on this evidence, the  
10 Court finds that, absent the NCAA's challenged rules, there would  
11 be a demand among television networks, third-party licensing  
12 companies, and advertisers for group licenses to use student-  
13 athletes in game re-broadcasts, advertisements, and other archival  
14 footage.

### 15 III. The Challenged Restraint

16 NCAA rules prohibit current student-athletes from receiving  
17 any compensation from their schools or outside sources for the use  
18 of their names, images, and likenesses in live game telecasts,  
19 videogames, game re-broadcasts, advertisements, and other footage.  
20 Plaintiffs contend that these rules restrain trade in the two  
21 markets identified above.

22 The NCAA imposes strict limits on the amount of compensation  
23 that student-athletes may receive from their schools. Most  
24 importantly, it prohibits any student-athlete from receiving  
25 "financial aid based on athletics ability" that exceeds the value  
26 of a full "grant-in-aid." Ex. 2340 at 208. The bylaws define a  
27 full "grant-in-aid" as "financial aid that consists of tuition and  
28 fees, room and board, and required course-related books." Id. at

1 207. This amount varies from school to school and from year to  
2 year. Any student-athlete who receives financial aid in excess of  
3 this amount forfeits his athletic eligibility. Id. at 208.

4 In addition to this cap on athletics-based financial aid, the  
5 NCAA also imposes a separate cap on the total amount of financial  
6 aid that a student-athlete may receive. Specifically, it  
7 prohibits any student-athlete from receiving financial aid in  
8 excess of his "cost of attendance." Ex. 2340 at 208. Like the  
9 term "grant-in-aid," the term "cost of attendance" is a school-  
10 specific figure defined in the bylaws. It refers to "an amount  
11 calculated by [a school]'s financial aid office, using federal  
12 regulations, that includes the total cost of tuition and fees,  
13 room and board, books and supplies, transportation, and other  
14 expenses related to attendance" at that school. Id. at 206.  
15 Because it covers the cost of "supplies, transportation, and other  
16 expenses," the cost of attendance is generally higher than the  
17 value of a full grant-in-aid. The gap between the full grant-in-  
18 aid and the cost of attendance varies from school to school but is  
19 typically a few thousand dollars.<sup>5</sup>

20 The NCAA also prohibits any student-athlete from receiving  
21 compensation from outside sources based on his athletic skills or  
22 ability.<sup>6</sup> Thus, while a student-athlete may generally earn money

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23  
24 <sup>5</sup> Under certain circumstances, a student-athlete who has an  
25 unexpected "special financial need" may be permitted to receive  
26 additional aid beyond the cost of attendance. Trial Tr. 2144:25-  
27 2145:14 (Petr). This additional aid comes from his school's "student  
28 assistance fund" and could include money for "needed clothing, needed  
supplies, a computer," or other academic needs. Ex. 2340 at 238.

<sup>6</sup> The NCAA's bylaws contain a minor exception permitting student-  
athletes to receive limited compensation for educational expenses  
"awarded by the U.S. Olympic Committee or a U.S. national governing  
body." Ex. 2340 at 211.

1 from any "on- or off-campus employment" unrelated to his athletic  
2 ability, he may not receive "any remuneration for value or utility  
3 that the student-athlete may have for the employer because of the  
4 publicity, reputation, fame or personal following that he or she  
5 has obtained because of athletics ability." Id. at 211. Student-  
6 athletes are also barred from endorsing any commercial product or  
7 service while they are in school, regardless of whether or not  
8 they receive any compensation to do so. Id. at 86.

9 Dr. Noll testified that these rules restrain competition  
10 among schools for recruits. If the grant-in-aid limit were  
11 higher, schools would compete for the best recruits by offering  
12 them larger grants-in-aid. Similarly, if total financial aid was  
13 not capped at the cost of attendance, schools would compete for  
14 the best recruits by offering them compensation exceeding the cost  
15 of attendance. This competition would effectively lower the price  
16 that the recruits must pay for the combination of educational and  
17 athletic opportunities that the schools provide. As Dr. Noll  
18 explained, "if the scholarship value is suppressed, that means the  
19 net price paid by a student-athlete to attend college is higher."  
20 Trial Tr. 105:24-107:1. Thus, he explained, because the NCAA has  
21 the power to and does suppress the value of athletic scholarships  
22 through its grant-in-aid rules, it has increased the prices  
23 schools charge recruits. Id. 127:20-129:13.

24 Dr. Noll's opinions are consistent with the opinions of the  
25 NCAA's own economic expert, Dr. Daniel Rubinfeld, who testified  
26 that the NCAA operates as a "joint venture which imposes  
27 restraints" on trade. Id. 2922:20-:21. Dr. Rubinfeld  
28 specifically acknowledged that "the NCAA does impose a restraint,

1 the restraint we have been discussing in this case.” Id.  
2 2921:8-:9. Although he opined that this restraint was lawful  
3 because it serves procompetitive purposes, he never denied that  
4 the NCAA restricts competition among its members for recruits. In  
5 fact, his own economics textbook specifically refers to the NCAA  
6 as a “cartel,” which he defined during his testimony as “a group  
7 of firms that impose a restraint.” Id. 2975:3-:4. Although the  
8 NCAA’s other economic expert, Dr. Lauren Stiroh, testified that  
9 the NCAA does not restrain competition in any market, her opinions  
10 were based on the theory that anticompetitive effects cannot arise  
11 unless consumers in a “downstream market” are harmed. Id.  
12 2766:16-:22. In this case, those consumers would be people who  
13 watch or attend college football and basketball games or purchase  
14 goods using the names, images, and likenesses of student-athletes.  
15 The Court rejects Dr. Stiroh’s theory that Plaintiffs cannot show  
16 any anticompetitive effects caused by the alleged restraint  
17 without demonstrating some harm to these consumers. The evidence  
18 cited above demonstrates that student-athletes themselves are  
19 harmed by the price-fixing agreement among FBS football and  
20 Division I basketball schools. In the complex exchange  
21 represented by a recruit’s decision to attend and play for a  
22 particular school, the school provides tuition, room and board,  
23 fees, and book expenses, often at little or no cost to the school.  
24 The recruit provides his athletic performance and the use of his  
25 name, image, and likeness. However, the schools agree to value  
26 the latter at zero by agreeing not to compete with each other to  
27 credit any other value to the recruit in the exchange. This is an  
28 anticompetitive effect. Thus, the Court finds that the NCAA has

1 the power -- and exercises that power -- to fix prices and  
2 restrain competition in the college education market that  
3 Plaintiffs have identified.

4 Dr. Noll testified that elite football and basketball  
5 recruits -- the buyers in Plaintiffs' college education market --  
6 could also be characterized as sellers in an almost identical  
7 market for their athletic services and licensing rights. Id.  
8 143:21-144:8. In that market, FBS football and Division I  
9 basketball schools are buyers seeking to acquire recruits'  
10 athletic services and licensing rights, paying for them with full  
11 grants-in-aid but no more. From that perspective, the NCAA's  
12 restrictions on student-athlete compensation still represent a  
13 form of price fixing but create a buyers' cartel, rather than a  
14 sellers' cartel. Just as in Plaintiffs' college education market,  
15 schools would engage in price competition in the market for  
16 recruits' athletic services and licensing rights if there were no  
17 restrictions on student-athlete compensation; the only difference  
18 would be that they would be viewed as buyers in the transactions  
19 rather than sellers. Thus, because Plaintiffs' college education  
20 market is essentially a mirror image of the market for recruits'  
21 athletic services and licensing rights, the Court finds that the  
22 NCAA exercises market power, fixes prices, and restrains  
23 competition in both markets.

#### 24 IV. Asserted Purposes of the Restraint

25 The NCAA asserts that the challenged restrictions on student-  
26 athlete compensation are reasonable because they are necessary to  
27 preserve its tradition of amateurism, maintain competitive balance  
28 among FBS football and Division I basketball teams, promote the

1 integration of academics and athletics, and increase the total  
2 output of its product.

3 A. Preservation of Amateurism

4 The NCAA asserts that its challenged rules promote consumer  
5 demand for its product by preserving its tradition of amateurism  
6 in college sports. It relies on historical evidence, consumer  
7 survey data, and lay witness testimony to support this assertion.  
8 The Court does not find this evidence sufficient to justify the  
9 challenged restraint.

10 Dr. Emmert testified that "the rules over the hundred-year  
11 history of the NCAA around amateurism have focused on, first of  
12 all, making sure that any resources that are provided to a  
13 student-athlete are only those that are focused on his or her  
14 getting an education." Trial Tr. 1737:8-:12. The historical  
15 evidence presented at trial, however, demonstrates that the  
16 association's amateurism rules have not been nearly as consistent  
17 as Dr. Emmert represents. In fact, these rules have changed  
18 numerous times since the NCAA -- then known as the Intercollegiate  
19 Athletic Association (IAA) -- enacted its first set of bylaws in  
20 1906. The IAA's first bylaws governing amateurism provided,

21 No student shall represent a College or  
22 University in an intercollegiate game or  
23 contest who is paid or receives, directly or  
24 indirectly, any money or financial concession  
25 or emolument as past or present compensation  
26 for, or as prior consideration or inducement  
27 to play in, or enter any athletic contest,  
28 whether the said remuneration be received  
from, or paid by, or at the instance of any  
organization, committee or faculty of such  
College or University, or any individual  
whatever.



1 Stip. Undisputed Facts ¶¶ 6-7. This rule would have barred even  
2 today's athletic scholarships. Despite the breadth of this  
3 written prohibition, the IAA's member schools recruited students  
4 using "player subsidies" and other illicit forms of payment. Id.  
5 ¶ 10.

6 In 1916, after changing its name to the NCAA, the association  
7 adopted a new rule stating that an amateur was "one who  
8 participates in competitive physical sports only for pleasure, and  
9 the physical, mental, moral, and social benefits directly derived  
10 therefrom." Id. The NCAA amended that definition in 1922 to  
11 define an amateur as "one who engages in sport solely for the  
12 physical, mental or social benefits he derives therefrom, and to  
13 whom the sport is nothing more than an avocation." Id. ¶ 14.

14 Most schools continued to ignore these rules for the first  
15 few decades of the NCAA's existence. Id. ¶¶ 17-20. Then, in  
16 1948, the NCAA enacted a strict set of rules known as the "Sanity  
17 Code" designed to curb violations of its bylaws. Id. ¶ 20. The  
18 Sanity Code "required that financial aid be awarded without  
19 consideration of athletics ability," which, again, would have  
20 prohibited today's athletic scholarships. Id. The NCAA repealed  
21 the Sanity Code the following year and, in 1952, created its first  
22 enforcement committee to address and prevent rules infractions.  
23 Id. ¶ 24.

24 In 1956, the NCAA enacted a new set of amateurism rules  
25 permitting schools to award athletic scholarships to student-  
26 athletes. Id. ¶ 25. These rules established a national standard  
27 governing athletics-based financial aid and imposed a limit on the  
28 size of athletic scholarships that schools were permitted to

1 offer. Id. That limit -- now known as a full "grant-in-aid" --  
2 precluded student-athletes from receiving any financial aid beyond  
3 that needed for "commonly accepted educational expenses,"  
4 including tuition, fees, room and board, books, and cash for  
5 incidental expenses such as laundry. Id.

6 The NCAA continued to revise its scholarship limits after  
7 implementing the grant-in-aid limit in 1956. In 1975, for  
8 instance, it removed the cash for incidental expenses from the  
9 full grant-in-aid. Walter Byers Depo. 21:21-22:14, 24:6-:17. It  
10 amended the grant-in-aid rules again in 2004 by allowing student-  
11 athletes who receive federal Pell grants to receive total  
12 assistance in excess of a full grant-in-aid and even in excess of  
13 the cost of attendance. Trial Tr. 161:10-162:4 (Noll); Ex. 2340  
14 at 208. As a result, student-athletes who qualify for a Pell  
15 grant are now eligible to receive a full grant-in-aid plus the  
16 value of their Pell grant -- currently, just over \$5,500 -- even  
17 if that total exceeds the cost of attendance. Trial Tr.  
18 1573:8-:16 (Pastides); Ex. 2340 at 208. The NCAA amended its  
19 rules again in 2013 to permit different levels of compensation for  
20 recruits in different sports. The new rules permit Division I  
21 tennis recruits to earn up to ten thousand dollars per year in  
22 prize money from athletic events before they enroll in college.  
23 Ex. 2340 at 75. Other Division I recruits, in contrast, remain  
24 barred from receiving any prize money in excess of their actual  
25 and necessary costs of competing in an event. Id.

26 The amateurism provision in the NCAA's current constitution  
27 states that student-athletes "shall be amateurs in an  
28 intercollegiate sport, and their participation should be motivated

1 primarily by education and by the physical, mental and social  
2 benefits to be derived. Student participation in intercollegiate  
3 athletics is an avocation, and student-athletes should be  
4 protected from exploitation by professional and commercial  
5 enterprises." Ex. 2340 at 18. This conception of amateurism  
6 stands in stark contrast to the definitions set forth in the  
7 NCAA's early bylaws. Indeed, education -- which the NCAA now  
8 considers the primary motivation for participating in  
9 intercollegiate athletics -- was not even a recognized motivation  
10 for amateur athletes during the years when the NCAA prohibited  
11 athletic scholarships. The Court finds that the NCAA's current  
12 restrictions on student-athlete compensation, which cap athletics-  
13 based financial aid below the cost of attendance, are not  
14 justified by the definition of amateurism set forth in its current  
15 bylaws.

16 Although the NCAA sought to establish the importance of these  
17 restrictions by asserting that they increase consumer interest in  
18 FBS football and Division I basketball, its evidence supporting  
19 this assertion is unpersuasive. It presented testimony from a  
20 survey research expert, Dr. J. Michael Dennis, who conducted a  
21 survey of consumer attitudes concerning college sports in 2013.  
22 Dr. Dennis surveyed 2,455 respondents across the United States and  
23 observed that they generally opposed the idea of paying college  
24 football and basketball players. Trial Tr. 2613:24-2614:6. His  
25 survey contained an initial question that apparently affected many  
26 respondents' answers to the survey's substantive questions. The  
27 initial open-ended question asked respondents what they had heard  
28 about student-athletes being paid. Id. 2716:15-2717:7; Exs. 2629,

1 2630. Plaintiffs' survey expert, Hal Poret, noted that the  
2 "single most common response" to this question was that  
3 respondents had heard about student-athletes receiving some form  
4 of illegal or illicit payments. Trial Tr. 2714:2-:20; Ex. 2629.  
5 Many other respondents mentioned paying student-athletes a salary.  
6 Trial Tr. 2714:21-2715:2 (Poret); Ex. 2630. Although Dr. Dennis  
7 testified that his results remained the same even after he removed  
8 these specific 274 respondents from his sample, the fact that  
9 these respondents expressly mentioned illicit payments or salaries  
10 at the start of the survey strongly suggests that the question  
11 primed respondents to think about such illicit payments when  
12 answering the other survey questions.

13 The NCAA relies heavily on the fact that sixty-nine percent  
14 of respondents to Dr. Dennis's survey expressed opposition to  
15 paying student-athletes while only twenty-eight percent favored  
16 paying them. Trial Tr. 2604:21-2605:2; Ex. 4045 at 19. These  
17 responses, however, are not relevant to the specific issues raised  
18 here and say little about how consumers would actually behave if  
19 the NCAA's restrictions on student-athlete compensation were  
20 lifted. Although Dr. Dennis testified that these responses were  
21 consistent with those observed in other polls and surveys  
22 concerning college sports, he acknowledged that those other  
23 studies may "vary in their quality or their methodology and their  
24 implementation." Trial Tr. 2641:24-2642:11; Ex. 4045 at 20.  
25 Accordingly, the Court does not find these findings to be credible  
26 evidence that consumer demand for the NCAA's product would  
27 decrease if student-athletes were permitted to receive  
28 compensation.

1 The most relevant questions in Dr. Dennis's survey asked  
2 respondents specifically whether they would be more or less likely  
3 to watch, listen to, or attend college football and basketball  
4 games if student-athletes were paid. Thirty-eight percent of all  
5 respondents stated they would be less likely to watch, listen to,  
6 or attend games if student-athletes were paid \$20,000 per year.  
7 Ex. 4045 at 23. Forty-seven percent stated that they would be  
8 less likely to watch, listen to, or attend games if student-  
9 athletes were paid \$50,000 per year. Id. In contrast, only about  
10 four or five percent of respondents said that they would be more  
11 likely to watch, listen to, or attend games if student-athletes  
12 were paid \$20,000 or \$50,000 per year. Trial Tr. 2651:14-2652:8  
13 (Dennis). The remaining respondents stated that they would be no  
14 more or less likely to watch, listen to, or attend games if  
15 student-athletes were paid these amounts. Id.

16 While these questions are more germane to consumer behavior  
17 than the survey's findings about respondents' general opinions  
18 about compensating student-athletes, they still do not credibly  
19 establish that the specific rules challenged here contribute to  
20 consumer demand. Dr. Dennis did not ask respondents for their  
21 opinions about providing student-athletes with a share of  
22 licensing revenue generated from the use of their own names,  
23 images, and likenesses. Id. 2669:15-:18 (Dennis); 2709:6-:18  
24 (Poret). Nor did he ask their opinions about paying student-  
25 athletes the full cost of attendance, or any amount less than  
26 \$20,000 per year. Dr. Dennis also failed to ask respondents how  
27 their behavior would be affected if small or large amounts of  
28 compensation for the use of student-athletes' names, images, and

1 likenesses were held in trust for them until they left school --  
2 one of Plaintiffs' proposed alternatives here. Id. 2686:18-2687:3  
3 (Dennis); 2711:21-2712:9, 2718:19-2714:12 (Poret).

4 In addition, numerous respondents provided internally  
5 inconsistent responses to different survey questions. Eighty-  
6 three of the respondents who said that they favored paying  
7 student-athletes also stated that they would be less likely to  
8 watch, listen to, or attend games if student-athletes were paid.  
9 Id. 2729:25-2730:9. Another thirty-three respondents stated that  
10 they opposed paying student-athletes but said that they would be  
11 more likely to watch, listen to, or attend games if student-  
12 athletes were paid. Id. These responses suggest that some  
13 respondents did not understand or did not take seriously some of  
14 the survey questions and illustrate the limits of Dr. Dennis's  
15 conclusions.

16 Based on these flaws in Dr. Dennis's survey, the Court finds  
17 that it does not provide credible evidence that demand for the  
18 NCAA's product would decrease if student-athletes were permitted,  
19 under certain circumstances, to receive a limited share of the  
20 revenue generated from the use of their own names, images, and  
21 likenesses. Although Plaintiffs did not provide their own opinion  
22 survey to counter Dr. Dennis's survey, the Court notes that the  
23 NCAA produced Dr. Dennis's survey as a rebuttal report, which may  
24 have limited Plaintiffs' opportunity to commission such a survey.  
25 What's more, Dr. Dennis himself acknowledged that it would be  
26 extremely difficult to ask the specific kinds of detailed survey  
27 questions most relevant to this case -- specifically, those  
28

1 relating to varying amounts and methods of payment for the use of  
2 student-athletes' names, images, and likenesses.

3 Plaintiffs presented other evidence illustrating the limits  
4 of opinion surveys as predictors of consumer demand for sports-  
5 entertainment products. Their expert on sports management, Dr.  
6 Daniel Rascher, described how opinion surveys conducted between  
7 1970 and the present consistently showed that the public  
8 overwhelmingly opposed rising baseball player salaries but  
9 continued to watch, listen to, and attend Major League Baseball  
10 games at a high rate even as player salaries rose during this  
11 period. Id. 901:12-903:24; Ex. 2549. He specifically noted that  
12 many people felt that the removal of the reserve clause in the  
13 1970s -- which ultimately enabled players to become free agents,  
14 thus leading to higher salaries -- would undermine the popularity  
15 of professional baseball. However, despite these predictions and  
16 fans' stated opposition to rising salaries, Major League Baseball  
17 revenues continued to rise after the removal of the reserve  
18 clause. Id. 903:13-:16 ("So even though the fans in polls say,  
19 'Hey, we don't want the players to make so much money,' ultimately  
20 they continue to watch on television, you know, buy tickets,  
21 concessions, the whole thing." (internal quotation marks added)).  
22 Dr. Rascher highlighted another survey showing public opposition  
23 to the decision of the International Olympic Committee (IOC) to  
24 permit professional athletes to compete in the Olympics, even as  
25 consumer interest in the Olympics remained high and revenues  
26 generated by the event continued to rise during the same period.  
27 Id. 904:22-905:18; see also id. 226:15-227:17 (testimony of Dr.  
28 Noll that the Olympics are "much more popular now than they were

1 [when] amateur"). In addition to the Olympics, Dr. Rascher also  
2 pointed to various other formerly amateur sports associations --  
3 such as those governing rugby and tennis -- whose events grew in  
4 popularity after they began to allow their athletes to accept  
5 payments. Id. 903:25-904:21.

6 Although the NCAA presented evidence showing that the Nielsen  
7 ratings for professional baseball and the Olympics have declined  
8 since the 1970s and 1980s, this does not cast doubt on Dr.  
9 Rascher's findings. As Dr. Rascher explained, Nielsen ratings  
10 measure the share of the population watching a particular event,  
11 not the raw number of viewers. Id. 986:7-:10, 1019:20-1020:9. As  
12 a result, Nielsen ratings have declined for virtually every  
13 television program or sporting event over the past few decades as  
14 the viewing population and number of television channels has  
15 grown. Id. Even a single event as popular as the Super Bowl,  
16 which has seen a dramatic increase in the raw number of viewers  
17 over the years, has experienced flat Nielsen ratings for several  
18 decades. Id. 1024:18-1026:7, 1025:6-:15.

19 Other historical evidence suggests that the NCAA's  
20 restrictions on student-athlete compensation have not contributed  
21 significantly to the popularity of FBS football and Division I  
22 basketball. The NCAA's former president, the late Walter Byers,  
23 testified during his 2007 deposition, for instance, that the  
24 NCAA's decision to remove incidental expenses from the grant-in-  
25 aid coverage in 1975 was not motivated by a desire to increase  
26 consumer demand for its product. Byers Depo. 21:21-22:14,  
27 24:6-:17. In fact, he specifically noted that NCAA sports  
28 experienced a tremendous growth in popularity during the period



1 between 1956 and 1975 when grants-in-aid still covered the full  
2 cost of attendance. Id. 25:15-26:8.<sup>7</sup> None of the evidence in the  
3 trial record suggests that the removal of incidental expenses or  
4 any other changes to the grant-in-aid limit had an impact on the  
5 popularity of college sports during this time.

6 Thus, the Court finds that the NCAA's restrictions on  
7 student-athlete compensation are not the driving force behind  
8 consumer demand for FBS football and Division I basketball-related  
9 products. Rather, the evidence presented at trial suggests that  
10 consumers are interested in college sports for other reasons. Mr.  
11 Pilson testified, for instance, that the popularity of college  
12 sports is driven by feelings of "loyalty to the school," which are  
13 shared by both alumni and people "who live in the region or the  
14 conference." Trial Tr. 757:20-758:13. Similarly, Christine  
15 Plonsky, an associate athletics director at the University of  
16 Texas (UT), testified that UT sports would remain popular as long  
17 as they had "anything in our world to do with the University of  
18 Texas." Id. 1414:23-:24; see also id. 1376:13 ("Longhorns are  
19 pretty loyal."). Dr. Emmert himself noted that much of the  
20 popularity of the NCAA's annual men's basketball tournament stems  
21 from the fact that schools from all over the country participate  
22 "so the fan base has an opportunity to cheer for someone from  
23 their region of the country." Id. 1757:1-:9; see also id. ("It's  
24 become extremely popular at least in part because there's someone  
25

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26 <sup>7</sup> The NCAA's objections to this testimony under Federal Rules of  
27 Evidence 602 and 701 are overruled. Walter Byers was the executive  
28 director of the NCAA between 1956 and 1975, Stip. Undisputed Facts ¶ 23,  
and therefore had personal knowledge of the popularity of NCAA sports  
during this period.

1 from your neighborhood likely to be in the tournament." ). He  
2 testified that college bowl games have the same appeal. Id.  
3 1757:16-:19. This evidence demonstrates that the NCAA's  
4 restrictions on student-athlete pay is not the driving force  
5 behind consumer interest in FBS football and Division I  
6 basketball. Thus, while consumer preferences might justify  
7 certain limited restraints on student-athlete compensation, they  
8 do not justify the rigid restrictions challenged in this case.

9 B. Competitive Balance

10 The NCAA asserts that its challenged restraints are  
11 reasonable and procompetitive because they are needed to maintain  
12 the current level of competitive balance among FBS football and  
13 Division I basketball teams. It further asserts that it must  
14 maintain this particular level of competitive balance in order to  
15 sustain consumer demand for its product.

16 The Court finds that the NCAA's current restrictions on  
17 student-athlete compensation do not promote competitive balance.  
18 As Dr. Noll testified, since the 1970s, numerous sports economists  
19 have studied the NCAA's amateurism rules and nearly all have  
20 concluded that the rules have no discernible effect on the level  
21 of competitive balance. Trial Tr. 229:8-234:2. He noted that one  
22 of the more recent articles addressing the subject, a 2007 study  
23 by economist Jim Peach published in the Social Science Journal,  
24 found that there is "little evidence that the NCAA rules and  
25 regulations have promoted competitive balance in college athletics  
26 and no a priori reason to think that eliminating the rules would  
27 change the competitive balance situation.'" Id. 232:22-233:1  
28 (quoting Peach article). Dr. Rascher reached the same conclusion

1 based on his review of the economics literature. Id. 920:9-  
2 922:16. He specifically cited one of the leading textbooks in the  
3 field of sports economics, by Rod Fort, which found that the  
4 NCAA's restrictions on student-athlete pay do not appear to have  
5 any impact on competitive balance. Id. 921:10-:18.

6 The academic consensus on this issue is not surprising given  
7 that many of the NCAA's other rules and practices suggest that the  
8 association is unconcerned with achieving competitive balance.  
9 Several witnesses testified that the restrictions on student-  
10 athlete compensation lead many schools simply to spend larger  
11 portions of their athletic budgets on coaching, recruiting, and  
12 training facilities. Id. 296:14-297:18 (Noll); 865:11-866:2,  
13 910:2-911:7 (Rascher). In the major conferences, for instance,  
14 the average salary for a head football coach exceeds \$1.5 million.  
15 Id. 1151:20-1152:14 (Staurowsky). The fact that high-revenue  
16 schools are able to spend freely in these other areas cancels out  
17 whatever leveling effect the restrictions on student-athlete pay  
18 might otherwise have. The NCAA does not do anything to rein in  
19 spending by the high-revenue schools or minimize existing  
20 disparities in revenue and recruiting. In fact, Dr. Emmert  
21 specifically conceded that it is "not the mission of the  
22 association to . . . try and take away the advantages of a  
23 university that's made a significant commitment to facilities and  
24 tradition and all of the things that go along with building a  
25 program." Trial Tr. 1774:23-1775:6.

26 This same sentiment underlies the NCAA's unequal revenue  
27 distribution formula, which rewards the schools and conferences  
28 that already have the largest athletic budgets. Revenues

1 generated from the NCAA's annual Division I men's basketball  
2 tournament are distributed to the conferences based on how their  
3 member schools performed in the tournament in recent years.  
4 Docket No. 207, Stip. Re: Broadcast Money, at ¶ 10. As a result,  
5 the major conferences -- and the highest revenue schools --  
6 typically receive the greatest payouts, which hinders, rather than  
7 promotes, competitive balance.

8       The only quantitative evidence that the NCAA presented  
9 related to competitive balance is a cursory statistical analysis  
10 conducted by Dr. Rubinfeld comparing the levels of competitive  
11 balance in FBS football and Division I basketball to the levels in  
12 the NFL and NBA. Nothing in Dr. Rubinfeld's analysis suggests  
13 that the NFL and NBA -- each of which has fewer teams than  
14 Division I -- provide an appropriate baseline for comparing  
15 competitive balance. More importantly, his analysis does not  
16 suggest that the NCAA's challenged rules actually produce the  
17 levels of competitive balance he observed.

18       Even if the NCAA had presented some evidence of a causal  
19 connection between its challenged rules and its current level of  
20 competitive balance, it has not shown that the current level of  
21 competitive balance is necessary to maintain its current level of  
22 consumer demand. Trial Tr. 228:20-229:2 (Noll). It is undisputed  
23 that the ideal level of competitive balance for a sports league is  
24 somewhere between perfect competitive balance (where every team  
25 has an equal chance of winning every game) and perfect imbalance  
26 (where every game has a predictable outcome). Id. 453:8-:22  
27 (Noll); 3127:2-:21 (Rubinfeld). The NCAA has not even attempted  
28 to identify the specific level of competitive balance between

1 those extremes that is ideal or necessary to sustain its current  
2 popularity. Given the lack of such evidence in the record, the  
3 Court finds that the NCAA's challenged rules are not needed to  
4 achieve a level of competitive balance necessary, or even likely,  
5 to maintain current levels of consumer demand for FBS football and  
6 Division I basketball.

7 C. Integration of Academics and Athletics

8 The NCAA contends that its restrictions on student-athlete  
9 compensation are reasonable and procompetitive because they  
10 promote the integration of academics and athletics. In  
11 particular, it asserts that its challenged rules ensure that  
12 student-athletes are able to obtain all of the educational  
13 benefits that their schools provide and participate in their  
14 schools' academic communities. According to the NCAA, the  
15 integration of academics and athletics increases the quality of  
16 the educational services its member schools provide to student-  
17 athletes in the college education market that Plaintiffs have  
18 identified.

19 For support, the NCAA relies on evidence showing that  
20 student-athletes receive both short-term and long-term benefits  
21 from being student-athletes. One of its experts, Dr. James  
22 Heckman, testified that participation in intercollegiate athletics  
23 leads to better academic and labor market outcomes for many  
24 student-athletes as compared to other members of their  
25 socioeconomic groups. Trial Tr. 1493:13-1494:25. Dr. Heckman  
26 found that these benefits are particularly pronounced for student-  
27 athletes from disadvantaged backgrounds. Id. The NCAA presented  
28 additional evidence, including its own data on student-athlete

1 graduation rates, to show that student-athletes enjoy substantial  
2 benefits from participating in intercollegiate athletics.  
3 However, none of this data nor any of Dr. Heckman's observations  
4 suggests that student-athletes benefit specifically from the  
5 restrictions on student-athlete compensation that are challenged  
6 in this case. To the contrary, Dr. Heckman specifically testified  
7 that the long-term educational and academic benefits that student-  
8 athletes enjoy stem from their increased access to financial aid,  
9 tutoring, academic support, mentorship, structured schedules, and  
10 other educational services that are unrelated to the challenged  
11 rules in this case. Id. 1512:23-1516:17. FBS football and  
12 Division I basketball schools offer most of these services to  
13 their student-athletes independently and are not compelled to do  
14 so by the NCAA, particularly not by the challenged rules.

15 The same is true of the various other benefits of integration  
16 that the NCAA has identified. For instance, the benefits that  
17 student-athletes derive from interacting with faculty and non-  
18 student-athletes on campus are achieved mostly through the NCAA's  
19 rules requiring student-athletes to attend class and meet certain  
20 academic requirements. They are also achieved through the  
21 association's rules prohibiting schools from creating dorms solely  
22 for student-athletes or from requiring student-athletes to  
23 practice more than a certain number of hours each week. None of  
24 these rules is challenged here.

25 The only evidence that the NCAA has presented that suggests  
26 that its challenged rules might be necessary to promote the  
27 integration of academics and athletics is the testimony of  
28 university administrators, who asserted that paying student-

1 athletes large sums of money would potentially "create a wedge"  
2 between student-athletes and others on campus. Id. 1591:2-:20  
3 (Pastides). These administrators noted that, depending on how  
4 much compensation was ultimately awarded, some student-athletes  
5 might receive more money from the school than their professors.  
6 Student-athletes might also be inclined to separate themselves  
7 from the broader campus community by living and socializing off  
8 campus.

9 It is not clear that any of the potential problems identified  
10 by the NCAA's witnesses would be unique to student-athletes. In  
11 fact, when the Court asked Dr. Emmert whether other wealthy  
12 students -- such as those who come from rich families or start  
13 successful businesses during school -- raise all of the same  
14 problems for campus relations, he replied that they did. Id.  
15 1790:18-:22. It is also not clear why paying student-athletes  
16 would be any more problematic for campus relations than paying  
17 other students who provide services to the university, such as  
18 members of the student government or school newspaper.

19 Nonetheless, the Court finds that certain limited restrictions on  
20 student-athlete compensation may help to integrate student-  
21 athletes into the academic communities of their schools, which may  
22 in turn improve the schools' college education product.

23 Plaintiffs have produced anecdotal and statistical evidence  
24 suggesting that the NCAA's current rules do not serve to integrate  
25 FBS football players or Division I basketball players into the  
26 academic communities at their schools. For example, Ed O'Bannon,  
27 the former UCLA basketball star, testified that he felt like "an  
28 athlete masquerading as a student" during his college years. Id.

1 33:11-:14. Plaintiffs also presented testimony from Dr. Ellen  
2 Staurowsky, a sports management professor, who studied the  
3 experiences of FBS football and Division I basketball players and  
4 concluded that the time demands of their athletic obligations  
5 prevent many of them from achieving significant academic success.  
6 Id. 1175:12-1176:21. Some of this evidence conflicts with the  
7 NCAA's data on student-athlete graduation rates and Dr. Heckman's  
8 observations surrounding academic outcomes for student-athletes.  
9 However, the Court need not resolve these factual disputes  
10 because, regardless of how they are resolved, the restraints on  
11 student-athlete compensation challenged in this case generally do  
12 not serve to enhance academic outcomes for student-athletes.

13 D. Increased Output

14 The NCAA asserts that its challenged rules are reasonable and  
15 procompetitive because they enable it to increase the number of  
16 opportunities available to schools and student-athletes to  
17 participate in FBS football and Division I basketball, which  
18 ultimately increases the number of games that can be played. It  
19 refers to this increased number of FBS football and Division I  
20 schools, student-athletes, and games as increased output.

21 The Court finds that the NCAA's restrictions on student-  
22 athlete compensation do nothing to increase this output. The  
23 number of schools participating in FBS football and Division I  
24 basketball has increased steadily over time and continues to  
25 increase today. Stip. Undisputed Facts ¶¶ 42-49. This is because  
26 participation in FBS football and Division I basketball typically  
27 raises a school's profile and leads to increased athletics-based  
28 revenue. Trial Tr. 872:1-874:20 (Rascher). Although Dr. Emmert



1 and other NCAA and conference officials say that this trend is not  
2 the result of increased Division I revenues but, rather, because  
3 of schools' philosophical commitment to amateurism, this theory is  
4 implausible. Id. 1783:2-:14; 2080:11-:23 (Delany); 2418:5-:25  
5 (Sankey); 3188:25-3189:17 (Lewis). Schools in some of the major  
6 conferences have specifically undertaken efforts to change the  
7 NCAA's existing scholarship rules, which suggests that the rules  
8 are not the reason that they choose to participate in Division I.  
9 Ex. 2095 at 4 (2013 presentation by representatives of the five  
10 major conferences requesting autonomy to raise existing  
11 scholarship limits); Ex. 2527 at 2 (2014 letter from Pac 12 urging  
12 other major conferences to support rule changes, including raising  
13 the grant-in-aid limit). What's more, there is no evidence to  
14 suggest that any schools joined Division I originally because of  
15 its amateurism rules. These schools had numerous other options to  
16 participate in collegiate sports associations that restrict  
17 compensation for student-athletes, including the NCAA's lower  
18 divisions and the NAIA. Indeed, schools in FCS, Division II, and  
19 Division III are bound by the same amateurism provisions of the  
20 NCAA's constitution as the schools in Division I. The real  
21 difference between schools in Division I and schools in other  
22 divisions and athletics associations, as explained above, is the  
23 amount of resources that Division I schools commit to athletics.  
24 Thus, while there may be tangible differences between Division I  
25 schools and other schools that participate in intercollegiate  
26 sports, these differences are financial, not philosophical.

27 For this reason, the NCAA's assertion that schools would  
28 leave FBS and Division I for financial reasons if the challenged

1 restraints were removed is not credible. The testimony of Dr.  
2 Emmert and various other athletics administrators that most  
3 Division I athletic programs operate at a loss and would not  
4 remain in Division I if the challenged rules were removed  
5 conflicts with the clear weight of the evidence. Trial Tr.  
6 1784:6-:18 (Emmert); 3188:25-3189:3 (Lewis). Indeed, some of the  
7 NCAA's own witnesses undermined this claim. Dr. Harris Pastides,  
8 the president of the University of South Carolina, for instance,  
9 specifically testified that his school "would probably continue to  
10 compete in football and men's basketball" if the challenged  
11 restrictions on student-athlete compensation were lifted. Id.  
12 1598:23-:25. The commissioner of Conference USA, Britton  
13 Banowsky, similarly expressed skepticism that universities would  
14 leave Division I if the restrictions were removed. Id. 2371:25-  
15 2372:20. Ms. Plonsky also cast doubt on Dr. Emmert's assertion  
16 that most Division I sports programs operate at a loss by noting  
17 that UT's athletics department is not only self-sustaining but, in  
18 fact, generates surplus revenue that funds other university  
19 programs and expenses. Id. 1385:12-:18, 1465:20-1466:10. She  
20 indicated that UT was not abnormal in this regard and that the  
21 "vast proportion" of athletics programs across the country are  
22 operated by "self-sourced, self-generated" revenues. Id. 1467:22-  
23 1468:11. Mr. Lewis himself acknowledged that the NCAA's revenues,  
24 most of which are distributed back to its member schools and  
25 conferences, have increased in recent years. Id. 3195:19-3196:3.

26 Dr. Rascher offered similar testimony and documented that  
27 participation in FBS football and Division I basketball generates  
28 significant revenue and is highly profitable for most schools.

1 Id. 830:4-831:15. These revenues are what enable them to spend so  
2 much on coaches and training facilities. Dr. Rascher also noted  
3 that most FBS football schools used to spend even more on their  
4 student-athletes before the NCAA lowered its team scholarship cap  
5 from 105 to eighty-five. Id. 873:20-874:20. Furthermore, Dr.  
6 Noll testified that some of the schools that currently compete in  
7 FBS and Division I do so without providing the maximum amount of  
8 financial aid permitted under NCAA rules.

9 Based on this evidence, the Court finds that schools would  
10 not exit FBS football and Division I basketball if they were  
11 permitted to pay their student-athletes a limited amount of  
12 compensation beyond the value of their scholarships. The NCAA's  
13 challenged restrictions on compensation do not increase the number  
14 of opportunities for schools or student-athletes to participate in  
15 Division I.

16 V. Alternatives to the Restraint

17 Plaintiffs have proposed three modifications to the NCAA's  
18 challenged rules which, they contend, would allow the NCAA to  
19 achieve the purposes of its challenged rules in a less restrictive  
20 manner: (1) raise the grant-in-aid limit to allow schools to award  
21 stipends, derived from specified sources of licensing revenue, to  
22 student-athletes; (2) allow schools to deposit a share of  
23 licensing revenue into a trust fund for student-athletes which  
24 could be paid after the student-athletes graduate or leave school  
25 for other reasons; or (3) permit student-athletes to receive  
26 limited compensation for third-party endorsements approved by  
27 their schools.

28

1 The Court finds that Plaintiffs' first proposed  
2 alternative -- allowing schools to award stipends -- would limit  
3 the anticompetitive effects of the NCAA's current restraint  
4 without impeding the NCAA's efforts to achieve its stated  
5 purposes, provided that the stipends do not exceed the cost of  
6 attendance as that term is defined in the NCAA's bylaws. A  
7 stipend capped at the cost of attendance would not violate the  
8 NCAA's own definition of amateurism because it would only cover  
9 educational expenses. Indeed, as noted above, the NCAA's member  
10 schools used to provide student-athletes with similar stipends  
11 before the NCAA lowered its cap on grants-in-aid. Byers Depo.  
12 21:21-22:14, 24:6-:17. Dr. Emmert testified that raising the  
13 grant-in-aid limit to cover the full cost of attendance would not  
14 violate the NCAA's amateurism rules. Trial Tr. 1742:15-:18. Greg  
15 Sankey, the executive associate commissioner and chief operating  
16 officer of the SEC, expressed the same view during his testimony,  
17 as did Dr. Rubinfeld. Id. 2430:23-:24 (Sankey); 3117:2-:4  
18 (Rubinfeld).

19 None of the evidence presented at trial suggests that  
20 consumer demand for the NCAA's product would decrease if schools  
21 were permitted to provide such stipends to student-athletes once  
22 again. Nor does any of the evidence suggest that providing such  
23 stipends would hinder any school's efforts to educate its student-  
24 athletes or integrate them into the academic community on campus.  
25 If anything, providing student-athletes with such stipends would  
26 facilitate their integration into academic life by removing some  
27 of the educational expenses that they would otherwise have to  
28 bear, such as school supplies, which are not covered by a full

1 grant-in-aid. Ex. 2340 at 207. Raising the grant-in-aid cap to  
2 allow for such stipends also would not have any effect on the  
3 NCAA's efforts to achieve competitive balance or increase its  
4 output because, as explained above, its existing restrictions on  
5 student-athlete compensation do not advance these goals.

6 Plaintiffs' second proposed less restrictive alternative --  
7 allowing schools to hold payments in trust for student-athletes --  
8 would likewise enable the NCAA to achieve its goals in a less  
9 restrictive manner, provided the compensation was limited and  
10 distributed equally among team members. The NCAA's own witness,  
11 Mr. Pilson, testified that he would not be troubled if schools  
12 were allowed to make five thousand dollar payments to their  
13 student-athletes and that his general concerns about paying  
14 student-athletes would be partially assuaged if the payments were  
15 held in trust. Trial Tr. 770:25-771:18. Stanford's athletic  
16 director, Bernard Muir, similarly acknowledged that his concerns  
17 about paying student-athletes varied depending on the size of the  
18 payments that they would receive. Id. 254:3-:18 ("Where I set the  
19 dollar limit, you know, that varies, but it does concern me when  
20 we're talking about six figures, seven figures in some cases.").  
21 This testimony is consistent with Dr. Dennis's general observation  
22 that, if the NCAA's restrictions on student-athlete pay were  
23 removed, the popularity of college sports would likely depend on  
24 the size of payments awarded to student-athletes. The Court  
25 therefore finds that permitting schools to make limited payments  
26 to student-athletes above the cost of attendance would not harm  
27 consumer demand for the NCAA's product -- particularly if the  
28 student-athletes were not paid more or less based on their

1 athletic ability or the quality of their performances and the  
2 payments were derived only from revenue generated from the use of  
3 their own names, images, and likenesses.

4 Holding these limited and equal shares of licensing revenue  
5 in trust until after student-athletes leave school would further  
6 minimize any potential impact on consumer demand. Indeed, former  
7 student-athletes are already permitted to receive compensation for  
8 the use of their names, images, and likenesses in game re-  
9 broadcasts and other archival footage of their college  
10 performances as long as they enter into such agreements after they  
11 leave school. The popularity of college sports would not suffer  
12 if current and future student-athletes were given the opportunity  
13 to receive compensation from their schools after they leave  
14 college. Likewise, holding compensation in trust for student-  
15 athletes while they are enrolled would not erect any new barriers  
16 to schools' efforts to educate student-athletes or integrate them  
17 into their schools' academic communities. The Court therefore  
18 finds that consumer demand for the NCAA's products would not  
19 change if schools were allowed to offer and student-athletes on  
20 FBS football and Division I basketball teams were allowed, after  
21 leaving college, to receive limited and equal shares of licensing  
22 revenue generated from the use of their names, images, and  
23 likenesses during college.

24 Although Drs. Emmert and Rubinfeld suggested that student-  
25 athletes could potentially monetize these future earnings while  
26 they are still in school by taking out loans against the trust,  
27 the NCAA could easily prohibit such borrowing, just as it  
28 currently prohibits student-athletes from borrowing against their

1 future earnings as professional athletes. See Ex. 2340 at 236  
2 (prohibiting student-athletes from accepting any loan issued based  
3 on the "student-athlete's athletics reputation, skill or pay-back  
4 potential as a future professional athlete"). None of the NCAA's  
5 witnesses testified that its current rules would not suffice to  
6 prevent student-athletes from borrowing against their future  
7 compensation. Nor did they rule out that the NCAA and its member  
8 schools could place the money in a special account, such as a  
9 spendthrift trust, to prevent such borrowing. Accordingly, the  
10 Court finds that allowing FBS football and Division I basketball  
11 schools to hold in trust a limited and equal share of licensing  
12 revenue for their recruits would provide a less restrictive means  
13 of achieving the NCAA's stated purposes.

14 Plaintiffs' third proposed alternative, however -- allowing  
15 student-athletes to receive money for endorsements -- does not  
16 offer a less restrictive way for the NCAA to achieve its purposes.  
17 Allowing student-athletes to endorse commercial products would  
18 undermine the efforts of both the NCAA and its member schools to  
19 protect against the "commercial exploitation" of student-athletes.  
20 Although the trial record contains evidence -- and Dr. Emmert  
21 himself acknowledged -- that the NCAA has not always succeeded in  
22 protecting student-athletes from commercial exploitation, this  
23 failure does not justify expanding opportunities for commercial  
24 exploitation of student-athletes in the future. Plaintiffs  
25 themselves previously indicated that they were not seeking to  
26 enjoin the NCAA from enforcing its current rules prohibiting such  
27 endorsements. In light of this record, the Court finds that  
28

1 Plaintiffs' third proposed less restrictive alternative does not  
2 offer the NCAA a viable means of achieving its stated goals.

3 CONCLUSIONS OF LAW

4 I. Legal Standard under the Section 1 of the Sherman Act

5 Section 1 of the Sherman Act makes it illegal to form any  
6 "contract, combination in the form of trust or otherwise, or  
7 conspiracy, in restraint of trade or commerce among the several  
8 States." 15 U.S.C. § 1. To prevail on a claim under this  
9 section, a plaintiff must show "(1) that there was a contract,  
10 combination, or conspiracy; (2) that the agreement unreasonably  
11 restrained trade under either a per se rule of illegality or a  
12 rule of reason analysis; and (3) that the restraint affected  
13 interstate commerce.'" Tanaka v. Univ. of S. Cal., 252 F.3d 1059,  
14 1062 (9th Cir. 2001) (citing Hairston v. Pacific 10 Conference,  
15 101 F.3d 1315, 1318 (9th Cir. 1996)).

16 In this case, Plaintiffs allege that the NCAA's rules and  
17 bylaws operate as an unreasonable restraint of trade. In  
18 particular, they seek to challenge the set of rules that preclude  
19 FBS football players and Division I men's basketball players from  
20 receiving any compensation, beyond the value of their athletic  
21 scholarships, for the use of their names, images, and likenesses  
22 in videogames, live game telecasts, re-broadcasts, and archival  
23 game footage. The NCAA does not dispute that these rules were  
24 enacted and are enforced pursuant to an agreement among its  
25 Division I member schools and conferences. Nor does it dispute  
26 that these rules affect interstate commerce. Accordingly, the  
27 only remaining question here is whether the challenged rules  
28 restrain trade unreasonably.



1 "The rule of reason is the presumptive or default standard"  
2 for making this determination. California ex rel. Harris v.  
3 Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011) (citing Texaco  
4 Inc. v. Dagher, 547 U.S. 1, 5 (2006)). Although certain  
5 restraints may be examined under a truncated "quick look" or per  
6 se analysis, the Supreme Court has "expressed reluctance to adopt  
7 per se rules with regard to 'restraints imposed in the context of  
8 business relationships where the economic impact of certain  
9 practices is not immediately obvious.'" State Oil Co. v. Khan,  
10 522 U.S. 3, 10 (1997) (citing FTC v. Indiana Federation of  
11 Dentists, 476 U.S. 447, 458-459 (1986)). The Supreme Court has  
12 specifically held that concerted actions undertaken by joint  
13 ventures should be analyzed under the rule of reason. American  
14 Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010)  
15 ("When 'restraints on competition are essential if the product is  
16 to be available at all,' per se rules of illegality are  
17 inapplicable, and instead the restraint must be judged according  
18 to the flexible Rule of Reason." (citing NCAA v. Board of Regents  
19 of Univ. of Oklahoma, 468 U.S. 85, 101 (1984))). Thus, as  
20 explained in prior orders, the Court analyzes the challenged  
21 restraint in this case under the rule of reason rather than a  
22 "quick look" or per se rule. See Case No. 09-1967, Docket No.  
23 1025, April 11, 2014 Order, at 8-9; Case No. 09-1967, Docket No.  
24 151, Feb. 8, 2010 Order, at 9-10.

25 "A restraint violates the rule of reason if the restraint's  
26 harm to competition outweighs its procompetitive effects."  
27 Tanaka, 252 F.3d at 1063. Courts typically rely on a burden-  
28 shifting framework to conduct this balancing. Under that

1 framework, the "plaintiff bears the initial burden of showing that  
 2 the restraint produces 'significant anticompetitive effects'  
 3 within a 'relevant market.'" Id. (citing Hairston, 101 F.3d at  
 4 1319). If the plaintiff satisfies this initial burden, "the  
 5 defendant must come forward with evidence of the restraint's  
 6 procompetitive effects." Id. Finally, if the defendant meets  
 7 this burden, the plaintiff must "show that 'any legitimate  
 8 objectives can be achieved in a substantially less restrictive  
 9 manner.'" Id. (citing Hairston, 101 F.3d at 1319).

## 10 II. Anticompetitive Effects in the Relevant Markets

11 "Proof that defendant's activities had an impact upon  
 12 competition in the relevant market is 'an absolutely essential  
 13 element of the rule of reason case.'" Supermarket of Homes, Inc.  
 14 v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1405 (9th  
 15 Cir. 1986) (citations omitted). The term "relevant market," in  
 16 this context,

17 "encompasses notions of geography as well as  
 18 product use, quality, and description. The  
 19 geographic market extends to the area of  
 20 effective competition . . . where buyers can  
 21 turn for alternative sources of supply. The  
 22 product market includes the pool of goods or  
 23 services that enjoy reasonable  
 24 interchangeability of use and cross-elasticity  
 25 of demand."

26 Tanaka, 252 F.3d at 1063 (quoting Oltz v. St. Peter's Cmty. Hosp.,  
 27 861 F.2d 1440, 1446 (9th Cir. 1988) (internal citations omitted)).

28 Here, Plaintiffs allege that the challenged restraint causes  
 anticompetitive effects in two related national markets: (1) the  
 "college education market," in which colleges and universities  
 compete to recruit student-athletes to play FBS football or  
 Division I basketball; and (2) the "group licensing market," in

1 which videogame developers, television networks, and others  
2 compete for group licenses to use the names, images, and  
3 likenesses of FBS football and Division I men's basketball players  
4 in videogames, telecasts, and clips. The Court addresses each of  
5 these markets in turn.

6 A. College Education Market

7 1. Market Definition

8 As outlined in the findings of fact, Plaintiffs produced  
9 sufficient evidence at trial to establish the existence of a  
10 national market in which NCAA Division I schools compete to sell  
11 unique bundles of goods and services to elite football and  
12 basketball recruits. Specifically, these schools compete to offer  
13 recruits the opportunity to earn a higher education while playing  
14 for an FBS football or Division I men's basketball team.<sup>8</sup> In  
15 exchange, the recruits who accept these offers provide their  
16 schools with their athletic services and acquiesce in their  
17 schools' use of their names, images, and likenesses while they are  
18 enrolled. The recruits must also pay for any other costs of  
19 attendance not covered by their grants-in-aid.

20 The NCAA contends that it does not restrain competition in  
21 this market. In particular, it argues that FBS football and  
22 Division I basketball schools lack the power to fix prices in this  
23 market because they must compete with other colleges and  
24 universities -- such as those in other divisions and college

---

25  
26 <sup>8</sup> This market could be divided into two submarkets -- one in which  
27 Division I basketball schools compete for elite basketball recruits and  
28 one in which FBS football schools compete for elite football recruits.  
However, because the parties' evidence and arguments in this case apply  
generally to both of these submarkets, there is no need to subdivide the  
broader market for the purposes of this analysis.

1 athletic associations -- in supplying educational and athletic  
2 opportunities to elite recruits. The NCAA also points to foreign  
3 professional sports leagues and domestic minor leagues which might  
4 likewise provide alternatives to playing FBS football or Division  
5 I basketball. By failing to account for these other schools and  
6 leagues, the NCAA argues, Plaintiffs have defined the field of  
7 competition in the college education market too narrowly.

8 The "field of competition" within a given product market  
9 consists of "the group or groups of sellers or producers who have  
10 actual or potential ability to deprive each other of significant  
11 levels of business." Thurman Indus., Inc. v. Pay 'N Pak Stores,  
12 Inc., 875 F.2d 1369, 1374 (9th Cir. 1989). This group is not  
13 limited to producers of the particular "product at issue" but also  
14 includes the producers of "all economic substitutes for the  
15 product." Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d  
16 1038, 1045 (9th Cir. 2008). To determine whether a product has  
17 economic substitutes, courts typically consider two factors:  
18 "first, [the product's] reasonable interchangeability for the same  
19 or similar uses; and second, cross-elasticity of demand, an  
20 economic term describing the responsiveness of sales of one  
21 product to price changes in another." Los Angeles Memorial  
22 Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th  
23 Cir. 1984); see also Brown Shoe Co. v. United States, 370 U.S.  
24 294, 325 (1962) ("The outer boundaries of a product market are  
25 determined by the reasonable interchangeability of use or the  
26 cross-elasticity of demand between the product itself and  
27 substitutes for it."). This analysis requires an examination of  
28 the price, use, and qualities of all potential substitutes for the

1 product at issue. See Paladin Associates, Inc. v. Montana Power  
2 Co., 328 F.3d 1145, 1163 (9th Cir. 2003) ("For antitrust purposes,  
3 a 'market is composed of products that have reasonable  
4 interchangeability for the purposes for which they are produced --  
5 price, use and qualities considered.'" (citations omitted)). An  
6 analysis of these factors in the present case demonstrates that  
7 Plaintiffs have properly defined the scope of a relevant college  
8 education market.

9 As set forth in the findings of fact, the product that FBS  
10 and Division I schools offer is unique. The combination of  
11 educational and athletic opportunities offered by schools outside  
12 of FBS football and Division I -- including schools in FCS,  
13 Divisions II and III, and associations like the NAIA, USCAA,  
14 NJCAA, or NCCAA -- differ significantly in both price and quality  
15 from those offered by FBS and Division I schools. Non-Division I  
16 schools typically offer a lower level of athletic competition,  
17 inferior training facilities, lower-paid coaches, and fewer  
18 opportunities to play in front of large crowds and on television.  
19 Furthermore, because many of these schools do not offer athletic  
20 scholarships, the cost of attending these institutions is much  
21 higher for many student-athletes than the cost of attending an FBS  
22 football or Division I basketball school. This is why recruits  
23 who receive scholarship offers to play FBS football or Division I  
24 basketball rarely turn them down and, when they do, almost never  
25 do so to play football or basketball at a school outside of FBS or  
26 Division I. In short, non-FBS and non-Division I schools do not  
27 compete with FBS and Division I schools in the recruiting market,  
28 just as they do not on the football field or the basketball court.

1 The same holds true for professional sports leagues such as  
2 the AFL, NBA D-League, and foreign football and basketball  
3 leagues. These leagues do not offer recruits opportunities to  
4 earn a higher education or regularly showcase their athletic  
5 talents on national television. The NCAA's own evidence  
6 demonstrates that FBS football and Division I basketball command a  
7 significantly larger domestic television audience than virtually  
8 every other football or basketball league, with the exceptions of  
9 the NFL and NBA (neither of which permits an athlete to enter its  
10 league directly from high school). The evidence shows that elite  
11 football and basketball recruits rarely pursue careers in these  
12 second-tier leagues immediately after high school and  
13 overwhelmingly prefer to play for FBS football teams and Division  
14 I basketball teams.

15 In sum, the qualitative differences between the opportunities  
16 offered by FBS football and Division I basketball schools and  
17 those offered by other schools and sports leagues illustrate that  
18 FBS football schools and Division I basketball schools operate in  
19 a distinct market. See Rock v. NCAA, 2013 WL 4479815, at \*13  
20 (S.D. Ind.) (finding plaintiff's allegations regarding "the  
21 superior competition, institutional support, overall preference,  
22 higher revenue, and more scholarship opportunities provided in  
23 Division I football, as opposed to Division II or NAIA football"  
24 sufficient to support his assertion that "Division II and NAIA  
25 football are not adequate substitutes for Division I football and,  
26 thus, not part of the same relevant market"); White v. NCAA, Case  
27 No. 06-999, Docket No. 72, at 3 (C.D. Cal. Sept. 20, 2006)  
28 (finding plaintiff's allegations that student-athletes had no

1 reasonably interchangeable alternatives for the "unique  
2 combination of coaching-services and academics" offered by FBS  
3 football and Division I basketball schools sufficient to plead a  
4 relevant market). So, too, does the fact that historic  
5 fluctuations in the price of attending FBS and Division I schools  
6 resulting from changes in the grant-in-aid limit have not caused  
7 large numbers of FBS football and Division I basketball recruits  
8 to migrate toward other schools or professional leagues. See  
9 Trial Tr. 127:4-:17 (Noll); Lucas Auto. Engineering, Inc. v.  
10 Bridgestone/Firestone, Inc., 275 F.3d 762, 767 (9th Cir. 2001)  
11 ("The determination of what constitutes the relevant product  
12 market hinges, therefore, on a determination of those products to  
13 which consumers will turn, given reasonable variations in  
14 price."). Taken together, this evidence shows that the various  
15 schools and professional leagues that the NCAA has identified lack  
16 the power to deprive FBS football and Division I basketball  
17 schools of a significant number of recruits. Accordingly, these  
18 other schools and leagues are not suppliers in the market that  
19 Plaintiffs have identified.

## 20 2. The Challenged Restraint

21 Because FBS football and Division I basketball schools are  
22 the only suppliers in the relevant market, they have the power,  
23 when acting in concert through the NCAA and its conferences, to  
24 fix the price of their product. They have chosen to exercise this  
25 power by forming an agreement to charge every recruit the same  
26 price for the bundle of educational and athletic opportunities  
27 that they offer: to wit, the recruit's athletic services along  
28 with the use of his name, image, and likeness while he is in

1 school. If any school seeks to lower this fixed price -- by  
2 offering any recruit a cash rebate, deferred payment, or other  
3 form of direct compensation -- that school may be subject to  
4 sanctions by the NCAA.

5 This price-fixing agreement constitutes a restraint of trade.  
6 The evidence presented at trial makes clear that, in the absence  
7 of this agreement, certain schools would compete for recruits by  
8 offering them a lower price for the opportunity to play FBS  
9 football or Division I basketball while they attend college.  
10 Indeed, the NCAA's own expert, Dr. Rubinfeld, acknowledged that  
11 the NCAA operates as a cartel that imposes a restraint on trade in  
12 this market.

13 Despite this undisputed evidence, the NCAA contends that its  
14 conduct does not amount to price-fixing because the price that  
15 most student-athletes actually pay is "at or close to zero" due to  
16 their athletic scholarships. This argument mischaracterizes the  
17 commercial nature of the transactions between FBS football and  
18 Division I basketball schools and their recruits. While it is  
19 true that many FBS football and Division I basketball players do  
20 not pay for tuition, room, or board in a traditional sense, they  
21 nevertheless provide their schools with something of significant  
22 value: their athletic services and the rights to use their names,  
23 images, and likenesses while they are enrolled. They must also  
24 pay the incidental expenses of their college attendance. The  
25 Seventh Circuit recently observed that these "transactions between  
26 NCAA schools and student-athletes are, to some degree, commercial  
27 in nature, and therefore take place in a relevant market with  
28 respect to the Sherman Act." Agnew v. NCAA, 683 F.3d 328, 341



1 (7th Cir. 2012). The court reasoned that "the transactions those  
2 schools make with premier athletes -- full scholarships in  
3 exchange for athletic services -- are not noncommercial, since  
4 schools can make millions of dollars as a result of these  
5 transactions." Id. at 340.

6 A court in the Central District of California similarly  
7 concluded that these transactions take place within a cognizable  
8 antitrust market. In White, the court found that a group of  
9 student-athletes had stated a valid Sherman Act claim against the  
10 NCAA by alleging that its cap on the value of grants-in-aid  
11 operated as a price-fixing agreement among FBS football and  
12 Division I basketball schools. Case No. 06-999, Docket No. 72, at  
13 4. The court specifically rejected the NCAA's argument that the  
14 plaintiffs had failed to allege a sufficient harm to competition.  
15 It explained,

16 Plaintiffs' [complaint] alleges that student-  
17 athletes are consumers of the higher education  
18 and coaching services that the NCAA schools  
19 provide. Plaintiffs allege that the GIA  
20 [grant-in-aid] cap operates to restrict the  
21 price at which student-athletes purchase those  
22 services by forcing student-athletes to bear a  
23 greater portion of the cost of attendance than  
they would have borne if the GIA cap had not  
been in place. Taken in a light most  
favorable to the Plaintiffs, these allegations  
suggest that the GIA cap harms would-be  
buyers, forcing them to pay higher prices than  
would result from unfettered competition.

24 Id. (citations omitted). The same reasoning governs here, where  
25 Plaintiffs have shown that FBS football and Division I basketball  
26 schools have fixed the price of their product by agreeing not to  
27 offer any recruit a share of the licensing revenues derived from  
28 the use of his name, image, and likeness.

1 The fact that this price-fixing agreement operates by  
2 undervaluing the name, image, and likeness rights that the  
3 recruits provide to the schools -- rather than by explicitly  
4 requiring schools to charge a specific monetary price -- does not  
5 preclude antitrust liability here. Federal antitrust law  
6 prohibits various kinds of price-fixing agreements, even indirect  
7 restraints on price. See United States v. Socony-Vacuum Oil Co.,  
8 310 U.S. 150, 223 (1940) ("[T]he machinery employed by a  
9 combination for price-fixing is immaterial. Under the Sherman Act  
10 a combination formed for the purpose and with the effect of  
11 raising, depressing, fixing, pegging, or stabilizing the price of  
12 a commodity in interstate or foreign commerce is illegal *per se*.").  
13 In Catalano, Inc. v. Target Sales, Inc., for instance, the  
14 Supreme Court held that an agreement among beer wholesalers to  
15 cease providing interest-free credits to retailers was "merely one  
16 form of price fixing" and could therefore be "presumed illegal"  
17 under § 1 of the Sherman Act. 446 U.S. 643, 650 (1980). The  
18 Court reasoned that the "agreement to terminate the practice of  
19 giving credit is [] tantamount to an agreement to eliminate  
20 discounts, and thus falls squarely within the traditional *per se*  
21 rule against price fixing." Id. at 648; see also id. ("[C]redit  
22 terms must be characterized as an inseparable part of the  
23 price."). It noted that, prior to their agreement, the  
24 "wholesalers had competed with each other with respect to trade  
25 credit, and the credit terms for individual retailers had varied  
26 substantially." Id. at 644-45. The agreement to eliminate this  
27 practice thus "extinguish[ed] one form of competition among the  
28 sellers" and could be presumed unlawful, even though it did not

1 ultimately require the sellers to set their prices at some  
2 specific, pre-determined level. Id.

3 Like the wholesalers' agreement in Catalano, the agreement  
4 among FBS football and Division I basketball schools not to offer  
5 recruits a share of their licensing revenue eliminates one form of  
6 price competition. Although this agreement may operate to fix  
7 prices indirectly, rather than directly, it is nevertheless  
8 sufficient to satisfy Plaintiffs' initial burden under the rule of  
9 reason. Plaintiffs need not identify an agreement as obviously  
10 unlawful as the wholesalers' agreement in Catalano to establish a  
11 per se violation, let alone to meet the lower burden imposed by  
12 the first step of a rule of reason analysis. See 446 U.S. at 644-  
13 45 ("[W]e have held agreements to be unlawful per se that had  
14 substantially less direct impact on price than the agreement  
15 alleged in this case.").

16 Indeed, in another case involving concerted action by members  
17 of a sports league, then-Judge Sotomayor observed that an  
18 antitrust plaintiff may sometimes meet its burden by identifying  
19 an agreement to fix prices indirectly. See Major League Baseball  
20 Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 337 (2d Cir.  
21 2008) (Sotomayor, J., concurring). In that case, the plaintiff  
22 sought to challenge an agreement among Major League Baseball teams  
23 to license their trademarks and other intellectual property  
24 exclusively through a designated third party called Major League  
25 Baseball Properties (MLBP). The plaintiff alleged that the  
26 agreement violated the Sherman Act because it eliminated price  
27 competition among the teams as suppliers of intellectual property.  
28 A three-judge panel of the Second Circuit rejected this claim,

1 finding that the agreement did not constitute price-fixing. In a  
2 separate concurrence, then-Judge Sotomayor noted that, although  
3 she agreed that the licensing arrangement was lawful, she believed  
4 that the majority had endorsed "an overly formalistic view of  
5 price fixing." Id. at 334. She reasoned, "While the MLB  
6 agreement does not specify a price to be charged, the effect of  
7 the agreement clearly eliminates price competition between the  
8 [teams] for trademark licenses. An agreement to eliminate price  
9 competition from the market is the essence of price fixing." Id.  
10 at 335; see also id. at 336-37 ("In other words, an agreement  
11 between competitors to 'share profits' or to make a third party  
12 the exclusive seller of their competing products that has the  
13 purpose and effect of fixing, stabilizing, or raising prices may  
14 be a per se violation of the Sherman Act, even if no explicit  
15 price is referenced in the agreement."). Then-Judge Sotomayor  
16 also noted that such an agreement could be unlawful, even if it  
17 was only meant to bind members of a joint venture. She explained,

18 [T]he antitrust laws prohibit two companies A  
19 and B, producers of X, from agreeing to set  
20 the price of X. Likewise, A and B cannot  
21 simply get around this rule by agreeing to set  
22 the price of X through a third-party  
23 intermediary or "joint venture" if the purpose  
24 and effect of that agreement is to raise,  
25 depress, fix, peg, or stabilize the price of  
26 X.

27 Id. at 336.<sup>9</sup> Although she ultimately concluded that the MLB  
28 agreement served a procompetitive purpose, because it increased

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26 <sup>9</sup> The Supreme Court recently relied on this language from then-  
27 Judge Sotomayor's concurrence in another Sherman Act case involving a  
28 challenge to concerted action by members of a sports league. American  
Needle, 560 U.S. at 202 ("[C]ompetitors 'cannot simply get around'  
antitrust liability by acting 'through a third-party intermediary or

1 the total number of licenses sold, her opinion nevertheless  
2 illustrates that price-fixing agreements take many forms and may  
3 be unlawful even if they are implemented by members of a joint  
4 venture.

5 Although Plaintiffs have characterized FBS football and  
6 Division I basketball schools as sellers in the market for  
7 educational and athletic opportunities, in their post-trial brief  
8 they argued that the schools could alternatively be characterized  
9 as buyers in a market for recruits' athletic services and  
10 licensing rights. The relevant market would be that for the  
11 recruitment of the highest ranked male high school football and  
12 basketball players each year. Viewed from this perspective,  
13 Plaintiffs' antitrust claim arises under a theory of monopsony,  
14 rather than monopoly, alleging an agreement to fix prices among  
15 buyers rather than sellers. Such an agreement, if proven, would  
16 violate § 1 of the Sherman Act just as a price-fixing agreement  
17 among sellers would. See generally Omnicare, Inc. v. UnitedHealth  
18 Grp., Inc., 629 F.3d 697, 705 (7th Cir. 2011) ("Ordinarily, price-  
19 fixing agreements exist between sellers who collude to set their  
20 prices above or below prevailing market prices. But buyers may  
21 also violate § 1 by forming what is sometimes known as a 'buyers'  
22 cartel.'"); Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601  
23 (7th Cir. 1984) ("Just as a sellers' cartel enables the charging  
24 of monopoly prices, a buyers' cartel enables the charging of  
25 monopsony prices; and monopoly and monopsony are symmetrical  
26 distortions of competition from an economic standpoint."

27  
28 'joint venture.'") (quoting Salvino, 542 F.3d at 336 (Sotomayor, J.,  
concurring)).

1 (citations omitted)). The Supreme Court has noted that the  
2 "kinship between monopoly and monopsony suggests that similar  
3 legal standards should apply to claims of monopolization and to  
4 claims of monopsonization." Weyerhaeuser Co. v. Ross-Simmons  
5 Hardwood Lumber Co., Inc., 549 U.S. 312, 322 (2007) (citing Roger  
6 G. Noll, "'Buyer Power' and Economic Policy," 72 Antitrust L.J.  
7 589, 591 (2005)).

8 In recent years, several courts have specifically recognized  
9 that monopsonistic practices in a market for athletic services may  
10 provide a cognizable basis for relief under the Sherman Act. See,  
11 e.g., Rock, 2013 WL 4479815, at \*11 (finding that plaintiff had  
12 identified a cognizable market in which "buyers of labor (the  
13 schools) are all members of NCAA Division I football and are  
14 competing for the labor of the sellers (the prospective student-  
15 athletes who seek to play Division I football)"); In re NCAA I-A  
16 Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1150 (W.D.  
17 Wash. 2005) ("Plaintiffs have alleged a sufficient 'input' market  
18 in which NCAA member schools compete for skilled amateur football  
19 players."). Indeed, the Seventh Circuit recently noted in Agnew  
20 that the "proper identification of a labor market for student-  
21 athletes . . . would meet plaintiffs' burden of describing a  
22 cognizable market under the Sherman Act." 683 F.3d at 346. Given  
23 that Plaintiffs' alternative monopsony theory mirrors their  
24 monopoly price-fixing theory, the evidence presented and facts  
25 found above are sufficient to establish a restraint of trade in a  
26 market for recruits' athletic services just as they are to  
27 establish a restraint of trade in the college education market.  
28 As explained above, viewed from this perspective, the sellers in

1 this market are the recruits; the buyers are FBS football and  
2 Division I basketball schools; the product is the combination of  
3 the recruits' athletic services and licensing rights; and the  
4 restraint is the agreement among schools not to offer any recruit  
5 more than the value of a full grant-in-aid. In the absence of  
6 this restraint, schools would compete against one another by  
7 offering to pay more for the best recruits' athletic services and  
8 licensing rights -- that is, they would engage in price  
9 competition.

10 The NCAA argues that Plaintiffs cannot prevail under a  
11 monopsony theory because they have not presented evidence of an  
12 impact on price or output in a "downstream market." Trial Tr.  
13 2766:16-:22 (Stiroh). They cite Dr. Stiroh's testimony that the  
14 only way that a restraint on an input market -- such as a market  
15 for recruits' athletic services and licensing rights -- can give  
16 rise to an anticompetitive harm is if that restraint ultimately  
17 harms consumers by reducing output or raising prices in a  
18 downstream market. Whatever merit Dr. Stiroh's views might have  
19 among economists, they are not supported by the relevant case law.  
20 The Supreme Court has indicated that monopsonistic practices that  
21 harm suppliers may violate antitrust law even if they do not  
22 ultimately harm consumers. In Mandeville Island Farms v. Am.  
23 Crystal Sugar Co., 334 U.S. 219 (1948), the Supreme Court  
24 considered whether an agreement among sugar refiners to fix the  
25 prices they paid for sugar beets constituted a violation of the  
26 Sherman Act. It concluded that "the agreement is the sort of  
27 combination condemned by the Act, even though the price-fixing was  
28 by purchasers, and the persons specially injured . . . are

1 sellers, not customers or consumers." Id. at 235. Notably, the  
2 Court reached this conclusion despite a vehement dissent from  
3 Justice Jackson noting that the price of sugar had not been  
4 affected by the refiners' agreement. Id. at 247. The majority's  
5 decision, thus, "strongly suggests that suppliers . . . are  
6 protected by antitrust laws even when the anti-competitive  
7 activity does not harm end-users." Telecor Communications, Inc.  
8 v. Sw. Bell Tel. Co., 305 F.3d 1124, 1134 (10th Cir. 2002); see  
9 also Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988  
10 (9th Cir. 2000) ("The Supreme Court's references to the goals of  
11 achieving 'the lowest prices, the highest quality and the greatest  
12 material progress' and of 'assur[ing] customers the benefits of  
13 price competition' do not mean that conspiracies among buyers to  
14 depress acquisition prices are tolerated. Every precedent in the  
15 field makes clear that the interaction of competitive forces, not  
16 price-rigging, is what will benefit consumers." (emphasis added)).

17 This is consistent with a long line of cases, including some  
18 decided by the Ninth Circuit, recognizing that restraints on  
19 competition within a labor market may give rise to an antitrust  
20 violation under § 1 of the Sherman Act. See, e.g., Anderson v.  
21 Shipowners' Ass'n, 272 U.S. 359, 365 (1926) (holding that a multi-  
22 employer agreement among ship owners restrained trade in a labor  
23 market for sailors); Todd v. Exxon Corp., 275 F.3d 191, 201 (2d  
24 Cir. 2001) (Sotomayor, J.) (holding that a conspiracy among oil  
25 industry employers to set salaries at "artificially low levels"  
26 restrained trade in a labor market and noting that "a horizontal  
27 conspiracy among buyers [of labor] to stifle competition is as  
28 unlawful as one among sellers"); Ostrofe v. H.S. Crocker Co.,



1 Inc., 740 F.2d 739, 740 (9th Cir. 1984) (holding that a multi-  
2 employer agreement in the paper lithograph label industry may  
3 restrain trade in a "market for personal services"). It is also  
4 consistent with the many recent cases, some of which are cited  
5 above, recognizing the validity of antitrust claims against the  
6 NCAA based on anticompetitive harms in a labor market. See, e.g.,  
7 Agnew, 683 F.3d at 346 (recognizing that the NCAA's scholarship  
8 rules may restrain trade in a "labor market for student-athletes"  
9 and noting that "labor markets are cognizable under the Sherman  
10 Act"); Law v. NCAA, 134 F.3d 1010, 1015 (10th Cir. 1998) (finding  
11 that an NCAA rule capping compensation for entry-level coaches  
12 restrained trade in a "labor market for coaching services" and  
13 noting that "[l]ower prices cannot justify a cartel's control of  
14 prices charged by suppliers, because the cartel ultimately robs  
15 the suppliers of the normal fruits of their enterprises"); In re  
16 NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d at 1150  
17 (recognizing that the NCAA's scholarship rules may restrain trade  
18 in an "'input' market in which NCAA member schools compete for  
19 skilled amateur football players"). In fact, a court in the  
20 Southern District of Indiana recently rejected the NCAA's argument  
21 that a student-athlete would need to plead a "'market-wide impact  
22 on the price or output of any commercial product'" in order to  
23 state a valid Sherman Act claim challenging its former prohibition  
24 on multi-year football scholarships. Rock, 2013 WL 4479815, at  
25 \*14 (S.D. Ind.) (quoting NCAA's brief). The court in that case  
26 found that the student-athlete's complaint "adequately plead[]  
27 anticompetitive effects of the challenged bylaws" in the  
28 "'nationwide market for the labor of Division I football student

1 athletes'" based on his allegations that, in the absence of the  
2 challenged scholarship rules, the schools competing for his  
3 services would have offered him a multi-year scholarship. Id. at  
4 \*3, \*15 (quoting complaint). The court specifically noted that  
5 the plaintiff had identified a cognizable harm to competition by  
6 alleging that removing the challenged restraint would "would force  
7 the schools to 'compete' for recruits." Id. at \*15. Plaintiffs  
8 here have presented sufficient evidence to show an analogous  
9 anticompetitive effect in a similar labor market. Accordingly,  
10 they have shown a cognizable harm to competition under the rule of  
11 reason.

12 The Court notes that Plaintiffs had not articulated a  
13 monopsony theory prior to trial. Their expert addressed it at  
14 trial in response to the Court's questions. For this reason, the  
15 Court has addressed Plaintiffs' monopoly theory in greater detail.  
16 However, Plaintiffs presented significant evidence to support a  
17 monopsony theory during trial. Both sides discussed the theory at  
18 length in their post-trial briefs. The evidence presented at  
19 trial and the facts found here, as well as the law, support both  
20 theories. The NCAA is not prejudiced by alternative reliance on a  
21 monopsony theory.

22 B. Group Licensing Market

23 Plaintiffs also allege that the NCAA has restrained  
24 competition in three specific national submarkets of a broader  
25 national group licensing market: namely, the submarkets for group  
26 licenses to use student-athletes' names, images, and likenesses in  
27 (1) live game telecasts, (2) videogames, and (3) game re-

28

1 broadcasts, highlight clips, and other archival footage. The  
2 Court addresses each of these submarkets separately.

3 1. Submarket for Group Licenses to Use Student-  
4 Athletes' Names, Images, and Likenesses in Live  
5 Game Telecasts

6 As noted above, television networks compete for the rights to  
7 telecast live FBS football and Division I basketball games. In  
8 order to secure these rights, networks typically purchase licenses  
9 to use the intellectual property of the participating schools and  
10 conferences during the game telecast as well as the names, images,  
11 and likenesses of the participating student-athletes.<sup>10</sup> Because  
12 student-athletes are not permitted by NCAA rules to license the  
13 rights to use their names, images, and likenesses, the networks  
14 deal exclusively with schools and conferences when acquiring the  
15 student-athletes' rights.

16 As the Court found above, in the absence of the NCAA's  
17 restrictions on student-athlete compensation, student-athletes on  
18 certain FBS football and Division I basketball teams would be able  
19 to sell group licenses for the use of their names, images, and  
20 likenesses to television networks. They would either sell those  
21 licenses to the television networks directly or do so through some  
22 intermediate buyer -- such as their school or a third-party  
23 licensing company -- which would bundle the group license with  
24 other intellectual property and performance rights and sell the

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25 <sup>10</sup> As discussed in the findings of fact, when a third party -- such  
26 as a bowl committee or the NCAA itself -- has organized a particular  
27 athletic event, the networks may also purchase a separate license from  
28 that party to use its intellectual property during the telecast.  
Because these transactions do not involve the transfer of rights to use  
student-athletes' names, images, and likenesses, they are not relevant  
to this discussion.

1 full bundle of rights to the network. Regardless of whether the  
2 student-athletes would sell their group licenses to the networks  
3 directly or through some intermediate buyer, however, a submarket  
4 for such group licenses would exist.

5 The NCAA denies that such a market exists as a matter of law.  
6 It argues that the First Amendment and certain state laws preclude  
7 student-athletes from asserting any rights of publicity in the use  
8 of their names, images, and likenesses during live game telecasts.  
9 The Court has previously rejected this argument. See April 11,  
10 2014 Order at 21. Furthermore, even if some television networks  
11 believed that student-athletes lacked publicity rights in the use  
12 of their names, images, and likenesses, they may have still sought  
13 to acquire these rights as a precautionary measure. Businesses  
14 often negotiate licenses to acquire uncertain rights. See C.B.C.  
15 Distribution & Mktg., Inc. v. Major League Baseball Advanced  
16 Media, L.P., 505 F.3d 818, 826 (8th Cir. 2007) (Colloton, J.,  
17 dissenting) ("CBC surely can 'agree,' as a matter of good business  
18 judgment, to bargain away any uncertain First Amendment rights  
19 that it may have in exchange for the certainty of what it  
20 considers to be an advantageous contractual arrangement."); Hynix  
21 Semiconductors, Inc. v. Rambus, Inc., 2006 WL 1991760, at \*4 (N.D.  
22 Cal.) (crediting expert testimony that "a negotiating patentee and  
23 licensee generally agree to a lower royalty rate if there is  
24 uncertainty as to whether the patents are actually valid and  
25 infringed"). The NCAA's argument does not undermine Plaintiffs'  
26 evidence of the existence of a national submarket for group  
27 licenses.  
28

1 That said, Plaintiffs have not identified any harm to  
2 competition in this submarket. As previously noted, an "essential  
3 element of a Section 1 violation under the rule of reason is  
4 injury to competition in the relevant market." Alliance Shippers,  
5 Inc. v. S. Pac. Transp. Co., 858 F.2d 567, 570 (9th Cir. 1988).  
6 That injury must go "beyond the impact on the claimant" and reach  
7 "a field of commerce in which the claimant is engaged." Austin v.  
8 McNamara, 979 F.2d 728, 738 (9th Cir. 1992) (citations and  
9 quotation marks omitted); see also Sicor Ltd. v. Cetus Corp., 51  
10 F.3d 848, 854 (9th Cir. 1995) ("Under the rule of reason approach,  
11 the plaintiff must show an injury to competition, rather than just  
12 an injury to plaintiff's business." (emphasis in original;  
13 citations and quotation marks omitted)). While Plaintiffs have  
14 shown that the NCAA's challenged rules harm student-athletes by  
15 depriving them of compensation that they would otherwise receive,  
16 they have not shown that this harm results from a restraint on  
17 competition in the group licensing market. In particular, they  
18 have failed to show that the challenged rules hinder competition  
19 among any potential buyers or sellers of group licenses.

20 The sellers in this market would be the student-athletes.  
21 Plaintiffs have not presented any evidence to show that, in the  
22 absence of the challenged restraint, teams of student-athletes  
23 would actually compete against one another to sell their group  
24 licenses. In fact, the evidence in the record strongly suggests  
25 that such competition would not occur. This is because any  
26 network that seeks to telecast a particular athletic event would  
27 have to obtain a group license from every team that could  
28 potentially participate in that event. For instance, a network

1 seeking to telecast a conference basketball tournament would have  
2 to obtain group licenses from all of the teams in that conference.  
3 Under those circumstances, none of the teams in the conference  
4 would compete against each other as sellers of group licenses  
5 because the group licenses would constitute perfect complements:  
6 that is, every group license would have to be sold in order for  
7 any single group license to have value. See generally Herbert  
8 Hovenkamp, "Implementing Antitrust's Welfare Goals," 81 Fordham L.  
9 Rev. 2471, 2487 (2013) ("Perfect complements are goods that are  
10 invariably used together -- or, more technically, situations in  
11 which one good has no value unless it can be consumed together  
12 with the other good."). At the same time, the teams in that  
13 conference would never have to compete with teams outside of the  
14 conference because those teams -- as non-participants in the  
15 conference tournament -- would not be able to sell their group  
16 licenses with respect to that event in the first place. Thus, in  
17 this scenario, teams of student-athletes would never actually  
18 compete against each other as sellers of group licenses, even if  
19 the challenged NCAA rules no longer existed.

20 The same outcome would result whenever any network sought to  
21 telecast any other FBS football and Division I basketball event.  
22 Although the specific set of group licenses required for each  
23 event would vary, the lack of competition among student-athlete  
24 teams would remain constant: in every case, the network would need  
25 to acquire group licenses from a specific set of teams, none of  
26 which would have any incentive to compete either against each  
27 other or against any teams whose group licenses were not required  
28 for the telecast. These conditions would hold regardless of

1 whether the student-athlete teams sold their group licenses to the  
2 television networks directly or through some intermediary, such as  
3 their schools, because the demand for group licenses would be  
4 dictated primarily by the identity of the teams eligible to  
5 participate in each event. To the extent that entire conferences  
6 might compete against each other in order to secure a specific  
7 telecasting contract with a particular network, the challenged  
8 NCAA rules do not inhibit this type of competition. Conferences  
9 are already free to compete against each other in this way. So,  
10 too, are any individual pairs of schools whose teams are scheduled  
11 to play against each other in specific regular season games. Like  
12 the conferences, these pairs may freely compete against other  
13 pairs of schools whose games are scheduled for the same time in  
14 order to secure a contract with whatever networks can show games  
15 during that time slot.<sup>11</sup> In any event, Plaintiffs have not  
16 presented sufficient evidence to show that student-athlete teams  
17 would actually compete against each other in any of these ways if  
18 they were permitted to sell group licenses to use their names,  
19 images, and likenesses.

20 Plaintiffs have also failed to identify any situation in  
21 which buyers of group licenses might compete against each other.  
22 As noted above, there are two sets of potential buyers in this  
23 market: the television networks, which would buy group licenses  
24 directly from the student-athlete teams, and intermediate buyers,

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25  
26 <sup>11</sup> The evidence presented at trial suggests that most telecasting  
27 contracts, even for regular season games, are negotiated at the  
28 conference-wide level -- not the individual team level. Nevertheless,  
the Court notes that the challenged rules would not suppress competition  
in this market even if contracts to telecast regular season games were  
negotiated at the individual team level.

1 which would bundle those licenses with other rights and sell those  
2 bundles of rights to the networks. The first set of potential  
3 buyers -- the television networks -- already compete freely  
4 against one another for the rights to use student-athletes' names,  
5 images, and likenesses in live game telecasts. Although they may  
6 not be able to purchase these rights directly from the student-  
7 athletes, they nevertheless compete to acquire these rights from  
8 other sources, such as schools and conferences. The fact that the  
9 networks do not compete to purchase these rights directly from the  
10 student-athletes is due to the assurances by the schools,  
11 conferences, and NCAA that they have the authority to grant these  
12 rights. Such assurances might constitute conversion by the  
13 schools of the student-athletes' rights, or otherwise be unlawful,  
14 but they are not anticompetitive because they do not inhibit any  
15 form of competition that would otherwise exist.<sup>12</sup> Allowing  
16 student-athletes to seek compensation for group licenses would not  
17 increase the number of television networks in the market or  
18 otherwise enhance competition among them.

19 Nor would it increase competition among any potential  
20 intermediate buyers in this market, such as third-party licensing  
21 companies and schools. Third-party licensing companies are, like  
22 television networks, already free to compete against one another  
23 to acquire the rights to use student-athletes' names, images, and  
24 likenesses in live game telecasts. They may be barred from  
25

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26 <sup>12</sup> Plaintiffs voluntarily dismissed all of their claims against the  
27 NCAA for "individual damages, disgorgement of profits, and an  
28 accounting." Docket No. 198, Stip. Dismissal, at 2. They also  
dismissed their claims for unjust enrichment. Accordingly, the Court  
does not consider these claims here.



1 purchasing these rights directly from the student-athletes but  
2 they are not barred from competing to acquire these rights through  
3 other channels.

4 Unlike television networks and third-party licensing  
5 companies, schools do not currently compete for group licenses to  
6 use student-athletes' names, images, and likenesses in live game  
7 telecasts. This lack of competition, however, does not stem  
8 solely from the challenged restraint. Even if the restraint were  
9 lifted, each school would still only be able to purchase group  
10 licenses from its own student-athletes because those are the only  
11 licenses that the school could bundle with its own intellectual  
12 property rights for sale to a network. No school would be able to  
13 purchase a marketable group license from student-athletes at  
14 another school. To the extent that schools do compete against one  
15 another for the rights to use individual student-athletes' names,  
16 images, and likenesses, they do so only as sellers in the college  
17 education market or consumers in the market for recruits' athletic  
18 services and licensing rights. They do not compete as buyers in  
19 the market for group licenses.

20 Accordingly, Plaintiffs have failed to show that the  
21 challenged NCAA rules harm competition in this submarket.  
22 Although they have presented sufficient evidence to establish that  
23 they were injured by the NCAA's conduct, as noted above, "[i]njury  
24 to an antitrust plaintiff is not enough to prove injury to  
25 competition." O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d  
26 1464, 1469 (9th Cir. 1986). Plaintiffs have shown an injury to  
27 competition only in the college education market or the market for  
28 recruits' athletic services and licensing rights.

1                   2.     Submarket for Group Licenses to Use Student-  
2                   Athletes' Names, Images, and Likenesses in  
3                   Videogames

4                   Plaintiffs have presented sufficient evidence to establish  
5                   that, absent the challenged NCAA rules, a national submarket would  
6                   exist in which videogame developers would compete for group  
7                   licenses to use student-athletes' names, images, and likenesses.  
8                   This submarket is analogous to the live telecasting submarket  
9                   discussed above. As in that submarket, the sellers of group  
10                  licenses in the videogame submarket would be student-athletes on  
11                  certain FBS football and Division I basketball teams. The buyers  
12                  would either be videogame developers or intermediate buyers who  
13                  would bundle the student-athletes' rights with other parties'  
14                  rights and sell those bundles to videogame developers.

15                  The NCAA contends that, even if student-athletes were  
16                  permitted to receive compensation for the use of their names,  
17                  images, and likenesses, this submarket would not exist. It notes  
18                  that it and some of its member conferences recently decided to  
19                  stop licensing their intellectual property for use in videogames.  
20                  Without access to this intellectual property, the NCAA argues,  
21                  videogame developers cannot develop marketable videogames and,  
22                  thus, would not seek to purchase group licenses from student-  
23                  athletes.

24                  This argument overstates the significance of the decisions of  
25                  the NCAA and some of its member conferences not to license their  
26                  intellectual property to videogame developers. To begin with,  
27                  videogame developers do not need the intellectual property rights  
28                  of both the NCAA and all of its conferences in order to produce a  
                    college sports videogame. If a sufficient number of schools and

1 conferences were willing to license their intellectual property  
2 for use in videogames, a submarket for student-athletes' group  
3 licenses would likely exist. Indeed, Mr. Linzner specifically  
4 testified at trial that EA remains interested in acquiring the  
5 rights to use student-athletes' names, images, and likenesses and  
6 would seek to acquire them if not for the NCAA's challenged rules  
7 and the present litigation. This testimony suggests that the  
8 recent decisions of the NCAA and some of its conferences not to  
9 license their intellectual property has not permanently eliminated  
10 the demand for group licenses to use student-athletes' names,  
11 images, and likenesses.<sup>13</sup> Accordingly, these decisions -- which  
12 could have been adopted due to this litigation and could be  
13 reversed at any time -- do not establish the lack of a videogame  
14 submarket.

15 Nevertheless, Plaintiffs have not identified any injury to  
16 competition within this submarket. Just as in the live  
17 telecasting submarket, the ultimate buyers in this submarket --  
18 videogame developers -- would need to acquire group licenses from  
19 a specific set of teams in order to create their product. This  
20 set might include all of the teams within Division I, all of the  
21 teams within the major conferences, or some other set of teams

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22 <sup>13</sup> The NCAA's other argument -- that videogame developers would not  
23 need to acquire group licenses because their use of student-athletes'  
24 names, images, and likenesses is protected under the First Amendment --  
25 was rejected by the Ninth Circuit earlier in this litigation. In re  
26 NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268,  
27 1284 (9th Cir. 2013) (concluding that "EA's use of the likenesses of  
28 college athletes like Samuel Keller in its video games is not, as a  
matter of law, protected by the First Amendment"); see also Hart v.  
Electronic Arts, Inc., 717 F.3d 141, 170 (3d Cir. 2013) (holding that  
"the NCAA Football 2004, 2005 and 2006 games at issue in this case do  
not sufficiently transform Appellant's identity to escape the right of  
publicity claim").

1 that the videogame developer believed would be necessary to  
2 produce a marketable product. Regardless of which teams were  
3 included within that set, those teams would not compete against  
4 each other as sellers of group licenses, even in the absence of  
5 the challenged rules, because they would all share an interest in  
6 ensuring that the videogame developer acquired each of the group  
7 licenses required to create its product. These teams would also  
8 not compete against any teams outside of the set because the  
9 videogame developer determined that those other teams' group  
10 licenses were not required to produce the videogame. Indeed,  
11 competition between teams (or conferences) is even less likely in  
12 the videogame submarket than the live telecasting submarket  
13 because videogame developers -- unlike television networks -- are  
14 not constrained by the number of group licenses that they could  
15 use to produce their product. The evidence presented at trial  
16 demonstrates that videogame companies could, and often did,  
17 feature nearly every FBS football and Division I basketball team  
18 in their videogames. Under these circumstances, competition among  
19 individual teams and conferences to sell group licenses is  
20 extremely unlikely. And, to the extent that it happens (or would  
21 happen), it is not restrained by the challenged NCAA restrictions  
22 on student-athlete compensation. Thus, just as with the live  
23 telecasting submarket, the challenged rules do not suppress  
24 competition in this submarket.

1                   3.     Submarket for Group Licenses to Use Student-  
2                   Athletes' Names, Images, and Likenesses in Game Re-  
3                   Broadcasts, Highlight Clips, and Other Archival  
4                   Footage

5                   Plaintiffs allege that the NCAA's challenged rules impose  
6                   restraints on a national submarket for group licenses to use  
7                   student-athletes' names, images, and likenesses in game re-  
8                   broadcasts, highlight clips, and other archival game footage, both  
9                   for entertainment and to advertise products. However, they have  
10                  not presented sufficient evidence to show that the NCAA has  
11                  imposed any restraints in this submarket. As found above, the  
12                  undisputed evidence shows that the NCAA has designated a third-  
13                  party agent to negotiate and manage all licensing related to its  
14                  archival footage. That third-party agent, T3Media, is expressly  
15                  prohibited from licensing any footage that features current  
16                  student-athletes. It is also contractually required to obtain the  
17                  rights to use the names, images, and likenesses of any former  
18                  student-athletes who appear in footage that it has licensed.  
19                  Thus, under this arrangement, no current or former student-  
20                  athletes are actually deprived of any compensation for game re-  
21                  broadcasts or other archival footage that they would otherwise  
22                  receive in the absence of the challenged NCAA rules. What's more,  
23                  even if Plaintiffs had made such a showing, they have not  
24                  presented sufficient evidence to show an injury to competition in  
25                  this submarket. In order to license all of the footage in the  
26                  NCAA's archives, T3Media would have to obtain a group license from  
27                  every team that has ever competed in FBS or Division I. These  
28                  teams, once again, would have no incentive to compete against each

1 other in selling their group licenses. Enjoining the NCAA from  
2 enforcing its challenged rules would not change that.

### 3 III. Procompetitive Justifications

4 Because Plaintiffs have presented sufficient evidence to show  
5 that the NCAA's rules impose a restraint on competition in the  
6 college education market, the Court must determine whether that  
7 restraint is justified. In making this determination, it must  
8 consider whether the "anticompetitive aspects of the challenged  
9 practice outweigh its procompetitive effects." Paladin  
10 Associates, 328 F.3d at 1156.

11 The NCAA has asserted four procompetitive justifications for  
12 its rules barring student-athletes from receiving compensation for  
13 the use of their names, images, and likenesses: (1) the  
14 preservation of amateurism in college sports; (2) promoting  
15 competitive balance among FBS football and Division I basketball  
16 teams; (3) the integration of academics and athletics; and (4) the  
17 ability to generate greater output in the relevant markets. The  
18 Court considers each of these procompetitive justifications in  
19 turn.

#### 20 A. Amateurism

21 As noted in the findings of fact, the NCAA asserts that its  
22 restrictions on student-athlete compensation are necessary to  
23 preserve the amateur tradition and identity of college sports. It  
24 contends that this tradition and identity contribute to the  
25 popularity of college sports and help distinguish them from  
26 professional sports and other forms of entertainment in the  
27 marketplace. For support, it points to historical evidence of its  
28 commitment to amateurism, recent consumer opinion surveys, and

1 testimony from various witnesses regarding popular perceptions of  
2 college sports. Although this evidence could justify some limited  
3 restrictions on student-athlete compensation, it does not justify  
4 the specific restrictions challenged in this case. In particular,  
5 it does not justify the NCAA's sweeping prohibition on FBS  
6 football and Division I basketball players receiving any  
7 compensation for the use of their names, images, and likenesses.

8 Although the NCAA has cited the Supreme Court's decision in  
9 Board of Regents as support for its amateurism justification, its  
10 reliance on the case remains unavailing. As explained in previous  
11 orders, Board of Regents addressed limits on television  
12 broadcasting, not payments to student-athletes, and "does not  
13 stand for the sweeping proposition that student-athletes must be  
14 barred, both during their college years and forever thereafter,  
15 from receiving any monetary compensation for the commercial use of  
16 their names, images, and likenesses." Oct. 25, 2013 Order at 15.  
17 The Supreme Court's suggestion in Board of Regents that, in order  
18 to preserve the quality of the NCAA's product, student-athletes  
19 "must not be paid," 468 U.S. at 102, was not based on any factual  
20 findings in the trial record and did not serve to resolve any  
21 disputed issues of law. In fact, the statement ran counter to the  
22 assertions of the NCAA's own counsel in the case, who stated  
23 during oral argument that the NCAA was not relying on amateurism  
24 as a procompetitive justification and "might be able to get more  
25 viewers and so on if it had semi-professional clubs rather than  
26 amateur clubs." Oral Arg. Tr. at 25, Board of Regents, 468 U.S.  
27 85. He further argued, "When the NCAA says, we are running  
28 programs of amateur football, it is probably reducing its net

1 profits." Id. (emphasis added); see also id. ("The NCAA might be  
2 able to increase its intake if it abolished or reduced the  
3 academic standards that its players must meet."). Plaintiffs have  
4 also presented ample evidence here to show that the college sports  
5 industry has changed substantially in the thirty years since Board  
6 of Regents was decided. See generally Banks v. NCAA, 977 F.2d  
7 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and  
8 dissenting in part) ("The NCAA continues to purvey, even in this  
9 case, an outmoded image of intercollegiate sports that no longer  
10 jibes with reality. The times have changed."). Accordingly, the  
11 Supreme Court's incidental phrase in Board of Regents does not  
12 establish that the NCAA's current restraints on compensation are  
13 procompetitive and without less restrictive alternatives.

14 The historical record that the NCAA cites as evidence of its  
15 longstanding commitment to amateurism is unpersuasive. This  
16 record reveals that the NCAA has revised its rules governing  
17 student-athlete compensation numerous times over the years,  
18 sometimes in significant and contradictory ways. Rather than  
19 evincing the association's adherence to a set of core principles,  
20 this history documents how malleable the NCAA's definition of  
21 amateurism has been since its founding.

22 The association's current rules demonstrate that, even today,  
23 the NCAA does not consistently adhere to a single definition of  
24 amateurism. A Division I tennis recruit can preserve his amateur  
25 status even if he accepts ten thousand dollars in prize money the  
26 year before he enrolls in college. A Division I track and field  
27 recruit, however, would forfeit his athletic eligibility if he did  
28 the same. Similarly, an FBS football player may maintain his



1 amateur status if he accepts a Pell grant that brings his total  
2 financial aid package above the cost of attendance. But the same  
3 football player would no longer be an amateur if he were to  
4 decline the Pell grant and, instead, receive an equivalent sum of  
5 money from his school for the use of his name, image, and likeness  
6 during live game telecasts. Such inconsistencies are not  
7 indicative of "core principles."

8         Nonetheless, some restrictions on compensation may still  
9 serve a limited procompetitive purpose if they are necessary to  
10 maintain the popularity of FBS football and Division I basketball.  
11 If the challenged restraints actually play a substantial role in  
12 maximizing consumer demand for the NCAA's products --  
13 specifically, FBS football and Division I basketball telecasts,  
14 re-broadcasts, ticket sales, and merchandise -- then the  
15 restrictions would be procompetitive. See Board of Regents, 468  
16 U.S. at 120 (recognizing that "maximiz[ing] consumer demand for  
17 the product" is a legitimate procompetitive justification).  
18 Attempting to make this showing, the NCAA relies on consumer  
19 opinion surveys, including the survey it commissioned from Dr.  
20 Dennis specifically for this case. As noted above, however, this  
21 survey -- which contained several methodological flaws and did not  
22 ask respondents about the specific restraints challenged in this  
23 case -- does not provide reliable evidence that consumer interest  
24 in FBS football and Division I basketball depends on the NCAA's  
25 current restrictions on student-athlete compensation. Further,  
26 Plaintiffs offered evidence demonstrating that such surveys are  
27 inevitably a poor tool for accurately predicting consumer  
28 behavior. Dr. Rascher highlighted various polls and surveys which

1 documented widespread public opposition to rule changes that  
2 ultimately led to increased compensation for professional baseball  
3 players and Olympic athletes even as Major League Baseball and the  
4 IOC were experiencing periods of massive revenue growth. This  
5 evidence counsels strongly against giving any significant weight  
6 to Dr. Dennis's survey results. What Dr. Dennis's survey does  
7 suggest is that the public's attitudes toward student-athlete  
8 compensation depend heavily on the level of compensation that  
9 student-athletes would receive. This is consistent with the  
10 testimony of the NCAA's own witnesses, including Mr. Muir and Mr.  
11 Pilson, who both indicated that smaller payments to student-  
12 athletes would bother them less than larger payments.

13       Ultimately, the evidence presented at trial suggests that  
14 consumer demand for FBS football and Division I basketball-related  
15 products is not driven by the restrictions on student-athlete  
16 compensation but instead by other factors, such as school loyalty  
17 and geography. Mr. Pilson explained that college sports tend to  
18 be more popular in places where college teams are located.

19 Similarly, Ms. Plonsky noted that popular interest in college  
20 sports was driven principally by the loyalty of local fans and  
21 alumni. She testified, "I would venture to say that if we [UT]  
22 offered a tiddlywinks team, that would somehow be popular with  
23 some segment of whoever loves our university." Trial Tr. 1414:25-  
24 1415:2.

25       The Court therefore concludes that the NCAA's restrictions on  
26 student-athlete compensation play a limited role in driving  
27 consumer demand for FBS football and Division I basketball-related  
28 products. Although they might justify a restriction on large

1 payments to student-athletes while in school, they do not justify  
2 the rigid prohibition on compensating student-athletes, in the  
3 present or in the future, with any share of licensing revenue  
4 generated from the use of their names, images, and likenesses.

5 B. Competitive Balance

6 The NCAA asserts that its challenged rules are justified by  
7 the need to maintain the current level of competitive balance  
8 among its FBS football and Division I basketball teams in order to  
9 maintain their popularity. This Court has previously recognized  
10 that a sports league's efforts to achieve the optimal competitive  
11 balance among its teams may serve a procompetitive purpose if  
12 promoting such competitive balance increases demand for the  
13 league's product. See April 11, 2014 Order at 33; American  
14 Needle, 560 U.S. at 204 ("We have recognized, for example, 'that  
15 the interest in maintaining a competitive balance' among 'athletic  
16 teams is legitimate and important.'" (citing Board of Regents, 468  
17 U.S. at 117)). As the Supreme Court has explained, the  
18 "hypothesis that legitimates the maintenance of competitive  
19 balance as a procompetitive justification under the Rule of Reason  
20 is that equal competition will maximize consumer demand for the  
21 product." Board of Regents, 468 U.S. at 119-20.

22 Here, the NCAA has not presented sufficient evidence to show  
23 that its restrictions on student-athlete compensation actually  
24 have any effect on competitive balance, let alone produce an  
25 optimal level of competitive balance. The consensus among sports  
26 economists who have studied the issue, as summarized by Drs. Noll  
27 and Rascher, is that the NCAA's current restrictions on  
28 compensation do not have any effect on competitive balance.

1 Although Dr. Rubinfeld disagreed with this conclusion, he could  
2 not identify another economist who shared his view and did not  
3 offer any testimony to rebut the specific findings of the academic  
4 literature cited by Drs. Noll and Rascher. When the Court asked  
5 him whether his opinions were based on any academic literature,  
6 Dr. Rubinfeld directed the Court to the economic articles cited in  
7 his most recent report on competitive balance. But none of the  
8 articles cited in that report found that the NCAA's restrictions  
9 on student-athlete compensation promote competitive balance. In  
10 fact, the only article his report cited that actually examined  
11 competitive balance in college sports was a 2004 article by Katie  
12 Baird, which Dr. Noll quoted during his testimony. As Dr. Noll  
13 testified, that article concluded, "[L]ittle evidence supports  
14 the claim that NCAA regulations help level the playing field. At  
15 best, they appear to have had a very limited effect, and at worst  
16 they have served to strengthen the position of the dominant  
17 teams.'" Trial Tr. 230:18-231:11 (quoting Baird article). Dr.  
18 Rubinfeld's independent analysis of competitive balance was also  
19 unpersuasive because it did not show a causal link between the  
20 NCAA's challenged rules and competitive balance. More  
21 importantly, his analysis did not show that consumer demand for  
22 the NCAA's product would decrease if FBS football or Division I  
23 basketball teams were less competitively balanced than they  
24 currently are. As found above, the popularity of college sports  
25 is driven primarily by factors such as school loyalty and  
26 geography. Neither of these is dependent on competitive balance.

27 In its post-trial brief, the NCAA cites a passage from Board  
28 of Regents which states that the district court in that case found

1 that the NCAA's "restrictions designed to preserve amateurism"  
2 served to promote competitive balance. 468 U.S. at 119 (citing  
3 district court order, 546 F. Supp. 1276, 1296, 1309-10 (W.D. Okla.  
4 1982)). That factual finding is not binding on this Court and,  
5 more importantly, is contrary to the evidence presented in this  
6 case. The record in this case shows that revenues from FBS  
7 football and Division I basketball have grown exponentially since  
8 Board of Regents was decided and that, as a result of this growth,  
9 many schools have invested more heavily in their recruiting  
10 efforts, athletic facilities, dorms, coaching, and other amenities  
11 designed to attract the top student-athletes. This trend, which  
12 several witnesses referred to as an "arms race," has likely  
13 negated whatever equalizing effect the NCAA's restraints on  
14 student-athlete compensation might have once had on competitive  
15 balance. These changed factual circumstances -- in addition to  
16 the wealth of academic studies concluding that the restraints on  
17 student-athlete compensation do not promote competitive balance --  
18 preclude this Court from giving any significant weight to the  
19 district court's factual findings in Board of Regents.

20 Accordingly, the NCAA may not rely on competitive balance  
21 here as a justification for the challenged restraint. Its  
22 evidence is not sufficient to show that it must create a  
23 particular level of competitive balance among FBS football and  
24 Division I basketball teams in order to maximize consumer demand  
25 for its product. Nor is it sufficient to show that the challenged  
26 restraint actually helps it achieve the optimal level of  
27 competitive balance.

28

## 1 C. Integration of Academics and Athletics

2 The NCAA asserts that its restrictions on student-athlete  
3 compensation help educate student-athletes and integrate them into  
4 their schools' academic communities. It argues that the  
5 integration of academics and athletics serves to improve the  
6 quality of educational services provided to student-athletes in  
7 the restrained college education market.<sup>14</sup> Courts have recognized  
8 that this goal -- improving product quality -- may be a legitimate  
9 procompetitive justification. See County of Tuolumne v. Sonora  
10 Cnty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001) (recognizing that  
11 improving product quality may be a legitimate procompetitive  
12 justification); Law, 134 F.3d at 1023 (recognizing that  
13 "increasing output, creating operating efficiencies, making a new  
14 product available, enhancing service or quality, and widening  
15 consumer choice" may be procompetitive justifications).

16 The evidence presented by the NCAA suggests that integrating  
17 student-athletes into the academic communities at their schools  
18 improves the quality of the educational services that they  
19 receive. As noted above, several university administrators  
20 testified about the benefits that student-athletes derive from  
21 participating in their schools' academic communities. Plaintiffs  
22 confirmed that they appreciated receiving these educational

23  
24  
25 <sup>14</sup> In its post-trial brief, the NCAA argues that the integration of  
26 academics and athletics also increases consumer demand for its other  
27 product -- FBS football and Division I basketball games. It presented  
28 scant evidence at trial to support this assertion. In any event, to the  
extent that the NCAA contends that its restrictions on student-athlete  
compensation increase consumer demand for FBS football and Division I  
basketball games, the Court addresses that argument in its discussion of  
the NCAA's asserted procompetitive justification of amateurism.

1 benefits when they were student-athletes, while Dr. Heckman  
2 testified that these benefits also carry long-term value.

3 That said, the NCAA has not shown that the specific  
4 restraints challenged in this case are necessary to achieve these  
5 benefits. Indeed, student-athletes would receive many of the same  
6 educational benefits described above regardless of whether or not  
7 the NCAA permitted them to receive compensation for the use of  
8 their names, images, and likenesses. They would continue to  
9 receive scholarships, for instance, and would almost certainly  
10 continue to receive tutoring and other academic support services.  
11 As long as the NCAA continued to monitor schools' academic  
12 progress rates and require that student-athletes meet certain  
13 academic benchmarks -- a requirement that is not challenged  
14 here -- the schools' incentives to support their student-athletes  
15 academically would remain unchanged. Similarly, the student-  
16 athletes' own incentives to perform well academically would remain  
17 the same, particularly if they were required to meet these  
18 academic requirements as a condition of receiving compensation for  
19 the use of their names, images, and likenesses. Such a  
20 requirement might even strengthen student-athletes' incentives to  
21 focus on schoolwork.

22 As found above, the only way in which the challenged rules  
23 might facilitate the integration of academics and athletics is by  
24 preventing student-athletes from being cut off from the broader  
25 campus community. Limited restrictions on student-athlete  
26 compensation may help schools achieve this narrow procompetitive  
27 goal. As with the NCAA's amateurism justification, however, the  
28 NCAA may not use this goal to justify its sweeping prohibition on

1 any student-athlete compensation, paid now or in the future, from  
2 licensing revenue generated from the use of student-athletes'  
3 names, images, and likenesses.

4 D. Increased Output

5 The NCAA argues that the challenged restraint increases the  
6 output of its product. Courts have recognized that increased  
7 output may be a legitimate procompetitive justification. See  
8 Board of Regents, 468 U.S. at 114; Law, 134 F.3d at 1023.

9 Here, the NCAA argues that its restrictions on student-  
10 athlete compensation increase the number of opportunities for  
11 schools and student-athletes to participate in Division I sports,  
12 which ultimately increases the number of FBS football and Division  
13 I basketball games played. It claims that its rules increase this  
14 output in two ways: first, by attracting schools with a  
15 "philosophical commitment to amateurism" to compete in Division I  
16 and, second, by enabling schools that otherwise could not afford  
17 to compete in Division I to do so. Docket No. 279, NCAA Post-  
18 Trial Brief, at 24. Neither of these arguments is persuasive.

19 The NCAA has not presented sufficient evidence to show that a  
20 significant number of schools choose to compete in Division I  
21 because of a "philosophical commitment to amateurism." As noted  
22 in the findings of fact, some Division I conferences have recently  
23 sought greater autonomy from the NCAA specifically so that they  
24 could enact their own rules, including new scholarship rules.  
25 These efforts suggest that many current Division I schools are  
26 committed neither to the NCAA's current restrictions on student-  
27 athlete compensation nor to the idea that all Division I schools  
28 must award scholarships of the same value.



1 Similarly, the NCAA's argument that the current rules enable  
2 some schools to participate in Division I that otherwise could not  
3 afford to do so is unsupported by the record. Neither the NCAA  
4 nor its member conferences require high-revenue schools to  
5 subsidize the FBS football or Division I basketball teams at  
6 lower-revenue schools. Thus, to the extent that schools achieve  
7 any cost savings by not paying their student-athletes, there is no  
8 evidence that those cost savings are being used to fund additional  
9 teams or scholarships. In any event, Plaintiffs are not seeking  
10 an injunction requiring schools to provide compensation to their  
11 student-athletes -- they are seeking an injunction to permit  
12 schools to do so. Schools that cannot afford to re-allocate any  
13 portion of their athletic budget for this purpose would not be  
14 forced to do so. There is thus no reason to believe that any  
15 schools' athletic programs would be driven to financial ruin or  
16 would leave Division I if other schools were permitted to pay  
17 their student-athletes. The high coaches' salaries and rapidly  
18 increasing spending on training facilities at many schools suggest  
19 that these schools would, in fact, be able to afford to offer  
20 their student-athletes a limited share of the licensing revenue  
21 generated from their use of the student-athletes' own names,  
22 images, and likenesses. Accordingly, the NCAA may not rely on  
23 increased output as a justification for the challenged restraint  
24 here.

#### 25 IV. Less Restrictive Alternatives

26 As outlined above, the NCAA has produced sufficient evidence  
27 to support an inference that some circumscribed restrictions on  
28 student-athlete compensation may yield procompetitive benefits.

1 First, it presented evidence suggesting that preventing schools  
2 from paying FBS football and Division I basketball players large  
3 sums of money while they are enrolled in school may serve to  
4 increase consumer demand for its product. Second, it presented  
5 evidence suggesting that this restriction may facilitate its  
6 member schools' efforts to integrate student-athletes into the  
7 academic communities on their campuses, thereby improving the  
8 quality of educational services they offer. Thus, because the  
9 NCAA has met its burden under the rule of reason to that extent,  
10 the burden shifts back to Plaintiffs to show that these  
11 procompetitive goals can be achieved in "'other and better  
12 ways'" -- that is, through "'less restrictive alternatives.'" Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 n.4 (9th Cir.  
13 1991) (citations omitted).

14  
15 "As part of their burden to show the existence of less  
16 restrictive alternatives, [] plaintiffs must also show that 'an  
17 alternative is substantially less restrictive and is virtually as  
18 effective in serving the legitimate objective without  
19 significantly increased cost.'" County of Tuolomne, 236 F.3d at  
20 1159 (citations omitted; emphasis in original). In addition, any  
21 less restrictive alternatives "should either be based on actual  
22 experience in analogous situations elsewhere or else be fairly  
23 obvious." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law  
24 ¶ 1913b (3d ed. 2006). A defendant may show that a proffered less  
25 restrictive alternative is not feasible with "evidence that the  
26 proffered alternative has been tried but failed, that it is  
27 equally or more restrictive, or otherwise unlawful." Id.  
28

1 A court need not address the availability of less restrictive  
2 alternatives for achieving a purported procompetitive goal "when  
3 the defendant fails to meet its own obligation under the rule of  
4 reason burden-shifting procedure." Id.; see also Law, 134 F.3d at  
5 1024 n.16 ("Because we hold that the NCAA did not establish  
6 evidence of sufficient procompetitive benefits, we need not  
7 address question of whether the plaintiffs were able to show that  
8 comparable procompetitive benefits could be achieved through  
9 viable, less anticompetitive means."). Thus, in the present case,  
10 the Court does not consider whether Plaintiffs' proposed less  
11 restrictive alternatives would promote competitive balance or  
12 increase output because the NCAA failed to meet its burden with  
13 respect to these stated procompetitive justifications.<sup>15</sup> Rather,  
14 the Court's inquiry focuses only on whether Plaintiffs have  
15 identified any less restrictive alternatives for both preserving  
16 the popularity of the NCAA's product by promoting its current

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18 <sup>15</sup> The Court notes, however, that the NCAA could easily adopt  
19 several less restrictive rules if it wished to increase competitive  
20 balance or output. With respect to competitive balance, for instance,  
21 the NCAA could adopt a more equal revenue distribution formula. As  
22 noted above, its current formula primarily rewards the schools that  
23 already have the largest athletic budgets. This uneven distribution of  
24 revenues runs counter to the association's stated goal of promoting  
25 competitive balance. See, e.g., Salvino, 542 F.3d at 333 (noting that  
26 "disproportionate distribution of licensing income would foster a  
27 competitive imbalance" among Major League Baseball teams); Smith v. Pro  
28 Football, Inc., 593 F.2d 1173, 1188 (D.C. Cir. 1978) ("The least  
restrictive alternative of all, of course, would be for the NFL to  
eliminate the draft entirely and employ revenue-sharing to equalize the  
teams' financial resources [as] a method of preserving 'competitive  
balance' nicely in harmony with the league's self-proclaimed 'joint-  
venture' status."). As for the NCAA's stated goal of increasing output,  
the NCAA already has the power to achieve this goal in a much more  
direct way: by amending its current requirements for entry into Division  
I or increasing the number of athletic scholarships Division I schools  
are permitted to offer.

1 understanding of amateurism and improving the quality of  
2 educational opportunities for student-athletes by integrating  
3 academics and athletics.

4 As set forth in the findings of fact, Plaintiffs have  
5 identified two legitimate less restrictive alternatives for  
6 achieving these goals. First, the NCAA could permit FBS football  
7 and Division I basketball schools to award stipends to student-  
8 athletes up to the full cost of attendance, as that term is  
9 defined in the NCAA's bylaws, to make up for any shortfall in its  
10 grants-in-aid. Second, the NCAA could permit its schools to hold  
11 in trust limited and equal shares of its licensing revenue to be  
12 distributed to its student-athletes after they leave college or  
13 their eligibility expires. The NCAA could also prohibit schools  
14 from funding the stipends or payments held in trust with anything  
15 other than revenue generated from the use of the student-athletes'  
16 own names, images, and likenesses. Permitting schools to award  
17 these stipends and deferred payments would increase price  
18 competition among FBS football and Division I basketball schools  
19 in the college education market (or, alternatively, in the market  
20 for recruits' athletic services and licensing rights) without  
21 undermining the NCAA's stated procompetitive objectives.

22 The NCAA notes that Dr. Noll did not discuss a system of  
23 holding payments in trust for student-athletes in his expert  
24 reports or during his testimony. However, this does not bar  
25 Plaintiffs from proposing such a system as a less restrictive  
26 alternative here. As noted above, courts may consider any less  
27 restrictive alternatives that are "based on actual experience in  
28 analogous situations elsewhere" or otherwise "fairly obvious."

1 Areeda & Hovenkamp, Antitrust Law ¶ 1913b. Plaintiffs' proposal  
 2 for holding payments in trust falls squarely within this category.  
 3 One of Plaintiffs' experts, Dr. Rascher, discussed the creation of  
 4 a trust in his opening report, which was disclosed to the NCAA  
 5 more than eight months before trial. See Sept. 2013 Rascher  
 6 Report ¶¶ 80, 86. Although the Court does not rely on the content  
 7 of Dr. Rascher's report here, it notes that the report provided  
 8 the NCAA with ample notice of this proposal.<sup>16</sup> Plaintiffs' counsel

9 \_\_\_\_\_  
 10 <sup>16</sup> The Court also notes that, over the past two decades, numerous  
 11 commentators have suggested that the NCAA could hold payments in trust  
 12 for its student-athletes without violating generally accepted  
 13 understandings of amateurism used by other sports organizations. See,  
 14 e.g., Sean Hanlon & Ray Yasser, "'J.J. Morrison' and His Right of  
 15 Publicity Lawsuit Against the NCAA," 15 Vill. Sports & Ent. L.J. 241,  
 16 294 (2008) ("Searching for a solution to the problem posed by this  
 17 Comment, commentators have suggested a 'have-your-cake-and-eat-it-too'  
 18 approach whereby a trust would be created, allowing student-athletes the  
 19 ability to preserve their amateur status while their athletic  
 20 eligibility remains. The money generated through the use of the  
 21 commercial value of their identity would be placed in a trust until the  
 22 expiration of their athletic eligibility."); Kristine Mueller, "No  
 23 Control over Their Rights of Publicity: College Athletes Left Sitting  
 24 the Bench," 2 DePaul J. Sports L. & Contemp. Probs. 70, 87-88 (2004)  
 25 ("One suggestion put forth is to create a trust for the athletes, which  
 26 would become available to them upon graduation. . . . [This proposal]  
 27 allows the athletes to reap the financial benefits of their labors,  
 28 while maintaining the focus on amateur athletics."); Vladimir P. Belo,  
 "The Shirts Off Their Backs: Colleges Getting Away with Violating the  
 Right of Publicity," 19 Hastings Comm. & Ent. L.J. 133, 155 (1996)  
 ("Should the NCAA hold steadfastly to its notions of amateurism and  
 resist payment to the athletes, the trust fund alternative could be a  
 fair and reasonable compromise. First of all, it could be limited to  
 certain merchandising monies, such as those associated with selling game  
 jerseys or any other revenue from marketing a student-athlete's name and  
 likeness."); Stephen M. Schott, "Give Them What They Deserve:  
 Compensating the Student-Athlete for Participation in Intercollegiate  
 Athletics," 3 Sports Law. J. 25, 45 (1996) ("Revenue from television  
 rights, tickets sales, and donations from boosters could be used to  
 establish these trust funds. Overall, some type of trust fund may  
 provide the best alternative way of compensating the student-athlete and  
 preserving the educational objectives of the NCAA."); Kenneth L.  
 Shropshire, "Legislation for the Glory of Sport: Amateurism and  
 Compensation," 1 Seton Hall J. Sport L. 7, 27 (1991) ("From an NCAA  
 established trust fund the student athlete could receive a student life  
 stipend.").

1 also raised the issue repeatedly during trial and several of the  
2 NCAA's key witnesses -- including Dr. Emmert, Mr. Pilson, and Dr.  
3 Rubinfeld -- were specifically given an opportunity to respond to  
4 the idea. None of these witnesses provided a persuasive  
5 explanation as to why the NCAA could not implement a trust payment  
6 system like the one Plaintiffs propose. The Court therefore  
7 concludes that a narrowly tailored trust payment system -- which  
8 would allow schools to offer their FBS football and Division I  
9 basketball recruits a limited and equal share of the licensing  
10 revenue generated from the use of their names, images, and  
11 likenesses -- constitutes a less restrictive means of achieving  
12 the NCAA's stated procompetitive goals.

13 V. Summary of Liability Determinations

14 For the reasons set forth above, the Court concludes that the  
15 NCAA's challenged rules unreasonably restrain trade in violation  
16 of § 1 of the Sherman Act. Specifically, the association's rules  
17 prohibiting student-athletes from receiving any compensation for  
18 the use of their names, images, and likenesses restrains price  
19 competition among FBS football and Division I basketball schools  
20 as suppliers of the unique combination of educational and athletic  
21 opportunities that elite football and basketball recruits seek.  
22 Alternatively, the rules restrain trade in the market where these  
23 schools compete to acquire recruits' athletic services and  
24 licensing rights.

25 The challenged rules do not promote competitive balance among  
26 FBS football and Division I basketball teams, let alone produce a  
27 level of competitive balance necessary to sustain existing  
28 consumer demand for the NCAA's FBS football and Division I

1 basketball-related products. Nor do the rules serve to increase  
2 the NCAA's output of Division I schools, student-athletes, or  
3 football and basketball games. Although the rules do yield some  
4 limited procompetitive benefits by marginally increasing consumer  
5 demand for the NCAA's product and improving the educational  
6 services provided to student-athletes, Plaintiffs have identified  
7 less restrictive ways of achieving these benefits.

8 In particular, Plaintiffs have shown that the NCAA could  
9 permit FBS football and Division I basketball schools to use the  
10 licensing revenue generated from the use of their student-  
11 athletes' names, images, and likenesses to fund stipends covering  
12 the cost of attendance for those student-athletes. It could also  
13 permit schools to hold limited and equal shares of that licensing  
14 revenue in trust for the student-athletes until they leave school.  
15 Neither of these practices would undermine consumer demand for the  
16 NCAA's products nor hinder its member schools' efforts to educate  
17 student-athletes.

#### 18 VI. Remedy

19 "The several district courts of the United States are  
20 invested with jurisdiction to prevent and restrain violations" of  
21 § 1 of the Sherman Act. 15 U.S.C. § 4. Although the NCAA asserts  
22 that Plaintiffs must make a showing of irreparable harm in order  
23 to obtain permanent injunctive relief here, it failed to cite any  
24 authority holding that such a showing is required in an action  
25 brought under the Sherman Act. The Sherman Act itself gives  
26 district courts the authority to enjoin violations of its  
27 provisions and does not impose any additional requirements on  
28 plaintiffs who successfully establish the existence of an

1 unreasonable restraint of trade. Accordingly, this Court will  
2 enter an injunction to remove any unreasonable elements of the  
3 restraint found in this case.<sup>17</sup>

4 Consistent with the less restrictive alternatives found, the  
5 Court will enjoin the NCAA from enforcing any rules or bylaws that  
6 would prohibit its member schools and conferences from offering  
7 their FBS football or Division I basketball recruits a limited  
8 share of the revenues generated from the use of their names,  
9 images, and likenesses in addition to a full grant-in-aid. The  
10 injunction will not preclude the NCAA from implementing rules  
11 capping the amount of compensation that may be paid to student-  
12 athletes while they are enrolled in school; however, the NCAA will  
13 not be permitted to set this cap below the cost of attendance, as  
14 the term is defined in its current bylaws.

15 The injunction will also prohibit the NCAA from enforcing any  
16 rules to prevent its member schools and conferences from offering  
17 to deposit a limited share of licensing revenue in trust for their  
18 FBS football and Division I basketball recruits, payable when they  
19 leave school or their eligibility expires. Although the  
20 injunction will permit the NCAA to set a cap on the amount of  
21 money that may be held in trust, it will prohibit the NCAA from  
22 setting a cap of less than five thousand dollars (in 2014 dollars)  
23 for every year that the student-athlete remains academically  
24

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25 <sup>17</sup> In a footnote to its post-trial brief, the NCAA argues for the  
26 first time that "a number of states have made it illegal to offer  
27 [student-athletes] compensation beyond a scholarship or grant-in-aid to  
28 entice them to attend a particular school." NCAA Post-Trial Brief at  
35. However, all of the statutes it cites for support expressly exempt  
colleges and universities or distinguish between the prohibited payments  
and scholarships, financial aid, and other grants.



1 eligible to compete. The NCAA's witnesses stated that their  
2 concerns about student-athlete compensation would be minimized or  
3 negated if compensation was capped at a few thousand dollars per  
4 year. This is also comparable to the amount of money that the  
5 NCAA permits student-athletes to receive if they qualify for a  
6 Pell grant and the amount that tennis players may receive prior to  
7 enrollment. None of the other evidence presented at trial  
8 suggests that the NCAA's legitimate procompetitive goals will be  
9 undermined by allowing such a modest payment. Schools may offer  
10 lower amounts of deferred compensation if they choose but may not  
11 unlawfully conspire with each another in setting these amounts.  
12 To ensure that the NCAA may achieve its goal of integrating  
13 academics and athletics, the injunction will not preclude the NCAA  
14 from enforcing its existing rules -- or enacting new rules -- to  
15 prevent student-athletes from using the money held in trust for  
16 their benefit to obtain other financial benefits while they are  
17 still in school. Furthermore, consistent with Plaintiffs'  
18 representation that they are only seeking to enjoin restrictions  
19 on the sharing of group licensing revenue, the NCAA may enact and  
20 enforce rules ensuring that no school may offer a recruit a  
21 greater share of licensing revenue than it offers any other  
22 recruit in the same class on the same team. The amount of  
23 compensation schools decide to place in trust may vary from year  
24 to year. Nothing in the injunction will preclude the NCAA from  
25 continuing to enforce all of its other existing rules which are  
26 designed to achieve its legitimate procompetitive goals. This  
27 includes its rules prohibiting student-athletes from endorsing  
28 commercial products, setting academic eligibility requirements,

1 prohibiting schools from creating athlete-only dorms, and setting  
2 limits on practice hours. Nor shall anything in this injunction  
3 preclude the NCAA from enforcing its current rules limiting the  
4 total number of football and basketball scholarships each school  
5 may award, which are not challenged here.

6 The injunction will not be stayed pending any appeal of this  
7 order but will not take effect until the start of next FBS  
8 football and Division I basketball recruiting cycle.

#### 9 CONCLUSION

10 College sports generate a tremendous amount of interest, as  
11 well as revenue and controversy. Interested parties have strong  
12 and conflicting opinions about the best policies to apply in  
13 regulating these sports. Before the Court in this case is only  
14 whether the NCAA violates antitrust law by agreeing with its  
15 member schools to restrain their ability to compensate Division I  
16 men's basketball and FBS football players any more than the  
17 current association rules allow. For the reasons set forth above,  
18 the Court finds that this restraint does violate antitrust law.


19 To the extent other criticisms have been leveled against the  
20 NCAA and college policies and practices, those are not raised and  
21 cannot be remedied based on the antitrust causes of action in this  
22 lawsuit. It is likely that the challenged restraints, as well as  
23 other perceived inequities in college athletics and higher  
24 education generally, could be better addressed as a policy matter  
25 by reforms other than those available as a remedy for the  
26 antitrust violation found here. Such reforms and remedies could  
27 be undertaken by the NCAA, its member schools and conferences, or  
28 Congress. Be that as it may, the Court will enter an injunction,

1 in a separate order, to cure the specific violations found in this  
2 case.

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

7 IT IS SO ORDERED.

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9 Dated: August 8, 2014

  
CLAUDIA WILKEN  
United States District Judge

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**United States District Court**  
For the Northern District of California