Hot Legal Topics in College Sports

Friday, October 7, 2016
11:15am-12:45pm

Moderator

Laura Warren
Senior Associate General Counsel, DePaul University (Chicago, IL)

Panelists

Woodie Dixon, Jr.
General Counsel & Senior Vice President of Business Affairs, Pac-12 Conference (San Francisco, CA)

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Professor of Law, Director of Sports Law Program, Associate Provost for NCAA Compliance, Tulane University (New Orleans, LA)

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American Bar Association
Forum on the Entertainment and Sports Industries

2016 Annual Meeting
Las Vegas, NV

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Opinion: O’Bannon v. National Collegiate Athletic Association
Argued and Submitted March 17, 2015|
Filed Sept. 30, 2015

Signed 08/08/2014

Motion to Dismiss: O’Bannon v. National Collegiate Athletic Association
October 9, 2014

Trial Motion, Memorandum and Affidavit: National Collegiate Athletic Association
September 25, 2014

This session made possible through the generous support of ISDE
American Bar Association
Forum on the Entertainment and Sports Industries

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Program Discussion and
Learning Objectives

Take a journey into the trenches of college sports with our panelists as they examine the top legal issues, challenges, and up-to-the-minute developments in the world of college sports. Discover the inside scoop on the pay-for-play controversy and develop your game plan to effectively maneuver through the ever-changing antitrust, publicity, and employment playing fields. Industry experts will address the red-hot issues affecting NCAA governance and rules and provide their predictions for reforms in college sports moving forward.
Expansion and Media Rights
David Williams II
Vice Chancellor for Athletics and University Affairs, Athletic Director, and Law Professor
Vanderbilt University

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Statement and Purpose
The Pac-12 Conference is dedicated to protecting the safety, health and well being of its student-athletes. To this end, the Conference, its Presidents and Chancellors, Athletic Directors, and Football Coaches have agreed to establish parameters for football practice and participation that go beyond the limitations currently imposed by the NCAA. This Policy codifies many of the principles already practiced by our head football coaches.

Core Principles
Proper football technique and mechanics, especially when blocking and tackling are involved, should be the priority at every football practice. The core, upper body and lower body should be utilized for contact and players should be taught to avoid using the helmet to initiate contact. Players initiating contact should neither utilize their helmet in play-making nor target the recipient of a block or tackle above the shoulders.

Rules
A. *NCAA Rules*—except where expressly limited below, Pac-12 institutions shall continue to abide by the football practice rules and regulations outlined in the annual NCAA Division I Manual.

B. *Definition of “Full-Contact”*—The Pac-12 will define “full contact” as any live tackling, live tackling drills, scrimmages or other activities where players are generally taken to the ground. “Full contact” shall not include “thud” sessions or drills that involve “wrapping up” where players are not taken to the ground and contact is not aggressive in nature.

C. *Fall / In-Season Practices*—Pac-12 institutions shall only have two (2) full-contact practices per week during the football regular season (“regular season” being defined as the period between the first regular season game and the last regular season game or Pac-12 Championship Game (for participating institutions).

D. *Preseason Practices*—For days in which Pac-12 institutions schedule a two-a-day practice, full-contact shall only be allowed in one practice (the other practice is limited to helmets and shoulder pads). If full-contact practices are scheduled consecutively around one of the two-a-day full-contact practices, only one of those practices shall be more than 50% full-contact. By way of example, if a morning session of a two-a-day practice is full-contact, that morning session practice or the preceding one-a-day practice would be limited to no more than 50% full-contact.

E. *Spring Practices*—Pac-12 institutions shall schedule spring practices so that of the eight (8) permissible full-contact practices, only two (2) of those full-contact practices occur in a given week. (NCAA rules define these eight (8) practices as practices involving “tackling”.) This rule will be subject to instances where inclement weather or other unforeseen circumstances have constricted or otherwise altered a previously finalized spring schedule that complied with this rule.
For Immediate Release: Tuesday, July 12, 2016
Contact: Liz Beadle, lbeadle@pac-12.org

PAC-12 STUDENT-ATHLETE HEALTH AND WELL-BEING GRANT PROGRAM ANNOUNCES PROJECTS SELECTED FOR FUNDING

Pac-12 to invest $3.9 million in seven cutting-edge research projects

SAN FRANCISCO – As a part of the Pac-12’s Student-Athlete Health and Well-Being Grant Program, the Conference selected seven research projects to fund this year, it announced today. The research projects will explore important student-athlete health issues including head trauma, overuse and injury prevention, cardiovascular screening, thermal management and hydration, and mental health and total $3.9 million in funding.

Created in 2013, the Grant Program is part of the overall Pac-12 Student-Athlete Health and Well-Being Initiative. The initiative is a collective effort between the conference and its member universities to find ways to reduce injuries, share current best practices and latest studies, and conduct research to uncover new ways to keep student-athletes as safe as possible.

This is the second funding cycle of the Pac-12’s Student-Athlete Health and Well-Being Grant Program which commits roughly $3.5 million annually to research projects conducted at Pac-12 institutions that are designed to improve the health, general well-being, and safety of student-athletes at all Conference member institutions.

“The Pac-12 continues to aggressively seek solutions to serious problems that affect the health and safety of our student-athletes,” said Dr. David McAllister, chair of the Pac-12 Student-Athlete Health and Well-Being Board and associate head team physician at UCLA. “This Grant Program is an unprecedented collaboration between 12 leading universities with the unifying goal of making sports safer for the next generation, and we firmly believe that the projects selected this funding cycle will do just that.”

The Pac-12 Grant Program has made it a priority to fund cutting-edge research by pooling the collective expertise of its membership, which comprises some of the foremost research institutions in the world.

“The projects we’re funding this cycle address a diverse set of issues, all of which are extremely important to the health and well-being of student-athletes,” said Dan Nordquist, the Associate Vice President of Research Support and Operations at Washington State University and the chair of the Pac-12’s Research Grant Program Committee. “We look forward to seeing the results of these studies and putting what we learn into action to better the lives of current and future student-athletes.”
Doctors, athletic trainers, and research experts from all 12 Pac-12 institutions reviewed the projects and ultimately decided to fund seven projects to be conducted on four different Pac-12 campuses. The projects being funded this cycle include (with the lead university highlighted):

1. NCAA-Department of Defense Concussion Assessment, Research, and Education (CARE) Consortium Data Collection: Establishing a Research Infrastructure and Framework (Stanford)
   This project, co-funded by the NCAA, will create the first full-conference regional research hub of the landmark CARE Consortium. The Consortium is funded by a partnership of the U.S. Department of Defense Military Health System and the NCAA, and is a multi-site, longitudinal investigation of concussion and repetitive head impacts in NCAA athletes and military service academy cadets that addresses major gaps in the understanding of concussion. Through this project, agreed to in principal by the NCAA and Pac-12, each Pac-12 institution will be able to collect neurocognitive and neurobehavioral data on athletes at baseline, at the time a concussion occurs, and then at multiple time-points over the course of the year following an injury.

2. Health and Wellness: Assessing Student-Athlete Health and Performance (Colorado)
   This project proposes a comprehensive approach to optimize the academic, athletic, health, and wellness experience of student-athletes. Specifically, the project seeks to assess important indicators of student-athlete health and wellness, integrate key information within the Pac-12 Sports Injury Registry Management and Analytics Program, and implement and disseminate important best practices for sustainable student-athlete training and performance throughout the Pac-12.

3. Pac-12 Student-Athlete Project on Developing Coach Education (Washington)
   This project aims to develop evidence-based, easily scalable educational programs for college coaches about topics related to student-athlete health and safety, beginning with concussions.

4. Overuse Injuries/Injury Prevention: A Prospective Study to Improve Bone Health and Reduce Incidence of Bone Stress Injuries in Pac-12 Female Distance Runners (Stanford)
   The primary objective of this project is to improve the health of female collegiate distance runners, reduce the incidence and severity of bone stress injuries, and shorten recovery time. This will be accomplished with an active nutrition education program emphasizing the achievement of positive energy balance measured by increasing energy intake and/or reducing exercise energy expenditure.

5. Cardiovascular Screening in the Pac-12 Conference: Establishing Best Practices (Washington)
   Sudden cardiac death is the leading medical cause of death in college athletes and has been designated as a high priority area for research by the Pac-12. This study is designed to answer critical questions regarding screening for cardiovascular conditions that predispose athletes to sudden death by comparing the schools that screen with history and a physical to those that add an electrocardiogram. The study will compare conditions identified, total costs, costs per diagnosis, time lost from competition, and any adverse outcomes related to screening with each strategy.

6. Thermal Management for Athletes: Problems and Opportunities (Stanford)
The Heller laboratory at Stanford has developed a unique technology that rapidly extracts heat from the core of the body. It has been used in a number of cases where athletes were showing signs of heat illness, and recovery was rapid. This upcoming project will include a telemetric study of changes in body temperature of athletes during practice and competition as a function of environmental conditions, as well as comparative studies of methods to achieve rapid recovery from hyperthermia and studies of the benefits of heat extraction in physical conditioning of female athletes.

7. Mental Health and Head Trauma: Brain Health in Male and Female Basketball Student-Athletes at the University of Utah (Utah)

There is a need to better define the neurobiological, cognitive, and behavior changes in competitive athletes prone to head injury both pre- and post-injury. The aim of this study is to assess the association between concussive symptoms, mood states, cognitive performance, and brain changes in female and male basketball student-athletes and football student-athletes.

In the first funding cycle of the Grant Program, the Pac-12 funded the creation of a conference-wide sports injury database with the help of Presagia Sports, an Athlete Electronic Medical Record (EMR) platform. The database enables Conference doctors and athletic trainers to analyze the prevalence of sports injuries and conduct investigations on aspects of injury management such as prevention, treatment, and concussion assessment.

Also in the first funding cycle, the Grant Program funded a project from Oregon State titled “Injury Surveillance: How much is enough? Enhancing the precision of team injury estimates using detailed athlete exposure information” in conjunction with the advent of the conference-wide database. The results of this project will provide essential evidence that the Pac-12 can immediately use as a basis for deciding what level of athletic exposure data should be captured in order to harness the full potential of the new database.

The request for proposal for the third funding cycle of the Grant Program is now open and can be found at pac-12.com/conference/sahwbgp. Proposal submissions are due by Oct. 1, 2016.

About the Pac-12 Conference

The Conference has a tradition as the “Conference of Champions,” leading the nation in NCAA Championships in 51 of the last 56 years, with 488 NCAA team titles overall. The Conference comprises 12 leading U.S. universities: The University of Arizona, Arizona State University, the University of California-Berkeley, the University of California at Los Angeles (UCLA), the University of Colorado, the University of Oregon, Oregon State University, Stanford University, the University of Southern California, the University of Utah, the University of Washington and Washington State University. For more information on the Conference’s programs, member institutions, and Commissioner Larry Scott, go to www.pac-12.com/conference.

-- www.pac-12.com --
INTRODUCTION

1. The Defendants in this action—the National Collegiate Athletic Association ("NCAA") and five major NCAA conferences that have agreed to apply NCAA restrictions (the "Power Conferences")—earn billions of dollars in revenues each year through the hard work, sweat, and sometimes broken bodies of top-tier college football and men's basketball athletes who perform services for Defendants’ member institutions in the big business of college sports. However, instead of allowing their member institutions to compete for the services of those players while operating their businesses, Defendants have entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services. Those restrictions are pernicious, a blatant violation of the antitrust laws, have no legitimate pro-competitive justification, and should now be struck down and enjoined.

2. The Plaintiffs—three top-tier college football and men's basketball players, along with the class members whom the players seek to represent—are exploited by Defendants and their member institutions under false claims of amateurism. The Defendants and their member institutions have lost their way far down the road of commercialism, signing multi-billion dollar contracts wholly disconnected from the interests of “student athletes,” who are barred from receiving the benefits of competitive markets for their services even though their services generate these massive revenues. As a result of these illegal restrictions, market forces have been shoved aside and substantial damages have been inflicted upon a host of college athletes whose services have yielded riches only for others. This class action is necessary to end the NCAA’s unlawful cartel, which is inconsistent with the most fundamental principles of antitrust law.

3. This class action is brought to permanently enjoin violations by each Defendant of the federal antitrust laws.

4. Plaintiffs, and the classes of football and basketball players whom the player Plaintiffs seek to represent, are athletes who have performed services for Defendants’ member institutions in top-tier college football and men’s basketball competitions. These classes of athletes have entered into financial agreements with Defendants’ member institutions that sponsor and operate football and men’s basketball programs subject to the rules of the NCAA and the member conferences that have all agreed to apply NCAA restrictions.

5. Defendants have jointly agreed and conspired with their member institutions to deny Plaintiffs the ability to provide and/or
market their services as football and men’s basketball players in top-tier college football and men’s basketball markets through a patently unlawful price-fixing and group boycott arrangement.

6. The Defendants’ agreed-upon rules impose an artificial and unlawful ceiling on the remuneration that players may receive for their services as football and men’s basketball players in the multi-billion dollar college sports industry. Under NCAA and Power Conference rules, players may receive only tuition, required institutional fees, room and board, and required course-related books in exchange for their services as college football and men’s basketball players. This amount is defined by the NCAA as a “full grant-in-aid” and commonly referred to as an “athletic scholarship.”

7. These agreements to price-fix players’ compensation, and to boycott any institutions or players who refuse to comply with the price fixing agreement, are per se illegal acts under Section 1 of the Sherman Act, 15 U.S.C. § 1. They also constitute an unreasonable restraint of trade under the rule of reason, whether under a “quick look” or full-blown rule of reason analysis.

8. As a result of Defendants’ anticompetitive agreements, Plaintiffs and other similarly situated current and future college football and men’s basketball players in the relevant markets described in more detail below have received and/or will receive less remuneration for their playing services than they would receive in a competitive market. A permanent injunction, on behalf of the proposed injunctive class, is the only relief that can bring these unlawful restrictions to an end.

Plaintiffs, by their undersigned attorneys, for their Complaint herein allege as follows:

**JURISDICTION AND VENUE**

9. These claims arise and are brought under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

10. This Court has jurisdiction pursuant to 15 U.S.C. §§ 4 and 15, and 28 U.S.C. §§ 1331, 1337 and 1367, in that this action arises under federal antitrust laws.


12. Each of the Defendants can be found, resides, has an agent, or transacts business in the District of New Jersey, and the unlawful activities were or will be carried on in part by one or more of the Defendants within that district. The District of New Jersey is home to eight universities that operate Division I football and/or men’s basketball programs, including Fairleigh Dickinson University, Monmouth University, New Jersey Institute of Technology, Princeton University, Rider University, Rutgers University (“Rutgers”), Saint Peter’s University, and Seton Hall University (“Seton Hall”). Rutgers is a member of Defendant the Big Ten Conference. Additionally, the NCAA has conducted its Division I men’s basketball championship within the district, has contracted for services related to such event in the district, and has distributed revenue to universities within the district. Further, NCAA member institutions recruit the talents of football and men’s basketball players from the district and conduct transactions within the district, including the offering and signing of athletic scholarship agreements, which are the subject of the unlawful restrictions that are challenged in this action.

13. Defendants earn billions of dollars from television agreements that are the product of their unlawful restrictions, which revenues are earned in part from telecasts that are disseminated in the District of New Jersey.
14. Plaintiff Martin Jenkins is a college football player who was recruited by several NCAA Division I and Power Conference member institutions. In 2010, Jenkins was offered and accepted a full grant-in-aid to play football at Clemson University (“Clemson”), located in Clemson, South Carolina, a Division I member of the NCAA and the Atlantic Coast Conference, where he participated as a member of the football team until December 2014.

15. Pursuant to NCAA and conference rules, the athletics-based remuneration provided to Jenkins by Clemson during each year of his participation with the football team has been equal to, and no more than, the highest amount permitted under the artificial restraints imposed on athlete compensation by Defendants. Several other NCAA Division I member institutions offered Jenkins a full grant-in-aid to play football, the amounts of which were also capped by rules imposed by Defendants.

16. Plaintiff Nigel Hayes is a college basketball player who was recruited by several NCAA Division I and Power Conference member institutions. In 2013, Hayes was offered and accepted a full athletics-based grant-in-aid to play basketball at the University of Wisconsin, Madison (“Wisconsin”), located in Madison, Wisconsin, a Division I member of the NCAA and the Big Ten Conference.

17. Pursuant to NCAA and conference rules, the athletics-based remuneration provided to Hayes by Wisconsin during each year of his participation with the basketball team has been equal to the highest amount permitted under the artificial restraints imposed on athlete compensation by the Defendants. Several other NCAA Division I member institutions offered Hayes a full grant-in-aid to play basketball, the amounts of which were also capped by rules imposed by the Defendants.

18. Plaintiff Alec James is a college football player who was recruited by several NCAA Division I and Power Conference member institutions. In 2013, James was offered and accepted a full athletics-based grant-in-aid to play football at University of Wisconsin, Madison, located in Madison, Wisconsin, a Division I member of the NCAA and the Big Ten Conference.

19. Pursuant to NCAA and conference rules, the athletics-based remuneration provided to James by Wisconsin during each year of his participation with the football team has been equal to the highest amount permitted under the artificial restraints imposed on athlete compensation by the Defendants. Several other NCAA Division I member institutions offered James a full grant-in-aid to play football, the amounts of which were also capped by rules imposed by the Defendants.

20. Defendant NCAA is an unincorporated association of more than 1,200 colleges, universities, and athletic conferences located throughout the United States. The NCAA maintains its headquarters and principal place of business at 700 W. Washington Street in Indianapolis, Indiana. The NCAA is engaged in interstate commerce in the business of, among other things, governing the big business of top-tier college football and men’s basketball in the United States, as well as owning and operating the multi-billion dollar NCAA Division I Men’s Basketball Championship.

21. The remaining Defendants are the five Power Conferences, each of which is engaged in interstate commerce in the business of, among other things, governing the big business of top-tier college football and men’s basketball in the United States, as well as owning and operating their broadcast rights to their members’ competitions.

22. Upon information and belief, each of the five Power Conferences is a separately owned entity. The Power Conferences are:

- The Atlantic Coast Conference (“ACC”), an unincorporated association that identified itself, as of 2011, as a tax-exempt organization under Section 501(c)(3) of the U.S. Internal Revenue Code, with its principal place of business at 4512 Weybridge Lane, Greensboro, North Carolina 27407;

- The Big Twelve Conference, Inc. (“Big 12”), a corporation organized under the laws of Delaware that identified itself, as of 2011, as a tax-exempt organization under Section 501(c)(3) of the U.S. Internal Revenue Code, with its principal place of business at 400 East John Carpenter Freeway, Irving, Texas 75062;

- The Big Ten Conference (“Big Ten”), a corporation organized under the laws of Delaware that identified itself, as of 2011,
as a tax-exempt organization under Section 501(c)(3) of the U.S. Internal Revenue Code, with its principal place of business at 5440 Park Place, Rosemont, Illinois 60018;

- The Pac-12 Conference (“Pac-12”), an unincorporated association that identified itself, as of 2011, as a tax-exempt organization under Section 501(c)(3) of the U.S. Internal Revenue Code, with its principal place of business at 1350 Treat Boulevard, Suite 500, Walnut Creek, California 94597;

- The Southeastern Conference (“SEC”), an unincorporated association that identified itself, as of 2011, as a tax-exempt organization under Section 501(c)(3) of the U.S. Internal Revenue Code, with its principal place of business at 2201 Richard Arrington Boulevard North, Birmingham, Alabama 35203.

CLASS ACTION ALLEGATIONS

23. Each of Plaintiffs Martin Jenkins and Alec James (collectively, the “Football Plaintiffs”), and Plaintiff Nigel Hayes (the “Basketball Plaintiff”), is representative of an injunctive-relief class, as defined by Rule 23(b)(1) and/or Rule 23(b)(2) of the Federal Rules of Civil Procedure, and brings this action on behalf of himself and his respective class members as described in Paragraphs 24-25 below.

24. The class represented by the Football Plaintiffs is comprised of any and all NCAA Division I Football Bowl Subdivision (“FBS”) football players who, at any time from the date of this Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid (the “Football Class”).

25. The class represented by the Basketball Plaintiff is comprised of any and all NCAA Division I men’s basketball players who, at any time from the date of this Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid (the “Basketball Class”).

26. Each of the Football Class and the Basketball Class is so numerous and geographically so widely dispersed that joinder of all members is impracticable.

27. There are questions of law and fact common to each class. Each Plaintiff’s claims are typical of the claims of the class that he represents, and each Plaintiff will fairly and adequately protect the interests of the respective class that he represents.

28. Each person in each class is, has been, and/or will be subject to uniform agreements, rules, and practices among the Defendants that restrain competition for player services, including, but not limited to, the NCAA Bylaws and conference rules set forth herein, and any and all similar player restraints that are or will be uniformly imposed by the Defendants on members of each class. Indeed, the NCAA rules at issue apply uniformly to all members of each respective class.

29. The financial aid agreements signed by NCAA players are virtually identical throughout NCAA Division I for college football and men’s basketball players as a result of the unlawful restrictions that apply uniformly to all member institutions of the NCAA and the other defendants.

30. The prosecution of separate actions by individual members of each class would create the risk of:

(a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of
the other members not parties to the individual adjudications or would substantially impair or impede their abilities to protect their interests.

31. In construing and enforcing their uniform agreements, rules, and practices, and in taking and planning to take the actions described in this Complaint, the Defendants have acted or refused to act on grounds that apply generally to each of the classes, so that final injunctive relief or corresponding declaratory relief would be appropriate for each of the classes as a whole.

NATURE OF INTERSTATE TRADE AND COMMERCE

32. Defendants and/or their member institutions are engaged in the businesses of governing and/or operating major college football and men’s basketball businesses, including the sale of tickets and telecast rights to the public for the exhibition of the individual and collective football or basketball talents of players such as Plaintiffs. To conduct these businesses, the Defendants’ member institutions would, absent the restrictions at issue in this action, compete with each other for the services of athletes, such as Plaintiffs, who are recruited to perform services as football or basketball players for the various member institutions of the Defendants.

33. The Defendants’ and their member institutions’ operation of and engagement in the respective businesses of top-tier college football and men’s basketball involves a substantial volume of interstate trade and commerce, including, inter alia, the following interstate activities: travel; communications; purchases and movement of equipment; broadcasts of games; advertisements; promotions; sales of tickets and concession items; sales of merchandise and apparel; employment of coaches and administrative personnel; employment of referees; and negotiations for all of the above.

34. The Defendants’ and their member institutions’ aforesaid interstate transactions involve billions of dollars in collective annual expenditures and receipts.

35. The Plaintiffs have been recruited by one or more of the Defendants’ member institutions in interstate commerce as top-tier college football or men’s basketball players.

THE ILLEGAL AGREEMENTS TO RESTRAIN COMPETITION

36. The anticompetitive agreements of the Defendants are neither secret, nor in dispute. They are documented and published in the NCAA Division I Manual (the NCAA’s rule book) and the rulebooks of each of the Power Conferences. These rules constitute horizontal agreements in that they are proposed, drafted, voted upon, and agreed upon by NCAA members, including all of the Power Conference defendants, that compete with each other for the services of top-tier college football and men’s basketball players. The anticompetitive rules are also strictly enforced, so that member institutions have no choice but to comply with them or face penalties, including a boycott by the other member institutions of any institutions or players who do not comply.

37. NCAA Constitution Article 5.01.1 provides, “All legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled.” Additionally, NCAA Constitution Article 3.2.4.1 provides that members “agree to administer their athletics programs in accordance with the constitution, bylaws, and other legislation of the Association.”

38. Plaintiffs bring this suit to challenge, as illegal agreements, all NCAA rules, along with all rules of each Power Conference, that are applicable to the FBS Football Players Market and the D-I Men’s Basketball Players Market (described below), and that prohibit, cap, or otherwise limit the remuneration that players in each of those markets may receive for their athletic services, including but not limited to NCAA Bylaws 12.01.4, 12.1.2, 12.1.2.1, 13.2.1, 13.2.1.1, 13.5.1, 13.5.2, 13.6.2,
39. NCAA Bylaw 15 sets forth “Financial Aid” rules, many of which impose restrictions on the amount and nature of, and method by which, remuneration may be provided to athletes. Bylaw 15.1 provides that an athlete may receive remuneration on the basis of athletics ability, but such remuneration is strictly limited to “the value of a full grant-in-aid.” Under Bylaw 15.02.5, a full grant-in-aid “consists of tuition and fees, room and board, and required course-related books.” An athlete may receive remuneration beyond this amount only if such additional pay is unrelated to athletic ability; however, even those amounts are subject to a cap. Bylaw 15.1 states that, “A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance.” Cost of attendance is defined in Bylaw 15.02.2 as “an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.” Standing alone, these rules demonstrate a horizontal agreement among competitors to cap the amount of remuneration schools may provide athletes for their services, despite how much money those athletes may generate for their institutions and Defendants.

40. The NCAA falsely claims that the above-mentioned grants-in-aid, which are awarded specifically on the basis of athletic ability, are not to be considered payments. Bylaw 12.01.4 states, “A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association’s membership.” This bylaw is necessary because Bylaw 12 specifically prohibits any payment to athletes on the basis of the athletic services that they provide. Bylaw 12.1.2 provides:

- An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team per Bylaw 12.02.9, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or (g) Enters into an agreement with an agent.

41. Bylaw 12.1.2.1 then delineates 20 different rules about the forms of prohibited payment, including, among others: any salary, cash (or the equivalent thereof), unauthorized educational expenses, and “preferential treatment, benefits and services.”

42. Bylaw 16 also prohibits benefits on the basis of athletic ability. Bylaw 16.11.2 provides, “The student-athlete shall not receive any extra benefit.” Under Bylaw 16.02.3:

- An extra benefit is any special arrangement by an institutional employee or representative of the institution’s athletics interests to provide a student-athlete or the student-athlete family member or friend a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their family members or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution’s students or their family members or friends or to a particular segment of the student-body (e.g., international students, minority students) determined on a basis unrelated to athletics ability.

43. Under Bylaw 16.1.4, “Awards received for intercollegiate athletics participation may not be sold, exchanged or assigned for another item of value, even if the student-athlete’s name or picture does not appear on the award.” In fact, this bylaw is
interpreted to apply in perpetuity such that even after an athlete exhausts his NCAA eligibility, the sale of an award constitutes an NCAA violation.

44. Bylaw 13 restricts schools from providing prospective athletes with recruiting inducements. Bylaw 13.2.1 states, “An institution’s staff member or any representative of its athletics interests shall not be involved, directly or indirectly, in making arrangements for or giving or offering to give any financial aid or other benefits to a prospective student-athlete or his or her relatives or friends, other than expressly permitted by NCAA regulations.” Bylaw 13.2.1.1 delineates specific prohibitions, including: cash, gifts, loans, clothing, employment arrangements, free and/or reduced-cost housing or services, and “any tangible item.”

45. Limitations also are placed on the number and length of expense-paid visits schools may provide prospective athletes, and on the value of meals, transportation, and entertainment provided during such visits. Bylaw 13.6.2 provides, “A member institution may finance only one visit to its campus for a prospective student-athlete.” Under Bylaw 13.6.4, “An official visit to an institution shall not exceed 48 hours.” Additionally, Bylaw 13.6.7.1 states, “An institution may provide entertainment, which may not be excessive, on the official visit only for a prospective student-athlete and the prospective student-athlete’s parents (or legal guardians) or spouse and only within a 30-mile radius of the institution’s main campus.” According to Bylaw 13.6.7.4, “The institution … shall not provide cash to a prospective student-athlete for entertainment purposes.” However, under Bylaw 13.6.7.5, the institution may provide cash to a student host responsible for entertaining the prospective athlete up to “$40 for each day of the visit to cover all actual costs of entertaining the student host(s) and the prospective student-athlete (the prospective student-athlete’s parents, legal guardians or spouse), excluding the cost of meals and admission to campus athletics events.” Further, Bylaw 13.6.7.7 states, “The cost of actual meals, not to exceed three per day, on the official visit for a prospective student-athlete and the prospective student-athlete’s parents, legal guardians, spouse or children need not be included in the $40-per-day entertainment expense. Meals must be comparable to those provided to student-athletes during the academic year. A reasonable snack (e.g., pizza, hamburger) may be provided in addition to the three meals.” Although transportation to and from campus may be provided to the athlete, under Bylaw 13.5.2.1, “Use of a limousine or helicopter for such transportation is prohibited.”

46. The Power Conferences, as NCAA members, have agreed to the rules cited above and have codified their own rules which may be more restrictive, but not more liberal, than NCAA rules. Power Conference rules evidencing agreements among conference members to restrain competition for player services include the following:

(a) ACC Constitution Article II (“General Purpose”): “… The Conference aims to … (e) Coordinate and foster compliance with Conference and NCAA rules.” ACC Bylaw Article II: “Member institutions are bound by NCAA rules and regulations, unless Conference rules are more restrictive.”

(b) Big Ten Bylaw 14.01.3 (“Compliance with NCAA and Conference Legislation”): “The Constitution and Bylaws of the National Collegiate Athletic Association shall govern all matters of student-athlete eligibility except to the extent that such rules are modified by the Conference Rules and Agreements.”

(c) Big 12 Bylaw 1.3.2 (“Adherence to NCAA Rules”): “All Members of the Conference are committed to complying with NCAA rules and policies … In addition, the conduct of Members shall be fully committed to compliance with the rules and regulations of the NCAA and of the Conference …” Big 12 Bylaw 6.1 (“Eligibility Rules”): “A student-athlete must comply with appropriate minimum requirements of the NCAA and the Conference in order to be eligible for athletically-related aid … ” Big 12 Bylaw 6.5.3 (“Financial Aid Reports”): “Each institution shall comply with all financial aid legislation of the NCAA and the conference … “

(d) Pac-12 Bylaw 4.2 (“Application of NCAA Legislation”): “The Conference is a member of the NCAA, therefore, all member institutions are bound by NCAA rules and regulations unless the Conference rules are more demanding.” Pac-12 Executive Regulation 3-1: “The rule of the [NCAA] shall govern all matters concerning financial aid to student-athletes except to the extent that such rules are modified by the CEO Group.”

(e) SEC Bylaw Article 5.01.1 (“Governance”): “The Conference shall be governed by the Constitution, Bylaws, and other rules, regulations, and legislation of the Conference and the NCAA.” SEC Bylaw Article 15.01 (“General Principles”): “Any

scholarship or financial aid to a student-athlete must be awarded in accordance with all NCAA and SEC regulations.’’

47. These anticompetitive agreements are strictly enforced to punish any NCAA and Power Conference members that do not adhere completely to the letter of these restraints. NCAA Constitution Article 1.3.2 provides, “Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.” Additionally, NCAA Constitution Article 2.8.3 provides, “An institution found to have violated the Association’s rules shall be subject to such disciplinary and corrective actions as may be determined by the Association.” Accordingly, all NCAA members are forced to abide by the illegal restraints as co-conspirators with Defendants or face punishment.

48. Formalized enforcement procedures are codified in Bylaw 19 of the NCAA Division I Manual. Bylaw 19.01.2 provides, “The enforcement program shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels.”

49. Central to enforcement is the requirement that NCAA institutions report any instance of noncompliance. More than 3,000 “secondary” violations (now known as Level 3 and 4 violations) are reported by member institutions each year. Additionally, the NCAA employs approximately 60 full-time staff members in its enforcement department to investigate NCAA violations and bring charges against schools. Approximately 20 “major” violations (now known as Level 1 and 2 violations) are processed by the NCAA enforcement staff each year, although many more cases are investigated. Schools charged with violating the rules must appear before the NCAA Committee on Infractions, which makes factual findings and imposes penalties for deviating from the agreed upon restraints. Penalties include fines, scholarship reductions, recruiting restrictions, and even a “death penalty” in which a school is banned from competing in a sport for a year or more.

**RELEVANT MARKETS**

50. This action involves two distinct relevant markets, with at least one relevant market applicable to each Plaintiff, and to each of the Football Class and the Basketball Class: (i) the market for NCAA Division I Football Bowl Subdivision (“FBS”) football player services (the “FBS Football Players Market”); and (ii) the market for NCAA Division I men’s basketball player services (the “D-I Men’s Basketball Players Market”). Each of these markets represents the highest level of intercollegiate competition for each sport, and each is distinct in that it offers a unique opportunity for player services for which there is no substitute for Plaintiffs or class members.

**FBS Football Players Market**

51. The FBS Football Players Market is comprised of 128 colleges and universities that operate football programs at the highest level of intercollegiate football competition and is distinguished from its Division I subordinate, the Football Championship Subdivision (“FCS”), formerly known as Division I-AA, and lower levels of NCAA football, in that FBS college football programs have larger football budgets, higher attendance levels, greater revenues, and more athletic scholarships for athletes than do FCS institutions and those schools that compete in lower levels of NCAA football (i.e., Divisions II and III).

52. Although both the FBS and FCS abide by the rules set by the NCAA Football Rules Committee, their postseason formats are significantly different. As its name indicates, the FBS postseason competition is marked by invitational “bowl” games (35 in the 2013-14 football season), rather than an NCAA-sponsored championship tournament (as is the case for the FCS).

53. Starting with the 2014-15 football season, the FBS postseason features the newly created College Football Playoff (“CFP”) consisting of four teams that compete in two semifinal games for a chance to advance to a national championship
game. The postseason “bowl” games, including the new CFP, are some of the most lucrative properties in the sports industry and generate billions of dollars annually.

54. Each year between late August and January, FBS teams compete against each other over the course of a 12-game football schedule, not including conference championships or postseason bowl games. Historically, regular-season college football games were played on Saturdays, but, to maximize television viewership and gain additional revenue from the sale of media rights, some games are now played in “primetime” on Monday, Tuesday, Wednesday, Thursday, and Friday nights, despite interference with the academic courses in which the athletes are required to be enrolled.

55. The FBS Football Players Market is unique in that the athletes who compete in the market are the most talented football players outside of the National Football League (“NFL”).

56. In the FBS Football Players Market, colleges and universities—the member institutions of the NCAA and the Power Conference defendants—compete for the services of the most talented college football players in the country, but cannot offer a penny more than a full grant-in-aid. The Defendants ban athletically related remuneration to players in the FBS Football Market above a full grant-in-aid, which does not even cover a player’s full cost of attendance.

57. The FBS Football Players Market is national in scope. Colleges seek out players from across the country, including players in this district. For example, the geographic diversity represented by the 2014 recruiting class signed by the University of Miami (located in Miami, Florida) includes players from Arizona, California, New Jersey, and North Carolina; the 2014 class signed by The Ohio State University (located in Columbus, Ohio) includes players from Florida, Pennsylvania, New Jersey, and Texas; and the 2014 class signed by West Virginia University (located in Morgantown, West Virginia) includes players from California, Florida, Mississippi, Oklahoma, and Pennsylvania.

58. The FBS Football Players Market is the highest level at which football athletes of traditional college age can provide their services. Indeed, the NFL expressly bans from its league players who have not chronologically passed the level of a college “junior,” i.e., three years must elapse following high school graduation.

59. There is no reasonable alternative opportunity in which these athletes can provide their football services. Other professional or semi-professional football leagues available to college athletes, or lower level college divisions, do not offer nearly the level of competition, coaching instruction, funding, or attention as FBS football for players who are not yet eligible to play in the NFL. Moreover, most FBS football players never play in the NFL, so that FBS football is the last chance they have to realize the economic benefits of their talents as football players.

D-I Basketball Players Market

60. The D-I Men’s Basketball Players Market is comprised of 351 colleges and universities that operate basketball programs at the highest level of intercollegiate athletics. Between November and April each year, these teams compete against each other on the basketball court to produce the highly valued sports entertainment product known as D-I men’s college basketball, and especially the uniquely valuable NCAA Men’s Division I Basketball Championship, colloquially known as the “NCAA Tournament” or “March Madness.” The broadcast rights for the NCAA Tournament generate billions of dollars, none of which is shared with Plaintiffs or class members.

61. The D-I Men’s Basketball Players Market is distinguished from lower levels of NCAA basketball competition (i.e., Divisions II and III) in key ways. D-I basketball programs have larger basketball budgets, higher attendance levels, greater revenues, and more athletic scholarships than schools that compete in lower divisions.

62. In the D-I Men’s Basketball Players Market, colleges and universities compete for the services of the most talented college basketball players in the country, but cannot offer a penny more than a full grant-in-aid, which does not even cover a student’s full cost of attendance.
The D-I Men’s Basketball Players Market is national in scope. Colleges seek out talent from across the country. For example, the geographic diversity represented by the 2014 recruiting class signed by Duke University (“Duke”) (located in Durham, North Carolina) includes players from Florida, Illinois, Minnesota, and Texas; the 2014 class signed by the University of California, Los Angeles (“UCLA”) (located in Los Angeles, California) includes players from Georgia, New Jersey, and Virginia; and the 2014 class signed by the University of Michigan (located in Ann Arbor, Michigan) includes players from California, Florida, and Oregon.

There is no reasonable alternative opportunity in which these top-tier college basketball athletes can provide their services. Other lower-level college divisions and semi-professional leagues do not offer nearly the level of competition, coaching instruction, funding, or attention as D-I basketball. And most D-I college basketball players are never able to play in the National Basketball Association (“NBA”) (which prohibits any such players from even applying until one year after their high school classes have graduated), so that D-I basketball is the only chance these athletes have to realize the economic benefit of their talents as basketball players.

A Few Exceptions

In either one or both of FBS football and D-I men’s basketball, a limited number of institutions participate in athletic competition but, because of their special character, do not offer grants-in-aid based on athletics. Those schools are mainly the United States Military Academy, the United States Naval Academy, and the United States Air Force Academy (the “Service Academies”), and members of the Ivy League—Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, the University of Pennsylvania, and Yale University.

The Service Academies are members of NCAA Division I-A and participate in the FBS and D-I men’s basketball, but they offer full scholarships and stipends to all students who attend those schools (not only athletes) in exchange for required military service following graduation. NCAA rules governing athletic scholarships have no effect on the Service Academies or their student-athletes. Due to these differentiating elements, the Service Academies are not reasonable substitutes for the other colleges and universities that compete in the FBS and D-I men’s basketball, and they are not included in the relevant markets in this case.

The Ivy League schools participate in D-I men’s basketball but do not participate in the FBS. Ivy League schools have some of the nation’s highest academic admission standards, which apply to all prospective Ivy League students, including athletes, and Ivy League schools do not provide scholarships on the basis of athletics. NCAA restrictions on athletic scholarships thus do not directly affect the Ivy League. Due to these differentiating elements, the Ivy League schools are not reasonable substitutes for the other colleges and universities that compete in the FBS and D-I men’s basketball, and they are not included in the relevant markets in this case.

BACKGROUND OF THE UNLAWFUL RESTRAINTS

Formation of The NCAA Cartel

Founded in 1906 in response to circumstances far removed from today’s big time college sports businesses, the NCAA issues rules that govern the administration of intercollegiate athletics. The colleges, universities, and athletic conferences that form the NCAA’s membership collectively agree upon these rules. The NCAA operates and oversees the business of college football and college basketball.

Although no formalized rulebooks existed in the earliest years of the NCAA, payment to athletes in any form was prohibited at the NCAA’s very beginning. The NCAA eventually allowed its member schools to provide athletes with tuition
payments and related expenses at price-fixed amounts, but nothing more.

70. Originally, the NCAA was comprised of a single division with a uniform set of rules. Over time, the NCAA split into three divisions, with individual rules for each division. The separate divisions reflect not only philosophical differences among the schools related to the commercial scale of college sports, but also economic differences. An early example of such a divergence occurred in 1949 when the University of Chicago, a former football powerhouse and charter member of the Big Ten, withdrew from the conference due to what the university president viewed as the incompatibility of higher education and the increasing commercialization of major college sports.

71. The NCAA maintains that its foundational concept is amateurism, which it claims dictates, among other things, that athletes not receive pay for their participation in athletics. Yet, coaches, athletic directors, conference presidents, and NCAA executives are paid millions of dollars off the backs of the services provided by top-tier college football and basketball athletes. There is nothing “amateur” about the billions of dollars generated by FBS football and D-I men’s basketball.

**Competition Among NCAA Institutions for Player Services**

72. For decades, NCAA institutions have ferociously competed with each other for the services of football and men’s basketball athletes, but only within the constraints of the rules that prohibit any financial compensation to athletes beyond the price-fixed limits set by the NCAA and its conferences. The NCAA and the Power Conferences have promulgated and enforced numerous rules designed to limit this competition for athletes. In areas outside these financial payment restrictions, competition for the services of football and men’s basketball athletes has only escalated over time, demonstrating the competitive forces that have been restrained by the Defendants’ restrictions on remuneration to top-tier college football and men’s basketball athletes.

73. The demand for the services of top-tier football and men’s basketball athletes is greater than ever, and such services are only growing in value. These athletes are so desired that national media outlets closely track recruitments from as early as freshman year in high school until National Signing Day, the date when high-school seniors are permitted to sign letters of intent to attend NCAA institutions. Websites operated by media giants including ESPN and Yahoo! Sports create and maintain profiles of thousands of high school football and basketball players, along with in-depth statistics and analysis of their recruitments, including lists of universities that are recruiting the young men, the dates of “official visits” to campuses, and whether the athletes have been offered or accepted athletic scholarships. Numerous scouting services and publications sell subscriptions with detailed information about the top prospects each year. Media outlets generate lists and rankings of the top prospects, which are then discussed on television and radio at length for weeks and months leading up to National Signing Day. None of this attention has anything to do with how these athletes perform anywhere but on the athletic field, which, in turn, generates huge amounts of revenue for FBS football and D-I men’s basketball programs.

74. On National Signing Day, usually the first Wednesday in February for football, many high-school football players hold nationally televised press conferences to announce where they intend to play college football. Media outlets such as ESPN broadcast the signing decisions and provide commentary and analysis throughout the day (and for several days thereafter).

75. Competitor institutions boast of their sustained athletic success and notable alumni who play or have played in the NBA or NFL. Coaches bombard athletes with handwritten letters, sometimes sending dozens of letters in one day. And, perhaps most visibly, Power Conference schools are locked in an “arms race” to appeal to recruits—building expanded stadiums and arenas, luxury locker rooms and training facilities, high-end dorms, and specialized tutoring centers. The Power Conference schools also spend millions of dollars on coaches, all while the athletes are restricted from receiving any compensation beyond their NCAA capped “scholarships.”

76. As a result of the ever-increasing economic incentives to field the best teams and win games, FBS and D-I men’s basketball programs would clearly compete economically with one another for player services if not for NCAA and Power Conference restrictions. Such competition would provide fair compensation to these athletes for the billions of dollars in
The Big Business of College Football and Basketball

77. FBS college football and Division I men’s college basketball are, combined, among the most lucrative products in U.S. sports. Upon information and belief, the 65 schools in the five Power Conferences reported $5.15 billion in total revenue in 2011-12.

78. The massive revenues earned by the NCAA, the Power Conferences, and their member institutions are in significant part generated from long-term contracts with national television and cable-networks for the rights to broadcast their football and basketball games.

79. In 2010, the NCAA announced a fourteen-year agreement with CBS and Turner Sports for the rights to broadcast the NCAA Tournament on television. Upon information and belief, the deal, which also includes a digital rights component, is valued at more than $11 billion, and is worth 41% more than the previous broadcast rights contract for the NCAA Tournament. Conference partners and member schools split more than $740 million of this revenue annually.

80. Upon information and belief, in November 2012, ESPN agreed to pay $5.64 billion over twelve years—an average of $470 million annually—to broadcast the College Football Playoff (CFP), a college football postseason tournament featuring two semifinal games and a national championship game that rotate among several venues that bid for the right to host CFP games. Upon information and belief, the participating schools and conferences have announced that revenue from the CFP will be distributed under a formula that pays the Power Conferences and the University of Notre Dame (“Notre Dame”) 73% of the CFP’s revenue, an average of roughly $343.1 million per year. (Notre Dame is a member of the ACC for the purposes of D-I men’s basketball, but is an independent school for the purposes of FBS football.)

81. In addition, upon information and belief, ESPN has agreed to pay a total of approximately $220 million more annually to the major conferences for the rights to broadcast additional “major” football bowl games. For instance, ESPN will pay $80 million more per year between 2015 and 2026 to broadcast the Rose Bowl. In years when that game is not part of the CFP, the Rose Bowl’s partner conferences—the Big Ten and Pac-12—will divide that incremental $80 million among their twenty-six member schools. (The Big Ten increased to 14 teams at the start of the 2014 football season when Rutgers and the University of Maryland joined the conference.) Similarly, ESPN has agreed to pay substantially the same money to broadcast the Champions Bowl, an annual pairing of the conference champions from the SEC and Big 12.

82. Upon information and belief, during the 2014-15 season, the Power Conferences and Notre Dame will receive approximately $1.099 billion in revenue from television partners for regular season football games, irrespective of the additional revenue generated by the CFP. By the 2019-20 season, that number will grow to $1.633 billion.

83. Upon information and belief, when all football broadcast revenue sources are combined, the Power Conferences and Notre Dame will receive at least $1.6 billion from television partners in 2015 and $2.343 billion by 2020.

84. Television contracts signed by individual conferences granting the right to broadcast their football and basketball games during the regular seasons are equally staggering. For example, upon information and belief:
(a) The ACC receives $3.6 billion from ESPN through 2026-27, a per-school average of $17.1 million per year.
(b) The Big 12 receives $1.17 billion from Fox through 2024-25 and $480 million from ESPN through 2015-16, a per-school average of $15 million per year.
(c) The Big Ten receives $2.8 billion from its own Big Ten Network through 2031-32, $1 billion from ESPN through 2016-17, $145 million from Fox through 2016 just to broadcast the conference football championship game, and $72 million from CBS through 2016-17, a per-school average of $20.7 million per year
(d) The Pac-12 receives a combined $3 billion from Fox and ESPN through 2023-24, a per-school average of $20.8 million per year.

(e) The SEC receives $2.25 billion from ESPN through 2023-24 and $825 million from CBS through 2023-24, a per-school average of $14.6 million per year.

85. Flush with cash and unable to compete for athletes on the basis of financial remuneration, colleges have directed their resources and competitive efforts to, among other things, the hiring of head coaches, instead of players. For example, upon information and belief, more than half of the head football coaches in the Power Conferences are paid at least $2 million annually, and several head coaches are paid in excess of $4 million annually, excluding endorsement revenue and other income, which can also be quite substantial.

86. As media revenues have exploded, numerous NCAA schools have also switched athletic conferences to maximize their revenue, showing little or no loyalty to their former conferences and purported principles of amateurism. A raft of conference shifts has taken place in the past few years, with teams often now located nowhere near the geographical locations of their fellow conference members, helping to generate television revenues but disregarding the welfare of athletes who have to travel thousands of miles in the service of creating income for their schools. For example, West Virginia University is at least 800 miles from every other school in its conference, the Big 12.

87. The frenzy for new media revenues has resulted in a host of changes among conferences, and litigation involving spurned conferences and schools that left one conference for another. The NCAA and its members have unleashed this chaos with little regard for the athletes.

The NCAA’s History of Antitrust Violations

88. Rather than permit their members to engage in competition for player services as the financial success of these sports has exploded, the Defendants have combined and conspired to eliminate such competition for NCAA players through price-fixing arrangements. This has been, and continues to be, accomplished by the Defendants jointly adopting and imposing rules that have the purpose and effect of preventing players from offering their services in competitive markets.

89. The NCAA has a history of violating federal antitrust law. As a result, over the years, numerous parties have brought and successfully prosecuted multiple antitrust lawsuits against the NCAA.

90. In 1984, the Supreme Court of the United States ruled that the NCAA violated Section 1 of the Sherman Act by limiting the number of live televised football games under the media plan it adopted for the 1982-85 football seasons. In conjunction with the plan, the NCAA announced that it would punish any member institution that abided by a competing agreement with another network to televise more live games. The Court granted injunctive relief and held that this scheme unlawfully restrained the market for live broadcasts of college football. *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

91. The NCAA’s anticompetitive behavior was further illustrated in *Law v. NCAA*, in which the Court of Appeals for the Tenth Circuit upheld a summary judgment ruling that an NCAA cap on part-time coaches' salaries at $16,000 per year was an unlawful restraint of trade under Section 1 of the Sherman Act that could be condemned under a “quick look” analysis. The Tenth Circuit also upheld a permanent injunction that enjoined the NCAA from enforcing or attempting to enforce salary limitations on the specific class of coaches who had sued. The Court of Appeals held that the presence of a horizontal agreement to fix compensation was presumptively anticompetitive, and that the NCAA had failed to present even a triable issue concerning whether the salary restraint was procompetitive. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

92. In *Metropolitan Intercollegiate Basketball Association v. NCAA*, No. 01-cv-00071-MGC (S.D.N.Y.), five of the NCAA’s
own member institutions sued the NCAA under the antitrust laws, alleging that the NCAA engaged in anticompetitive behavior to harm the National Invitational Tournament (“NIT”), which was in competition with the NCAA Tournament. That action resulted in the NCAA paying a significant settlement to the schools and agreeing to the NIT’s continued operation.

93. College athletes have previously sought relief from the NCAA’s restraints on remuneration, resulting in the NCAA agreeing to temporary remedies but with the restraints left standing.

94. Specifically, in *White v. NCAA*, a class of college football and basketball players challenged NCAA rules limiting student-athlete compensation to the value of a grant-in-aid as a horizontal agreement that unreasonably restrained trade and violated the Sherman Act. The plaintiffs alleged that the grant-in-aid limitation suppressed competition in the market for talented student-athletes. The effect on competition was never tested through an evidentiary proceeding, as the parties settled before trial. However, before the *White* settlement, the court certified a class and denied an NCAA motion to dismiss, ruling that plaintiffs had adequately pled a relevant market and harm to competition. *White*, No. 06-999, Dkt. No. 72, slip op. at 3-4 (C.D. Cal. Sept. 20, 2006).

95. The short-term settlement in *White*, which has since expired, with its class members no longer attending NCAA schools, did not end the NCAA’s anticompetitive behavior restricting player compensation.

*The Restraints Have No Justifiable Pro-Competitive Effect*

96. The cap on remuneration for the services of athletes in the Football Class and the Basketball Class have no pro-competitive purpose and cannot be justified on any claimed basis that it promotes “competitive balance.” Indeed, competitive balance has never existed in FBS football or D-I men’s basketball, and there is no credible competitive balance value in these sports to preserve.

97. Among FBS schools, a gaping schism exists between members of the Power Conferences and all others. For instance, no school outside of a Power Conference (not including Notre Dame) has ever played in the Bowl Championship Series (“BCS”) championship game that has determined the college football national champion in the sixteen years of the BCS through the 2013-14 season. And, only seven teams from outside of a Power Conference have ever appeared in any of the 72 BCS bowl games, with these non-Power Conference teams securing just ten of 144 possible berths in those games. Going further back, fully 50 percent of the teams that finished among the top eight of the Associated Press’s year-end football poll between 1950 and 2006 were from just 13 schools.

98. Even among the Power Conference FBS teams, competitive balance does not exist. For example, an SEC team won the BCS national championship *seven years in a row* until 2014, when an SEC team finally lost in the BCS championship game to a team from the ACC.

99. The Power Conference teams receive an overwhelming share of revenue as well. Upon information and belief, the new CFP media deal will deliver 73% of its $5.64 billion value to Power Conference teams. Demand for Power Conference football is so much greater than the demand for non-Power Conference football that the Power Conference teams benefit from lucrative league-specific (and sometimes school-specific) television deals and their own proprietary cable networks that the other FBS schools cannot match.

100. Competitive balance is also completely lacking in D-I men’s basketball. Since the NCAA Tournament expanded its field to 64 teams or more in 1985, only three non-Power Conference teams have won a national championship (not counting Louisville, which joined the ACC in July of this year). Only seven teams from outside a Power Conference have even appeared in the championship game during this period, with non-Power Conference teams securing just ten of 58 possible berths. Nearly half of the teams in the national semifinals (the “Final Four”) between 1950 and 2013—over more than 60 years covering more than 250 team appearances—have been from just 13 schools.
101. Parity also does not exist among the Power Conference schools. A few examples make this evident. In the Big 12, the University of Kansas has won the conference championship ten straight years. In the ACC, Duke has been such a favorite that, during the ten years ending in the 2012-13 season, after 25 of its 31 loses away from its home court (an average of just three per season), opposing fans rushed the court in jubilation because an upset was so unlikely. In the Pac-12, either the University of Arizona or UCLA has won at least a share of the conference championship in 22 of the past 30 seasons.

102. Upon information and belief, the Power Conference teams receive an overwhelming share of basketball revenue as well. Because NCAA Tournament money is effectively allocated to conferences based on cumulative wins over a set number of years, and because the Power Conference teams are generally so much stronger than their counterparts from less successful conferences, the Power Conferences reap a greater share of NCAA Tournament proceeds. Additionally, as in football, demand for Power Conference basketball is so much greater than the demand for non-Power Conference basketball that the Power Conference teams benefit from lucrative league-specific (and sometimes school-specific) television deals and their own proprietary cable networks that the other D-I men’s basketball schools cannot match.

103. The disparity between the Power Conferences and all other schools was further demonstrated at the end of 2013, when the Power Conferences proposed a new governance structure designed to increase their independence from the less economically successful schools and expand grants-in-aid by offering a modest $2,000 annual stipend to athletes. These proposals just illustrate the tip of the compensation iceberg that players would and should receive, if not for the unlawful NCAA and Power Conference restrictions.

**IRREPARABLE INJURIES OF PLAINTIFFS AND THE FOOTBALL AND BASKETBALL CLASSES**

104. Upon information and belief, the Defendants intend to continue to impose their artificial caps on remuneration with anticompetitive effects in the relevant markets alleged above. Absent such restrictions, the Plaintiffs and the class members would be able to seek remuneration from colleges beyond that currently permitted under NCAA rules. Plaintiffs and the class members will suffer severe and irreparable harm if Defendants continue to prevent Plaintiffs and the class members from offering their services to NCAA member institutions free of these restraints.

105. The injuries that the Plaintiffs and the class members are incurring and will continue to incur will not be fully compensable by monetary damages. This is particularly true due to the short length of NCAA careers and the difficulty in estimating and proving the amount of monetary damages suffered by Plaintiffs as a result of the Defendants’ unlawful conduct.

106. Moreover, most class members will never have a career in the NFL or the NBA, and many will never receive a college degree. Most class members thus will not receive any economic benefit from their roles in generating billions of dollars for FBS football and D-I men’s college basketball.

107. The threatened injuries to the Plaintiffs and the class members are irreparable, warranting the issuance of injunctive relief for the class.

**Martin Jenkins**

108. Plaintiff Martin Jenkins was a starting defensive back for the Clemson Tigers. Out of high school, Jenkins ranked as the 38th best cornerback in the nation according to ESPN.com and was named an All-Southeast Region pick by PrepStars. He was recruited by numerous FBS schools, including several from the Power Conferences, and he received multiple athletic scholarship offers for his football talents.

109. In 2010, Jenkins accepted a one-year athletic scholarship from Clemson, limited to the amount of a full grant-in-aid as
required under the rules agreed upon by Defendants and their member institutions. The athletic scholarship was renewed for each of the 2011-12, 2012-13, 2013-14, and 2014-15 academic years.

110. Upon information and belief, in 2012, Clemson’s athletics department generated more than $70 million in revenue, the vast majority of which came from football. But for the illegal restraints imposed by the Defendants under NCAA and conference rules, to which Jenkins was subjected, Jenkins would have received and would receive greater remuneration for his services as a football athlete.

**Nigel Hayes**

111. Plaintiff Nigel Hayes is a starting forward for the Wisconsin Badgers. In high school, Hayes was a two-time All-State selection and named an ESPN Top-100 recruit for the class of 2013. He was recruited by numerous NCAA Division I schools, including several from the Power Conferences, and he received multiple athletic scholarship offers for his basketball talents.

112. In 2013, Hayes accepted a one-year athletic scholarship from Wisconsin, limited to the amount of a full grant-in-aid as required under the rules agreed upon by Defendants and their member institutions. The athletic scholarship was renewed for the 2014-15 academic year. Currently, Hayes is receiving an athletic scholarship from Wisconsin and has three more seasons of NCAA eligibility.

113. Upon information and belief, in 2012, Wisconsin’s athletics department generated more than $149 million in revenue. But for the illegal restraints imposed by the Defendants under NCAA and conference rules, to which Hayes is currently subjected, Hayes would have received and would receive greater remuneration for his services as a basketball athlete.

**Alec James**

114. Plaintiff Alec James is a defensive end for the Wisconsin Badgers. During his senior year of high school, James was the 2012 Wisconsin Football Coaches Association Defensive Player of the Year, ranked as the No. 1 recruit in the state of Wisconsin, according to ESPN, and a unanimous choice for first-team all-state, all-conference, and all-area. He was recruited by numerous NCAA Division I schools, including from the Power Conferences, and he received multiple athletic scholarship offers for his football talents.

115. In 2013, James accepted a one-year athletic scholarship from Wisconsin, limited to the amount of a full grant-in-aid as required under the rules agreed upon by Defendants and their member institutions. The athletic scholarship was renewed for the 2014-15 academic year. Currently, James is receiving an athletic scholarship from Wisconsin and has three more seasons of NCAA eligibility following this year.

116. Upon information and belief, in 2012, Wisconsin’s athletics department generated more than $149 million in revenue. But for illegal restraints imposed by the Defendants under NCAA and conference rules, to which James is currently subjected, James would have received greater remuneration for his services as a football athlete.

**CAUSE OF ACTION - COUNT I**

*Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1*

117. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 116.

118. The restraints imposed by Defendants limiting the remuneration that the Defendants’ member institutions may provide
to members of the Football Class and members of the Basketball Class constitute an anticompetitive, horizontal agreement among competitors to fix artificially the remuneration for the services of the members of each class in violation of Section 1 of the Sherman Act. The restraints also constitute an unlawful group boycott of any institutions or players who would not comply with these unlawful price fixing arrangements.

119. The restraints operate as a perpetual horizontal price-fixing agreement, and group boycott, each of which is per se unlawful.

120. The restraints also constitute an unreasonable restraint of trade under the rule of reason, whether under a “quick look” or full-blown rule of reason analysis. Defendants have market power in the relevant markets for the services of top-tier college football and men’s basketball players.

121. Defendants’ price-fixing agreement and group boycott is a naked restraint of trade without any pro-competitive purpose or effect. Less restrictive rules can be implemented to achieve any purported procompetitive objectives of Defendants.

122. Each of the Defendants is a participant in this unlawful contract, combination, or conspiracy.

123. The Plaintiffs and class members have suffered and will continue to suffer antitrust injury by reason of the continuation of this unlawful contract, combination, or conspiracy. NCAA and Power Conference rules have injured and will continue to injure Plaintiffs and the class members by depriving them of the ability to receive market value for their services as college football and men’s basketball players in a free and open market.

124. Monetary damages are not adequate to compensate Plaintiffs or other class members for the irreparable harm they have and will continue to suffer, warranting injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment with respect to their Complaint as follows:

1. Declaring that Defendants’ rules and agreements that prohibit, cap or otherwise limit remuneration and benefits to players in the Football Class or the Basketball Class for their athletic services to member institutions violate Section 1 of the Sherman Act, and enjoining said rules as they apply to those class members;

2. Enjoining the Defendants from restraining any Defendant member institution from negotiating, offering, or providing remuneration to members of the Football Class and members of the Basketball Class in compensation for their services as athletes;

3. Awarding Plaintiffs and the class they represent their costs and disbursements in this action, including reasonable attorneys’ fees; and

4. Granting Plaintiffs and class members such other and further relief as may be appropriate.

Dated: February 13, 2015

Respectfully submitted,

By: /s/ Jeffrey L. Kessler

Jeffrey L. Kessler (admitted pro hac vice)
The BCS started in 1998 and was replaced in the 2014-15 football season by the CFP.
Edward C. O’BANNON, Jr., On Behalf of Himself and All Others Similarly Situated, Plaintiff–Appellee, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, aka The NCAA, Defendant–Appellant.
Nos. 14–16601, 14–17068.
Argued and Submitted March 17, 2015.
Filed Sept. 30, 2015.

Synopsis

Background: Group of current and former college football and men’s basketball players brought antitrust class action against National Collegiate Athletic Association (NCAA), alleging Sherman Act violations for restraining trade in relation to players’ names, images, and likenesses (NIL). After bench trial, the United States District Court for the Northern District of California, Claudia Wilken, Senior Judge, entered judgment in plaintiffs’ favor, and NCAA appealed.

Holdings: The Court of Appeals, Bybee, Circuit Judge, held that:

1. NCAA’s compensation rules were subject to antitrust scrutiny;

2. plaintiffs suffered antitrust injury as result of compensation rules;

3. compensation rules were subject to analysis pursuant to rule of reason;

4. district court did not clearly err in finding that allowing NCAA member schools to award grants-in-aid up to their full cost of attendance would be substantially less restrictive alternative to current compensation rules; but

5. district court clearly erred in finding it viable alternative to allow students to receive NIL cash payments untethered to their education expenses.

Affirmed in part and vacated in part.

Thomas, Chief Judge, concurred in part, dissented in part, and filed opinion.

Attorneys and Law Firms


Martin Michaelson, William L. Monts III, Joel D.
Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1, prohibits “[e]very contract, combination ..., or conspiracy, in restraint of trade or commerce.” For more than a century, the National Collegiate Athletic Association (NCAA) has prescribed rules governing the eligibility of athletes at its more than 1,000 member colleges and universities. Those rules prohibit student-athletes from being paid for the use of their names, images, and likenesses (NILs). The question presented in this momentous case is whether the NCAA’s compensation rules are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade.

We conclude that the district court’s decision was largely correct. Although we agree with the Supreme Court and our sister circuits that many of the NCAA’s amateurism rules are likely to be procompetitive, we hold that those rules are not exempt from antitrust scrutiny; rather, they must be analyzed under the Rule of Reason. Applying the Rule of Reason, we conclude that the district court correctly identified one proper alternative to the current NCAA compensation rules—i.e., allowing NCAA members to give scholarships up to the full cost of attendance—but that the district court’s other remedy, allowing students to be paid cash compensation of up to $5,000 per year, was erroneous. We therefore affirm in part and reverse in part.
A. The NCAA


Fin de siècle college football was a rough game. Serious injuries were common, and it was not unheard of for players to be killed during games. Schools were also free to hire nonstudent ringers to compete on their teams or to purchase players away from other schools. By 1905, these and other problems had brought college football to a moment of crisis, and President Theodore Roosevelt convened a conference at the White House to address the issue of injuries in college football. Later that year, the presidents of 62 colleges and universities founded the Intercollegiate Athletic Association to create uniform rules for college football. In 1910, the IAA changed its name to the National Collegiate Athletic Association (NCAA), and it has kept that name to this day.

The NCAA has grown to include some 1,100 member schools, organized into three divisions: Division I, Division II, and Division III. Division I schools are those with the largest athletic programs—schools must sponsor at least fourteen varsity sports teams to qualify for Division I—and they provide the most financial aid to student-athletes. Division I has about 350 members.

For football competition only, Division I’s membership is divided into two subdivisions: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). FBS schools are permitted to offer more full scholarships to their football players and, as a result, the level of competition is generally higher in FBS than in FCS. FBS consists of about 120 of the nation’s premier college football schools.

*1054 B. The Amateurism Rules

One of the NCAA’s earliest reforms of intercollegiate sports was a requirement that the participants be amateurs. President C.A. Richmond of Union College commented in 1921 that the competition among colleges to acquire the best players had come to resemble “the contest in dreadnoughts” that had led to World War I, and the NCAA sought to curb this problem by restricting eligibility for college sports to athletes who received no compensation whatsoever. But the NCAA, still a voluntary organization, lacked the ability to enforce this requirement effectively, and schools continued to pay their athletes under the table in a variety of creative ways; a 1929 study found that 81 out of 112 schools surveyed provided some sort of improper inducement to their athletes.

The NCAA began to strengthen its enforcement capabilities in 1948, when it adopted what became known as the “Sanity Code”—a set of rules that prohibited schools from giving athletes financial aid that was based on athletic ability and not available to ordinary students. See Daniel E. Lazaroff, The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?, 86 Or. L.Rev. 329, 333 (2007). The Sanity Code also created a new “compliance mechanism” to enforce the NCAA’s rules—“a Compliance Committee that could terminate an institution’s NCAA membership.” Id.

In 1956, the NCAA departed from the Sanity Code’s approach to financial aid by changing its rules to permit its members, for the first time, to give student-athletes scholarships based on athletic ability. These scholarships were capped at the amount of a full “grant in aid,” defined as the total cost of “tuition and fees, room and board, and required course-related books.” Student-athletes were prohibited from receiving any “financial aid based on athletics ability” in excess of the value of a grant-in-aid, on pain of losing their eligibility for collegiate athletics. Student-athletes could seek additional financial aid not related to their athletic skills; if they chose to do this, the total amount of athletic and nonathletic financial aid they received could not exceed the “cost of attendance” at their respective schools.1

In August 2014, the NCAA announced it would allow athletic conferences to authorize *1055 their member schools to increase scholarships up to the full cost of attendance. The 80 member schools of the five largest athletic conferences in the country voted in January 2015
to take that step, and the scholarship cap at those schools is now at the full cost of attendance. Marc Tracy, Top Conferences to Allow Aid for Athletes’ Full Bills, N.Y. Times, Jan. 18, 2015, at SP8.

In addition to its financial aid rules, the NCAA has adopted numerous other amateurism rules that limit student-athletes’ compensation and their interactions with professional sports leagues. An athlete can lose his amateur status, for example, if he signs a contract with a professional team, enters a professional league’s player draft, or hires an agent. And, most importantly, an athlete is prohibited—with few exceptions—from receiving any “pay” based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete’s name, image, and likeness (NIL).

C. The O’Bannon and Keller Litigation

In 2008, Ed O’Bannon, a former All–American basketball player at UCLA, visited a friend’s house, where his friend’s son told O’Bannon that he was depicted in a college basketball video game produced by Electronic Arts (EA), a software company that produced video games based on college football and men’s basketball from the late 1990s until around 2013. The friend’s son turned on the video game, and O’Bannon saw an avatar of himself—a virtual player who visually resembled O’Bannon, played for UCLA, and wore O’Bannon’s jersey number, 31. O’Bannon had never consented to the use of his likeness in the video game, and he had not been compensated for it.

In 2009, O’Bannon sued the NCAA and the Collegiate Licensing Company (CLC), the entity which licenses the trademarks of the NCAA and a number of its member schools for commercial use, in federal court. The gravamen of O’Bannon’s complaint was that the NCAA’s amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs, were an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.

Around the same time, Sam Keller, the former starting quarterback for the Arizona State University and University of Nebraska football teams, separately brought suit against the NCAA, CLC, and EA. Keller alleged that EA had impermissibly used student-athletes’ NILs in its video games and that the NCAA and CLC had wrongfully turned a blind eye to EA’s misappropriation of these NILs. The complaint stated a claim under Indiana’s and California’s right of publicity statutes, as well as a number of common-law claims.

The two cases were consolidated during pretrial proceedings. The defendants moved to dismiss Keller’s right-of-publicity claims on First Amendment grounds. The district court denied the motion to dismiss, and we affirmed that decision, holding that “[u]nder California’s transformative use defense, EA’s use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment.” In re NCAA Student–Athlete Name & Likeness Licensing Litig. (“Keller”), 724 F.3d 1268, 1284 (9th Cir.2013).

In November 2013, the district court granted the plaintiffs’ motion for class certification. The court held that certification of a damages class under Rule 23(b)(3) was inappropriate, but it certified the following class under Rule 23(b)(2) for injunctive and declaratory relief:

All current and former student-athletes residing in the United States who compete *1056 on, or competed on, an NCAA Division I (formerly known as “University Division” before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I–A until 2006) men’s 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.4

After class certification was granted, the plaintiffs voluntarily dismissed their damages claims with prejudice. The plaintiffs also settled their claims against EA and CLC, and the district court preliminarily approved the settlement. O’Bannon and Keller were deconsolidated, and in June 2014, the antitrust claims against the NCAA at issue in O’Bannon went to a bench trial before the district court.
D. The District Court’s Decision
After a fourteen-day bench trial, the district court entered judgment for the plaintiffs, concluding that the NCAA’s rules prohibiting student-athletes from receiving compensation for their NILs violate Section 1 of the Sherman Act. *O’Bannon v. NCAA, 7 F.Supp.3d 955 (N.D.Cal.2014).*

1. The Markets
The court began by identifying the markets in which the NCAA allegedly restrained trade. It identified two markets that were potentially affected by the challenged NCAA rules.

a. The college education market
First, the court found that there is a “college education market” in which FBS football and Division I basketball schools compete to recruit the best high school players by offering them “unique bundles of goods and services” that include not only scholarships but also coaching, athletic facilities, and the opportunity to face high-quality athletic competition. *Id.* at 965–66. The court found that very few athletes talented enough to play FBS football or Division I basketball opt not to attend an FBS/Division I school; hardly any choose to attend an FCS, Division II, or Division III school or to compete in minor or foreign professional sports leagues, and athletes are not allowed to join either the NFL or the NBA directly from high school.* Id.* at 966. Thus, the *1057* court concluded, the market specifically for FBS football and Division I basketball scholarships is cognizable under the antitrust laws because “there are no professional [or college] football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide.” *Id.* at 968.

b. The group licensing market
The second market identified by the district court was a “group licensing market” in which, but for the NCAA’s compensation rules, college football and basketball athletes would be able to sell group licenses for the use of their NILs. *Id.* The court broke this “group licensing market” down into three submarkets in which players’ NILs could be profitably licensed: (1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage.* Id.* With respect to live game telecasts, the court noted that the TV networks that broadcast live college football and basketball games “often seek to acquire the rights to use” the players’ NILs, which the court concluded “demonstrate[s] that there is a demand for these rights” on the networks’ part. *Id.* at 968–69. With respect to video games, the court found that the use of NILs increased the attractiveness of college sports video games to consumers, creating a demand for players’ NILs. *Id.* at 970. And with respect to archival footage, the court noted that the NCAA had licensed footage of student-athletes—including current athletes—to a third-party licensing company, T3Media, proving that there is demand for such footage. *Id.* at 970–71.

2. The Rule of Reason
Having concluded that the NCAA’s compensation rules potentially restrained competition in these two markets, the court proceeded to analyze the legality of the challenged NCAA rules with respect to those markets, applying the Rule of Reason. *Id.* at 984–1009. The district court found that the NCAA’s rules have an anticompetitive effect in the college education market but not in the group licensing market. It then concluded that the rules serve procompetitive purposes. Finally, it determined that the procompetitive purposes of the rules could be achieved by less restrictive alternative restraints and that the current rules were therefore unlawful.

a. Anticompetitive effects
At the first step of the Rule of Reason, the court found that the NCAA’s rules have an anticompetitive effect on the college education market. Were it not for those rules, the court explained, schools would compete with each other by offering recruits compensation exceeding the cost of attendance, which would “effectively lower the price that the recruits must pay for the combination of educational and athletic opportunities that the schools provide.” *Id.* at 972. The rules prohibiting compensation for the use of student-athletes’ NILs are thus a price-fixing agreement. *1058* recruits pay for the bundles...
of services provided by colleges with their labor and their NILs, but the “sellers” of these bundles—the colleges—collectively “agree to value [NILs] at zero.” Id. at 973. Under this theory, colleges and universities behave as a cartel—a group of sellers who have colluded to fix the price of their product.

The court found in the alternative that the college education market can be thought of as a market in which student-athletes are sellers rather than buyers and the schools are purchasers of athletic services. In the court’s alternative view, the college education market is a monopsony—a market in which there is only one buyer (the NCAA schools, acting collectively) for a particular good or service (the labor and NIL rights of student-athletes), and the colleges’ agreement not to pay anything to purchase recruits’ NILs causes harm to competition. Id. at 973, 991.

By contrast, the court found that the NCAA’s rules do not have an anticompetitive effect on any of the submarkets of the group licensing market. The court explained that although these submarkets exist, there would be no competition in any of them if the challenged NCAA rules were abolished. The court reasoned that the value of an NIL license to a live game broadcaster or a video game company would depend on the licensee’s acquiring every other NIL license that was available. A live game broadcaster, for example, would need to acquire a license from every team or player whose games it might telecast. Similarly, a video game producer would want to acquire NIL rights for all of the teams it needed to include in the game. Given these requirements, the court deemed it highly unlikely that groups of student-athletes would compete with each other to sell their NIL rights; on the contrary, they would have an incentive to cooperate to make sure that the package of NIL rights sold to buyers was as complete as possible. Id. at 993–98. With respect to archival footage, meanwhile, the court found that the NCAA’s licensing arrangement with T3Media did not deprive student-athletes of any compensation they might otherwise receive because T3Media is prohibited from licensing footage of current athletes and must obtain the consent of any former athlete whose NIL appears in its footage. Id. at 998–99.

b. Procompetitive purposes

At the second step of the Rule of Reason, the NCAA proffered four procompetitive purposes for its rules prohibiting student-athletes from receiving compensation for the use of their NILs: (1) preserving “amateurism” in college sports; (2) promoting competitive balance in FBS football and Division I basketball; (3) integrating academics and athletics; and (4) increasing output in the college education market. Id. at 999. The court accepted the first and third justifications in part while rejecting the others.

(1) *Amateurism.* The NCAA argued to the district court that restrictions on student-athlete compensation are “necessary to preserve the amateur tradition and identity of college sports.” Id. It contended that amateurism had been one of the NCAA’s core principles since its founding and that amateurism is a key driver of college sports’ popularity with consumers and fans. Id. at 999–1000.

The district court rejected the NCAA’s contention that it had a “longstanding commitment to amateurism,” concluding instead that the NCAA’s definition of amateurism was “malleable,” changing frequently over time in “significant and contradictory ways.” Id. at 1000. The court suggested that, even today, the NCAA’s definition of amateurism is inconsistent: although players generally cannot receive *1059* compensation other than scholarships, tennis players are permitted to accept up to $10,000 in prize money before enrolling in college, and student-athletes are permitted to accept Pell grants even when those grants raise their total financial aid package above their cost of attendance. Id. It thus concluded that amateurism was not, in fact, a “core principle[ ]” of the NCAA. Id.

The district court was not persuaded that amateurism is the primary driver of consumer demand for college sports—but it did find that amateurism serves some procompetitive purposes. The court first concluded that consumers are primarily attracted to college sports for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the school in their region of the country. Id. at 977–78. It also found much of the NCAA’s evidence about amateurism unreliable. For example, the NCAA provided a survey conducted by Dr. J. Michael Dennis, a “survey research expert,” which purported to show that Americans “generally oppose[ ] the idea of paying college football and basketball players.” Id. at 975. The court deemed the Dennis survey “unpersuasive” for a couple reasons, one of which was that it believed the survey’s initial question skewed the results by priming respondents to think about illicit payments to
student-athletes rather than the possibility of allowing athletes to be paid. Id.

But the district court ultimately found that the NCAA’s “current understanding of amateurism” plays some role in preserving “the popularity of the NCAA’s product.” Id. at 1005. It found that the NCAA’s current rules serve a procompetitive benefit by promoting this understanding of amateurism, which in turn helps preserve consumer demand for college sports.

(2) Competitive Balance. The NCAA argued before the district court that restricting compensation to student-athletes helps level the playing field between FBS and Division I schools in recruiting, thereby maintaining competitive balance among those schools’ football and basketball teams. Id. at 1001–02.

The district court acknowledged that promoting competitive balance could be a valid procompetitive purpose under the antitrust laws, but it concluded that the challenged NCAA rules do not promote competitive balance. The court noted that numerous economists have studied the NCAA over the years and that “nearly all” of them have concluded that the NCAA’s compensation rules do not promote competitive balance. Id. at 978. The court also explained that although the NCAA forbids its member schools to pay student-athletes anything beyond a fixed scholarship, it allows schools to spend as much as they like on other aspects of their athletic programs, such as coaching, facilities, and the like, which “negate[s] whatever equalizing effect the NCAA’s restraints on student-athlete compensation might have once had.” Id. at 1002. The court concluded that competitive balance was thus not a viable justification for restricting student-athlete compensation.

(3) Integrating Academics and Athletics. The NCAA’s third procompetitive justification for its restraints on student-athlete compensation was that these restraints integrate academics and athletics and thereby “improve the quality of educational services provided to student-athletes.” Id. According to the NCAA, student-athletes derive long-term benefits from participating fully in academic life at their schools, which the compensation rules encourage them to do. Id. at 979–80.

The district court allowed that this was a viable procompetitive justification for the NCAA’s regulating the college education market, but it concluded that most of the benefits of academic and athletic “integration” are not the result of the NCAA’s rules restricting compensation. Rather, these benefits are achieved by other NCAA rules—such as those requiring student-athletes to attend class, prohibiting athletes-only dorms, and forbidding student-athletes to practice more than a certain number of hours per week. Id. at 980. The court explained that the only way in which the compensation rules might facilitate the integration of athletics and academics is that, by prohibiting student-athletes from being paid large sums of money not available to ordinary students, the rules prevent the creation of a social “wedge” between student-athletes and the rest of the student body. Id. at 980, 1003. It held, however, that even though the avoidance of such a “wedge” is a legitimate procompetitive goal, it does not justify a total, “sweeping prohibition” on paying student-athletes for the use of their NILs. Id. at 1003.

(4) Increasing Output. The fourth and final procompetitive justification alleged by the NCAA was that the restraints on student-athlete compensation “increase output” in the college education market by increasing the available opportunities for students to play FBS football or Division I basketball. Id. at 1003–04. The NCAA contended that its rules accomplish this goal by attracting schools with a philosophical commitment to amateurism to compete in Division I and by enabling schools to compete in Division I that otherwise could not afford to do so. Id. at 1004.

The district court rejected this justification. The court found the idea that schools join Division I because of a philosophical commitment to amateurism “implausible,” noting that some major-conference schools had lobbied to change the NCAA’s scholarship rules to raise compensation limits. Id. at 981. The court also explained that schools in FCS, Division II, and Division III are subject to the same amateurism rules as Division I schools, making it unlikely that schools choose to join Division I because of the amateurism rules. Id.

The court likewise found no support in the record for the notion that the NCAA’s compensation rules enable more schools to compete in Division I. The court found that, because Division I schools do not share revenue, there is no reason to believe that the cost savings from not paying student-athletes are being used to fund additional scholarships at low-revenue schools or to enable those schools to join Division I. Id. at 1004. The court also noted that the plaintiffs were not seeking to require that all schools pay their student-athletes; rather, they sought an injunction permitting schools to do so. Schools that
could not afford to pay their student-athletes would not need to do so if the plaintiffs prevailed and would therefore not be driven out of Division I by a ruling in the plaintiffs’ favor. *Id.*

c. Less restrictive alternatives

Having found that the NCAA had presented two procompetitive justifications for “circumscribed” limits on student-athlete compensation—*i.e.*, increasing consumer demand for college sports and preventing the formation of a “wedge” between student-athletes and other students—the court proceeded to the third and final step of the Rule of Reason, where it considered whether there were means of achieving the NCAA’s procompetitive purposes that were “substantially less restrictive” than a total ban on compensating student-athletes for use of their NILs. *Id.* at 1004–05.

The court held that the plaintiffs had identified two legitimate, less restrictive alternatives to the current NCAA rules: *1061 (1) allowing schools to award stipends to student-athletes up to the full cost of attendance, thereby making up for any “shortfall” in their grants-in-aid, and (2) permitting schools to hold a portion of their licensing revenues in trust, to be distributed to student-athletes in equal shares after they leave college. *Id.* at 1005–06. The court determined that neither of these alternatives to the total ban on compensating student-athletes for use of their NILs. *Id.* at 1005.

After entering judgment for the plaintiffs on their antitrust claims, the district court permanently enjoined the NCAA from prohibiting its member schools from (1) compensating FBS football and Division I men’s basketball players for the use of their NILs by awarding them grants-in-aid up to the full cost of attendance at their respective schools, or (2) paying up to $5,000 per year in deferred compensation to FBS football and Division I men’s basketball players for the use of their NILs, through trust funds distributable after they leave school. The NCAA timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.

II

We review the district court’s findings of fact after the bench trial for clear error and review the district court’s conclusions of law de novo. *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir.2014). Our clear-error review of the district court’s findings of fact is “deferential”; “we will accept the district court’s findings of fact unless we are left with the definite and firm conviction that a mistake has been committed.” *Id.* (alteration and internal quotation marks omitted).

III

On appeal, the NCAA contends that the plaintiffs’ Sherman Act claim fails on the merits, but it also argues that we are precluded altogether from reaching the merits, for three independent reasons: (1) The Supreme Court held in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), that the NCAA’s amateurism rules are “valid as a matter of law”; (2) the compensation rules at issue here are not covered by the Sherman Act at all because they do not regulate commercial activity; and (3) the plaintiffs have no standing to sue under the Sherman Act because they have not suffered “antitrust injury.” We find none of these three arguments persuasive.

A. Board of Regents Did Not Declare the NCAA’s Amateurism Rules “Valid as a Matter of Law”

We consider, first, the NCAA’s claim that, under *Board of Regents*, all NCAA amateurism rules are “valid as a matter of law.”

*Board of Regents* concerned the NCAA’s then-prevailing rules for televising college football games. The rules allowed television networks to negotiate directly with schools and conferences for the right to televise games, but they imposed caps on the total number of games that could be broadcast on television each year and the number of games that any particular school could televise. *1062 *Id.* at 91–94, 104 S.Ct. 2948. The University of Oklahoma and the University of Georgia challenged this regime as an illegal restraint of trade under Section 1.

The Court observed that the television rules resembled two kinds of agreements that are ordinarily considered per
se unlawful when made among horizontal competitors in the same market: a price-fixing agreement (in that the rules set a minimum aggregate price that the television networks were required to pay the NCAA’s members) and an output-restriction agreement (in that the rules artificially capped the number of televised game licenses for sale). \textit{Id.} at 99–100, 104 S.Ct. 2948. But it concluded that applying a per se rule of invalidity to the NCAA’s television rules would be “inappropriate” because college football is “an industry in which horizontal restraints on competition are essential if the product is to be available at all.” \textit{Id.} at 100–01, 104 S.Ct. 2948. The Court elaborated:

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football.... \textit{In order to preserve the character and quality of th}[is] “product,” “athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

\textit{Id.} at 101–02, 104 S.Ct. 2948 (emphasis added). The Court held that the NCAA’s rules should therefore be analyzed under the Rule of Reason.

Applying the Rule of Reason, the Court struck down the television rules on the ground that they did not serve any legitimate procompetitive purpose. \textit{Id.} at 113–20, 104 S.Ct. 2948. It then concluded its opinion by stating:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court’s conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.

\textit{Id.} at 120, 104 S.Ct. 2948 (emphasis added).

*1063 [3] Quoting heavily from the language in \textit{Board of Regents} that we have emphasized, the NCAA contends that any \textbf{Section 1} challenge to its amateurism rules must fail as a matter of law because the \textit{Board of Regents} Court held that those rules are presumptively valid. We disagree.
The Board of Regents Court certainly discussed the NCAA’s amateurism rules at great length, but it did not do so in order to pass upon the rules’ merits, given that they were not before the Court. Rather, the Court discussed the amateurism rules for a different and particular purpose: to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se. The point was a significant one. Naked horizontal agreements among competitors to fix the price of a good or service, or to restrict their output, are usually condemned as per se unlawful. See, e.g., United States v. Trenton Pottery Co., 273 U.S. 392, 398, 47 S.Ct. 77, 71 L.Ed. 700 (1927); see also, e.g., Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 19–20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (arrangements that “almost always tend to restrict competition and decrease output” are usually per se illegal). The Board of Regents Court decided, however, that because college sports could not exist without certain horizontal agreements, NCAA rules should not be held per se unlawful even when—like the television rules in Board of Regents—they appear to be pure “restraints on the ability of member institutions to compete in terms of price and output.” Bd. of Regents, 468 U.S. at 103, 104 S.Ct. 2948.

Board of Regents, in other words, did not approve the NCAA’s amateurism rules as categorically consistent with the Sherman Act. Rather, it held that, because many NCAA rules (among them, the amateurism rules) are part of the “character and quality of the [NCAA’s] ‘product,’ ” id. at 102, 104 S.Ct. 2948, no NCAA rule should be invalidated without a Rule of Reason analysis. The Court’s long encomium to amateurism, though impressive-sounding, was therefore dicta. To be sure, “[w]e do not treat considered dicta from the Supreme Court lightly”; such dicta should be accorded “appropriate deference.” United States v. Augustine, 712 F.3d 1290, 1295 (9th Cir.2013). Where applicable, we will give the quoted passages from Board of Regents that deference. But we are not bound by Board of Regents to conclude that every NCAA rule that somehow relates to amateurism is automatically valid.

What is more, even if the language in Board of Regents addressing amateurism were not dicta, it would not support the tremendous weight that the NCAA seeks to place upon it. The Court’s opinion supports the proposition that the preservation of amateurism is a legitimate procompetitive purpose for the NCAA to pursue, but the NCAA is not asking us to find merely that its amateurism rules are procompetitive; rather, it asks us to hold that those rules are essentially exempt from antitrust scrutiny.16 Nothing in Board of Regents supports such an exemption. To say that the NCAA’s amateurism rules are procompetitive, *1064 as Board of Regents did, is not to say that they are automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well. See Bd. of Regents, 468 U.S. at 101 n. 23, 104 S.Ct. 2948 (“While as the guardian of an important American tradition, the NCAA’s motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.”).

The NCAA cites decisions of three of our sister circuits, claiming that each adopted its view of Board of Regents. Two of these three cases, however, ultimately subjected the NCAA’s rules to Rule of Reason scrutiny—the very approach we adopt today. See Smith v. NCAA, 139 F.3d 180, 186 (3d Cir.1998), vacated on other grounds by NCAA v. Smith, 525 U.S. 459, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999); McCormack v. NCAA, 845 F.2d 1338, 1344–45 (5th Cir.1988). Only one—the Seventh Circuit’s decision in Agnew v. NCAA, 683 F.3d 328 (7th Cir.2012)—comes close to agreeing with the NCAA’s interpretation of Board of Regents, and we find it unpersuasive.

In Agnew, two former college football players who lost their scholarships challenged certain NCAA rules that prohibited schools from offering multi-year scholarships and capped the number of football scholarships each school could offer. Id. at 332–33. The Agnew court read Board of Regents broadly and concluded that, “when an NCAA bylaw is clearly meant to help maintain the ‘revered tradition of amateurism in college sports’ or the ‘preservation of the student-athlete in higher education,’ the bylaw [should] be presumed procompetitive.” Id. at 342–43 (quoting Bd. of Regents, 468 U.S. at 120, 104 S.Ct. 2948). The court concluded, however, that the scholarship limitations that were before it did not “implicate the preservation of amateurism,” since awarding more or longer scholarships to college athletes would not change their status as amateurs. Id. at 344. Thus, no “procompetitive presumption” applied to the scholarship rules. Id. at 345. Instead of dismissing the plaintiffs’ antitrust claims on the merits, the court dismissed them on the unrelated ground that the plaintiffs had failed to plead the existence of a cognizable market. Id.

Like the amateurism language in Board of Regents,
Agnew’s “procompetitive presumption” was dicta that was ultimately unnecessary to the court’s resolution of that case. But we would not adopt the Agnew presumption even if it were not dicta. Agnew’s analysis rested on the dubious proposition that in Board of Regents, the Supreme Court “blessed” NCAA rules that were not before it, and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny. Id. at 341. We doubt that was the Court’s intent, and we will not give such an aggressive construction to its words.

In sum, we accept Board of Regents’ guidance as informative with respect to the procompetitive purposes served by the NCAA’s amateurism rules, but we will go no further than that. The amateurism rules’ validity must be proved, not presumed.

B. The Compensation Rules Regulate “Commercial Activity”
The NCAA next argues that we cannot reach the merits of the plaintiffs’ Sherman Act claim because the compensation rules are not subject to the Sherman Act at all. The NCAA points out that Section 1 of the Sherman Act applies only to “restraint[s] of trade or commerce,” 15 U.S.C. § 1, and claims that its compensation rules are not subject to the Sherman Act at all. The NCAA next argues that we cannot reach the merits of the plaintiffs’ Sherman Act claim because the

the Sherman Act does not apply.” Id. at 339.

It is no answer to these observations to say, as the NCAA does in its briefs, that the compensation rules are “eligibility rules” rather than direct restraints on the terms of agreements between schools and recruits. True enough, the compensation rules are written in the form of eligibility rules; they provide that an athlete who receives compensation other than the scholarships specifically permitted by the NCAA loses his eligibility for collegiate sports. The mere fact that a rule can be characterized as an “eligibility rule,” however, does not mean the rule is not a restraint of trade; were the law otherwise, the NCAA could insulate its member schools’ relationships with student-athletes from antitrust scrutiny by renaming every rule governing student-athletes an “eligibility rule.” The antitrust laws are not to be avoided by such “clever manipulation of words.” Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 21–22, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964).

In other words, the substance of the compensation rules matters far more than how they are styled. And in substance, the rules clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools: a school may not give a recruit compensation beyond a grant-in-aid, and the recruit may not accept compensation beyond that limit, lest the recruit be disqualified and the transaction vitiated. The NCAA’s argument that its compensation rules are “eligibility” restrictions, rather than substantive restrictions on the price terms of recruiting agreements, is but a sleight of hand. There is real money at issue here.

As the NCAA points out, two circuits have held that certain NCAA rules are noncommercial in nature. In Smith v. NCAA, the Third Circuit dismissed a student-athlete’s challenge to the NCAA’s Postbaccalaureate Bylaw, which prohibited athletes from participating in athletics at postgraduate schools other than their undergraduate schools, on the grounds that the Sherman Act did not apply to that Bylaw. The Smith court held that eligibility rules such as the Postbaccalaureate Bylaw “are not related to the NCAA’s commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics.” Smith, 139 F.3d at 185.

The Sixth Circuit, meanwhile, held in *Bassett v. NCAA, 528 F.3d 426, 430, 433 (6th Cir.2008), that the NCAA’s rules against giving recruits “improper
inducements” were “explicitly noncommercial.” The court explained:

In fact, these rules are anti-commercial and designed to promote and ensure competitiveness amongst NCAA member schools. Violation of the applicable NCAA rules gives the violator a decided competitive advantage in recruiting and retaining highly prized student athletes. It also violates the spirit of amateur athletics by providing remuneration to athletes in exchange for their commitments to play for the violator’s football program. Finally, violators of these rules harm the student-athlete academically when coaches and assistants complete coursework on behalf of the student-athlete.

Id. at 433.

Neither Smith nor Bassett convinces us that the NCAA’s compensation rules are noncommercial. The Postbaccalaureate Bylaw challenged in Smith was a true “eligibility” rule, akin to the rules limiting the number of years that student-athletes may play collegiate sports or requiring student-athletes to complete a certain number of credit hours each semester. As the Smith court expressly noted, the Postbaccalaureate Bylaw was “not related to the NCAA’s commercial or business activities.” Smith, 139 F.3d at 185. By contrast, the rules here—which regulate what compensation NCAA schools may give student-athletes, and how much—do relate to the NCAA’s business activities: the labor of student-athletes is an integral and essential component of the NCAA’s “product,” and a rule setting the price of that labor goes to the heart of the NCAA’s business. Thus, the rules at issue here are more like rules affecting the NCAA’s dealings with its coaches or with corporate business partners—which courts have held to be commercial—than they are like the Bylaw challenged in Smith. See Bd. of Regents, 468 U.S. at 104–13, 104 S.Ct. 2948 (applying Sherman Act to rules governing NCAA members’ contracts with television networks); Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir.1998) (applying Sherman Act to NCAA rules limiting compensation of basketball coaches).

Bassett cannot be distinguished here in the way that Smith can since it involved an NCAA rule relating to payments to athletic recruits, but we believe Bassett was simply wrong on this point. Bassett’s reasoning, in fine, is that rules that seek to combat commercialism in college sports by preventing schools from competing to pay student-athletes cannot be considered restraints on “commerce.” We simply cannot understand this logic. Rules that are “anti-commercial and designed to promote and ensure competitiveness,” Bassett, 528 F.3d at 433, surely affect commerce just as much as rules promoting commercialism. The intent behind the NCAA’s compensation rules does not change the fact that the exchange they regulate—labor for in-kind compensation—is a quintessentially commercial transaction.

We therefore conclude that the NCAA’s compensation rules are within the ambit of the Sherman Act.

C. The Plaintiffs Demonstrated that the Compensation Rules Cause Them Injury in Fact

[5] The NCAA’s last argument antecedent to the merits is that the plaintiffs’ Section 1 claim fails at the threshold because the plaintiffs have failed to show that they have suffered “antitrust injury.” Antitrust injury is a heightened standing requirement that applies to private parties suing to enforce the antitrust laws. To satisfy the antitrust-injury requirement, a plaintiff must show “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” Glen Holly *1067 Entm’t, Inc. v. Tektronix Inc., 343 F.3d 1000, 1007–08 (9th Cir.2003) (quoting Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)) (internal quotation marks omitted).

Although the NCAA purports to be making an antitrust-injury argument, it is mistaken. The NCAA has not contended that the plaintiffs’ injuries are not “of the type the antitrust laws were intended to prevent.” Rather, the NCAA has made a garden-variety standing argument: it alleges that the plaintiffs have not been injured in fact by the compensation rules because those rules do not deprive them of any NIL compensation they would otherwise receive. Addressing each of the potential markets for NIL rights that the district court identified, the NCAA argues that (1) there are no legally-recognized NIL rights for participants in live game broadcasts; (2) the
NCAA’s compensation rules do not deprive the plaintiffs of compensation for use of their NILs in video games because the NCAA no longer permits college sports video games to be made and has a separate policy forbidding the use of student-athletes’ NILs in video games; and (3) the NCAA’s licensing agreement for archival footage with T3Media does not deprive athletes of NIL compensation for archival footage because it prevents T3Media from licensing student-athletes’ NILs while they are in school and requires the company to obtain consent once student-athletes have left school.

We conclude that the plaintiffs have shown that they are injured in fact as a result of the NCAA’s rules having foreclosed the market for their NILs in video games. We therefore do not reach the thornier questions of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA’s current licensing arrangement for archival footage.

1. Absent the NCAA’s compensation rules, video game makers would negotiate with student-athletes for the right to use their NILs

As we have explained, the district court found that, if permitted to do so, video game makers such as EA would negotiate with college athletes for the right to use their NILs in video games because these companies want to make games that are as realistic as possible. O’Bannon, 7 F.3d at 970. The district court noted that EA currently negotiates with the NFL and NBA players’ unions for the right to use their members’ NILs in professional sports video games. Id. The plaintiffs also put into evidence a copy of a 2005 presentation by EA representatives to the NCAA, which stated that EA’s inability to use college athletes’ NILs was the “number one factor holding back NCAA video game growth.”

2. Whether the Copyright Act preempts right-of-publicity claims based on sports video games is tangential to this case and irrelevant to the plaintiffs’ standing

In addition to arguing that its current policies against college sports video games defeat the plaintiffs’ claims to standing, the NCAA also contends that there are legal barriers that would prevent the plaintiffs from being compensated by a video game maker. Specifically, the NCAA argues that the Copyright Act would preempt any right-of-publicity claim arising out of the use of those NILs in sports video games. Thus, the NCAA maintains, if it were to resume its support for college sports video games and permit video game companies to use student-athletes’ NILs, the video game makers would not pay student-athletes for their NILs; rather, they could use the NILs for free.

We decline to consider this argument, for two reasons. First, it is convoluted and far afield from the main issues in this case. The NCAA asks us to decide whether, assuming that EA or some other video game company were to make a college sports video game that incorporated student-athletes’ NILs and then refuse to pay student-athletes for those NILs, the game maker would have a viable Copyright Act defense to a right-of-publicity lawsuit brought by the athletes. That question is a complex one, implicating both Section 301 of the Copyright Act, 17 U.S.C. § 301, which expressly preempts certain common-law claims, and a murky body
of case law holding that, in some circumstances, the Act impliedly preempts claims that fall outside of Section 301’s scope. See, e.g., Facenda v. NFL Films, Inc., 542 F.3d 1007, 1028–32 (3d Cir.2008) (suggesting, on the basis of a conflict preemption analysis, that federal copyright law can “impliedly preempt[]” right-of-publicity claims). It is scarcely fit for resolution within the confines of a standing inquiry in an antitrust suit between the NCAA and its student-athletes that involves neither EA nor any other video game company as a party. Should a college sports video game be made in the future and the right-of-publicity suit envisioned by the NCAA come to pass, the court hearing that suit will be in a far better position to resolve the question of Copyright Act preemption than we are.

Second and more importantly, the NCAA’s argument about the Copyright Act, even if correct, is irrelevant to whether the plaintiffs lack standing. On the NCAA’s interpretation of the Copyright Act, professional football and basketball players have no enforceable right-of-publicity claims against video game makers either—yet EA currently pays NFL and NBA players for the right to use their NILs in its video games. O’Bannon, 7 F.Supp.3d at 970. Thus, there is every reason to believe that, if permitted to do so, EA or another video game company would pay NCAA athletes for their NIL rights rather than test the enforceability of those rights in court. That the NCAA’s rules deny the plaintiffs all opportunity to receive this compensation is sufficient to endow them with standing to bring this lawsuit. See 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.4 (3d ed. 1998) (“[L]oss of an opportunity may constitute injury, even though it is not certain that any benefit would have been realized if the opportunity had been accorded.”) (collecting cases); cf., e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (rejecting the government’s argument that standing should be limited “to those who have ‘significantly’ affected by agency action”); Preminger v. Peake, 552 F.3d 757, 763 (9th Cir.2008) (“The injury may be minimal.”).

* * *

Because the plaintiffs have shown that, absent the NCAA’s compensation rules, video game makers would likely pay them for the right to use their NILs in college sports video games, the plaintiffs have satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury.

IV

Having rejected all of the NCAA’s preliminary legal arguments, we proceed to review the plaintiffs’ Section 1 claim on the merits. Although in another context the NCAA’s decision to value student-athletes’ NIL at zero might be per se illegal price fixing, we are persuaded—as was the Supreme Court in Board of Regents and the district court here—that the appropriate rule is the Rule of Reason. As the Supreme Court observed, the NCAA “market[s] a particular brand … [that] makes it more popular than professional sports to which it might otherwise be comparable.” Board of Regents, 468 U.S. at 101–02, 104 S.Ct. 2948. Because the “integrity of the ‘product’ cannot be preserved except by mutual agreement,” “restraints on competition are essential if the product is to be available at all.” Id. at 101, 102, 104 S.Ct. 2948; see also id. at 117, 104 S.Ct. 2948 (“Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved.” (footnote omitted)).

Like the district court, we follow the three-step framework of the Rule of Reason: “[1] The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [2] If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint’s procompetitive effects. [3] The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.” Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir.2001) (citations and internal quotation marks omitted).

A. Significant Anticompetitive Effects Within a Relevant Market

As we have recounted, the district court made the following factual findings: (1) that a cognizable “college education market” exists, wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities; (2) that if the NCAA’s compensation rules did not exist, member schools would compete to offer recruits compensation for their NILs; and (3) that the
compensation rules therefore have a significant anticompetitive effect on the college education market, in that they fix an aspect of the “price” that recruits pay to attend college (or, alternatively, an aspect of the price that schools pay to secure recruits’ services). These findings have substantial support in the record.

By and large, the NCAA does not challenge the district court’s findings. It does not take issue with the way that the district court defined the college education market. Nor does it appear to dispute the district court’s conclusion that the compensation rules restrain the NCAA’s member schools from competing with each other within that market, at least to a certain degree. Instead, the NCAA makes three modest arguments about why the compensation rules do not have a significant anticompetitive effect. First, it argues that because the plaintiffs never showed that the rules reduce output in the college education market, the plaintiffs did not meet their burden of showing a significant anticompetitive effect. Second, it argues that the rules have no anticompetitive effect because schools would not pay student-athletes anything for their NIL rights in any event, given that those rights are worth nothing. And finally, the NCAA argues that even if the district court was right that schools would pay student-athletes for their NIL rights, any such payments would be small, which means that the compensation rules’ anticompetitive effects cannot be considered significant.

We can dispose of the first two arguments quickly. First, the NCAA’s contention that the plaintiffs’ claim fails because they did not show a decrease in output in the college education market is simply incorrect. Here, the NCAA argues that output in the college education market “consists of opportunities for student-athletes to participate in FBS football or Division I men’s basketball,” and it quotes the district court’s finding that these opportunities have “increased steadily over time.” See O’Bannon, 7 F.Supp.3d at 981. But this argument misses the mark. Although output reductions are one common kind of anticompetitive effect in antitrust cases, a “reduction in output is not the only measure of anticompetitive effect.” Areeda & Hovenkamp ¶ 1503b(1) (emphasis added).

The “combination[s] condemned by the [Sherman] Act” also include “price-fixing ... by purchasers” even though “the persons specially injured ... are sellers, not customers or consumers.” Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). At trial, the plaintiffs demonstrated that the NCAA’s compensation rules have just this kind of anticompetitive effect: they fix the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component. The district court found that although consumers of NCAA football and basketball may not be harmed directly by this price-fixing, the “student-athletes themselves are harmed by the price-fixing agreement among FBS football and Division I basketball schools.” O’Bannon, 7 F.Supp.3d at 972–73. The athletes accept grants-in-aid, and no more, in exchange for their athletic performance, because the NCAA schools have agreed to value the athletes’ NILs at zero, “an anticompetitive effect.” Id. at 973. This anticompetitive effect satisfied the plaintiffs’ initial burden under the Rule of Reason. Cf. Cal. Dental Ass’n v. FTC, 526 U.S. 756, 777, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) (“[R]aising price, reducing output, and dividing markets have the same anticompetitive effects.” (quoting Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n, 744 F.2d 588, 594–95 (7th Cir.1984))).

Second, the NCAA’s argument that student-athletes’ NILs are, in fact, worth nothing is simply a repackaged version of its arguments about injury in fact, which we have rejected.

Finally, we reject the NCAA’s contention that any NIL compensation that student-athletes might receive in the absence of its compensation rules would be de minimis and that the rules therefore do not significantly affect competition in the college education market. This “too small to matter” argument is incompatible with the Supreme Court’s holding in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (per curiam). In Catalano, a group of beer retailers sued a group of beer wholesalers, alleging that the wholesalers had secretly agreed to end their customary practice of extending the retailers interest-free credit for roughly a month after the delivery of beer. Id. at 644, 100 S.Ct. 1925. The Court unanimously held that this agreement was unlawful per se. It reasoned that the agreement was clearly a means of “extinguishing one form of [price] competition among the sellers,” given that credit terms were part of the price of the beer, and that the agreement was therefore tantamount to price-fixing. Id. at 649, 100 S.Ct. 1925. The Court was not concerned with whether the agreement affected the market adversely: “It is no excuse that the prices fixed are themselves reasonable.” Id. at 647, 100 S.Ct. 1925.

The NCAA’s compensation rules function in much the
same way as the agreement at issue in Catalano: they “extinguish[] one form of competition” among schools seeking to land recruits. We acknowledge that Catalano was a per se case in which the Court did not analyze the anticompetitive effect of the wholesalers’ agreement in detail, but the decision nonetheless indicates that an antitrust court should not dismiss an anticompetitive price-fixing agreement as benign simply because the agreement relates only to one component of an overall price. That proposition finds further support in Board of Regents: in Board of Regents, a Rule of Reason case, the Court held that the NCAA’s television plan had “a significant potential for anticompetitive effects” without delving into the details of exactly how much the plan restricted output of televised games or how much it fixed the price of TV contracts. 468 U.S. at 104–05, 104 S.Ct. 2948. While the precise value of NIL compensation is uncertain, at this point in the analysis and in light of Catalano and Board of Regents, we conclude that the plaintiffs have met their burden at the first step of the Rule of Reason by showing that the NCAA’s compensation rules fix the price of one component (NIL rights) of the bundle that schools provide to recruits.

Because we agree with the district court that the compensation rules have a significant anticompetitive effect on the college education market, we proceed to consider the procompetitive justifications the NCAA proffers for those rules.

B. Procompetitive Effects

As discussed above, the NCAA offered the district court four procompetitive justifications for the compensation rules: (1) promoting amateurism, (2) promoting competitive balance among NCAA schools, (3) integrating student-athletes with their schools’ academic community, and (4) increasing output in the college education market. The district court accepted the first and third and rejected the other two.

Although the NCAA’s briefs state in passing that the district court erred in failing to “credit all four justifications fully,” the NCAA focuses its arguments to this court entirely on the first proffered justification—the promotion of amateurism. We therefore accept the district court’s factual findings that the compensation rules do not promote competitive balance, that they do not increase output in the college education market, and that they play a limited role in integrating student-athletes with their schools’ academic communities, since we have been offered no meaningful argument that those findings were clearly erroneous. See, e.g., Md. Cas. Co. v. Knight, 96 F.3d 1284, 1291 (9th Cir.1996).

The district court acknowledged that the NCAA’s current rules promote amateurism, which in turn plays a role in increasing consumer demand for college sports. O’Bannon, 7 F.Supp.3d at 978. The NCAA does not challenge that specific determination, but it argues to us that the district court gave the amateurism justification short shrift, in two respects. First, it claims that the district court erred by focusing solely on the question of whether amateurism increases consumers’ (i.e., fans’) demand for college sports and ignoring the fact that amateurism also increases choice for student-athletes by giving them “the only opportunity [they will] have to obtain a college education while playing competitive sports as students.” Second, it faults the district court for being inappropriately skeptical of the NCAA’s historical commitment to amateurism. Although we might have credited the depth of the NCAA’s devotion to amateurism differently, these arguments do not persuade us that the district court clearly erred.

The NCAA is correct that a restraint that broadens choices can be procompetitive. The Court in Board of Regents observed that the difference between college and professional sports “widen[s]” the choices “available to athletes.” Bd. of Regents, 468 U.S. at 102, 104 S.Ct. 2948. But we fail to see how the restraint at issue in this particular case—i.e., the NCAA’s limits on student-athlete compensation—makes college sports more attractive to recruits, or widens recruits’ spectrum of choices in the sense that Board of Regents *1073 suggested. As the district court found, it is primarily “the opportunity to earn a higher education” that attracts athletes to college sports rather than professional sports, O’Bannon, 7 F.Supp.3d at 986, and that opportunity would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships. Nothing in the plaintiffs’ prayer for compensation would make student-athletes something other than students and thereby impair their ability to become student-athletes.

Indeed, if anything, loosening or abandoning the compensation rules might be the best way to “widen” recruits’ range of choices; athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school. See Jeffrey L. Harrison & Casey C. Harrison, The Law and Economics of the

NCAA’s Claim to Monopsony Rights. 54 Antitrust Bull. 923, 948 (2009). We therefore reject the NCAA’s claim that, by denying student-athletes compensation apart from scholarships, the NCAA increases the “choices” available to them.16

The NCAA’s second point has more force—the district court probably underestimated the NCAA’s commitment to amateurism. See Bd. of Regents, 468 U.S. at 120, 104 S.Ct. 2948 (referring to the NCAA’s “revered tradition of amateurism in college sports”). But the point is ultimately irrelevant. Even if the NCAA’s concept of amateurism had been perfectly coherent and consistent, the NCAA would still need to show that amateurism brings about some procompetitive effect in order to justify it under the antitrust laws. See id. at 101–02 & n. 23, 104 S.Ct. 2948.

The NCAA cannot fully answer the district court’s finding that the compensation rules have significant anticompetitive effects simply by pointing out that it has adhered to those rules for a long time. Nevertheless, the district court found, and the record supports that there is a concrete procompetitive effect in the NCAA’s commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers. We therefore conclude that the NCAA’s compensation rules serve the two procompetitive purposes identified by the district court: integrating academics with athletics, and “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism.” O’Bannon, 7 F.Supp.3d at 1005.17

*1074 We note that the district court’s findings are largely consistent with the Supreme Court’s own description of the college football market as “a particular brand of football” that draws from “an academic tradition [that] differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.” Bd. of Regents, 468 U.S. at 101–02, 104 S.Ct. 2948. “Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.” Id. at 102, 104 S.Ct. 2948. But, as Board of Regents demonstrates, not every rule adopted by the NCAA that restricts the market is necessary to preserving the “character” of college sports. We thus turn to the final inquiry—whether there are reasonable alternatives to the NCAA’s current compensation restrictions.

C. Substantially Less Restrictive Alternatives

The third step in the Rule of Reason analysis is whether there are substantially less restrictive alternatives to the NCAA’s current rules. We bear in mind that—to be viable under the Rule of Reason—an alternative must be “virtually as effective” in serving the procompetitive purposes of the NCAA’s current rules, and “without significantly increased cost.” Cnty. of Tuolumne v. Sonora Cnty. Hosp., 236 F.3d 1148, 1159 (9th Cir.2001) (internal quotation marks omitted). We think that plaintiffs must make a strong evidentiary showing that its alternatives are viable here. Not only do plaintiffs bear the burden at this step, but the Supreme Court has admonished that we must generally afford the NCAA “ample latitude” to superintend college athletics. Bd. of Regents, 468 U.S. at 120, 104 S.Ct. 2948; see also Law v. Nat’l Collegiate Athletic Ass’n, 134 F.3d 1010, 1022 (10th Cir.1998) (“[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics.”); Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 83 (3d Cir.2010) (noting that, generally, “sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport”).

The district court identified two substantially less restrictive alternatives: (1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.18 O’Bannon, 7 F.Supp.3d at 1005–07. We hold that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative, but that it clearly erred when it found that allowing students to be paid compensation for their NILs is virtually as effective as the NCAA’s current amateur-status rule.

1. Capping the permissible amount of scholarships at the cost of attendance

[12] The district court did not clearly err in finding that allowing NCAA member schools to award grants-in-aid up to their full cost of attendance would be a substantially less restrictive alternative to the current compensation rules. All of the evidence *1075 before the district court indicated that raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism: Dr. Mark Emmert, the president of the NCAA, testified at trial that giving student-athletes...
scholarships up to their full costs of attendance would not violate the NCAA’s principles of amateurism because all the money given to students would be going to cover their “legitimate costs” to attend school. Other NCAA witnesses agreed with that assessment. Id. at 983. Nothing in the record, moreover, suggested that consumers of college sports would become less interested in those sports if athletes’ scholarships covered their full cost of attendance, or that an increase in the grant-in-aid cap would impede the integration of student-athletes into their academic communities. Id.

The NCAA, along with fifteen scholars of antitrust law appearing as amici curiae, warns us that if we affirm even this more modest of the two less restrictive alternative restraints identified by the district court, we will open the floodgates to new lawsuits demanding all manner of incremental changes in the NCAA’s and other organizations’ rules. The NCAA and these amici admonish us that as long as a restraint (such as a price cap) is “reasonably necessary to a valid business purpose,” it should be upheld; it is not an antitrust court’s function to tweak every market restraint that the court believes could be improved.

We agree with the NCAA and the amici that, as a general matter, courts should not use antitrust law to make marginal adjustments to broadly reasonable market restraints. See, e.g., Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853, 860 (1st Cir.1982) (noting that defendants are “not required to adopt the least restrictive” alternative); Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir.1975) (denying that the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree”). The particular restraint at issue here, however—the grant-in-aid cap that the NCAA set below the cost of attendance—is not such a restraint. To the contrary, the evidence at trial showed that the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA’s own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.

Thus, in holding that setting the grant-in-aid cap at student-athletes’ full cost of attendance is a substantially less restrictive alternative under the Rule of Reason, we are not declaring that courts are free to micromanage organizational rules or to strike down largely beneficial market restraints with impunity. Rather, our affirmation of this aspect of the district court’s decision should be taken to establish only that where, as here, a restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.

A compensation cap set at student-athletes’ full cost of attendance is a substantially less restrictive alternative means of accomplishing the NCAA’s legitimate procompetitive purposes. And there is no evidence that this cap will significantly increase costs; indeed, the NCAA already permits schools to fund student-athletes’ full cost of attendance. The district court’s determination that the existing compensation rules violate Section 1 of the Sherman Act was correct and its injunction requiring the NCAA to permit schools to allow compensation up to the full cost of attendance was proper.

2. Allowing students to receive cash compensation for their NILs

In our judgment, however, the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses. Again, the district court identified two procompetitive purposes served by the NCAA’s current rules: “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism” and “integrating academics and athletics.” O’Bannon, 7 F.Supp.3d at 1005; see also Board of Regents, 468 U.S. at 117, 104 S.Ct. 2948 (“It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”). The question is whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses, is “virtually as effective” in preserving amateurism as not allowing compensation. Cnty. of Tuolumne, 236 F.3d at 1159 (internal quotation marks omitted).

We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand. Both we and the district court agree that the NCAA’s amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively

as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs.\textsuperscript{30}

Having found that amateurism is integral to the NCAA’s market, the district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is “virtually as effective” for that market as being as amateur. Or, to borrow the Supreme Court’s analogy, the market for college football is distinct from other sports markets and must be “differentiate[d]” from professional sports lest it become \textsuperscript{1077}“minor league [football].” \textit{Bd. of Regents, 468 U.S. at 102, 104 S.Ct. 2948.}

Aside from the self-evident fact that paying students for their NIL rights will vitiate their amateur status as collegiate athletes, the court relied on threadbare evidence in finding that small payments of cash compensation will preserve amateurism as well the NCAA’s rule forbidding such payments. Most of the evidence elicited merely indicates that paying students large compensation payments would harm consumer demand more than smaller payments would—not that small cash payments will preserve amateurism. Thus, the evidence was addressed to the wrong question. Instead of asking whether deferred payments to student-athletes served the same procompetitive purposes as making no payments, the evidence before the district court went to a different question: Would the collegiate sports market be better off if the NCAA made small payments or big payments? For example, the district court noted that a witness called by the NCAA, Bernard Muir, the athletic director at Stanford University, testified that paying student-athletes modest sums raises less concern than paying them large sums. The district court also relied on Dr. Dennis’s opinion survey, which the court read to indicate that in the absence of the NCAA’s compensation rules, “the popularity of college sports would likely depend on the size of payments awarded to student-athletes.” \textit{O’Bannon, 7 F.Supp.3d at 983}. Dr. Dennis had found that payments of $200,000 per year to each athlete would alienate the public more than would payments of $20,000 per year. \textit{Id. at 975–76, 983}. At best, these pieces of evidence indicate that small payments to players will impact consumer demand less than larger payments. But there is a stark difference between finding that small payments are less harmful to the market than large payments—and finding that paying students small sums is virtually as effective in promoting amateurism as not paying them.

The other evidence cited by the district court is even less probative of whether paying these student-athletes will preserve amateurism and consumer demand. The district court adverted to testimony from a sports management expert, Daniel Rascher, who explained that although opinion surveys had shown the public was opposed to rising baseball salaries during the 1970s, and to the decision of the International Olympic Committee to allow professional athletes to compete in the Olympics, the public had continued to watch baseball and the Olympics at the same rate after those changes. \textit{Id. at 976–77}. But professional baseball and the Olympics are not fit analogues to college sports.\textsuperscript{21} The Olympics have not been nearly as transformed by the introduction of professionalism as college sports would be.

Finally, the district court, and the dissent, place particular weight on a brief interchange during plaintiffs’ cross-examination of one of the NCAA’s witnesses, Neal Pilson, a television sports consultant formerly employed at CBS. Pilson testified that “if you’re paid for your performance, you’re not an amateur,” and explained at length why paying students would harm the student-athlete market. Plaintiffs then asked Pilson whether his opinions about amateurism “depend on the level of the money” paid to players, and he acknowledged \textsuperscript{1078}that his opinion was “impacted by the level.” When asked whether there was a line that “should not be crossed” in paying players, Pilson responded “that’s a difficult question. I haven’t thought about the line. And I haven’t been asked to render an opinion on that.” When pressed to come up with a figure, Pilson repeated that he was “not sure.” He eventually commented that “I tell you that a million dollars would trouble me and $5,000 wouldn’t, but that’s a pretty good range.” When asked whether deferred compensation to students would concern him, Pilson said that while he would not be as concerned by deferred payments, he would still be “troubled by it.”\textsuperscript{22}

So far as we can determine, Pilson’s offhand comment under cross-examination is the sole support for the district court’s $5,000 figure. But even taking Pilson’s comments at face value, as the dissent urges, his testimony cannot support the finding that paying student-athletes small sums will be virtually as effective in preserving amateurism as not paying them. Pilson made clear that he was not prepared to opine on whether pure cash compensation, of any amount, would affect amateurism. Indeed, he was never asked about the impact of giving student-athletes small cash payments; instead, like other witnesses, he was asked only whether big payments would be worse than small payments. Pilson’s casual comment—“I haven’t been asked to render an opinion...
on that. It’s not in my report”—that he would not be troubled by $5,000 payments is simply not enough to support the district court’s far-reaching conclusion that paying students $5,000 per year will be as effective in preserving amateurism as the NCAA’s current policy.23

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.24 Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; *1079 we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its “particular brand of football” to minor league status. Bd. of Regents, 468 U.S. at 101–02, 104 S.Ct. 2948. In light of that, the meager evidence in the record, and the Supreme Court’s admonition that we must afford the NCAA “ample latitude” to superintend college athletics, Bd. of Regents, 468 U.S. at 120, 104 S.Ct. 2948, we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint.25 We thus vacate that portion of the district court’s decision and the portion of its injunction requiring the NCAA to allow its member schools to pay this deferred compensation.

V

By way of summation, we wish to emphasize the limited scope of the decision we have reached and the remedy we have approved. Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve procompetitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act’s rules. In this case, the NCAA’s rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.

We vacate the district court’s judgment and permanent injunction insofar as they require the NCAA to allow its member schools to pay student-athletes up to $5,000 per year in deferred compensation. We otherwise affirm. The parties shall bear their own costs on appeal.

AFFIRMED IN PART and VACATED IN PART.

THOMAS, Chief Judge, concurring in part and dissenting in part:

I largely agree with all but one of the majority’s conclusions.1 I respectfully disagree with the majority’s conclusion that the district court clearly erred in ordering the NCAA to permit up to $5,000 in deferred compensation above student-athletes’ full cost of attendance.

I

We review the district court’s determinations of fact for clear error. We are not permitted to “review the evidence de novo *1080 and freely substitute our judgment for that of the trial judge.” United States v. Ironworkers Local 86, 443 F.2d 544, 549 (9th Cir.1971). Rather, the clear error standard “is significantly deferential, and we will accept the lower court’s findings of fact unless we are left with the definite and firm conviction that a mistake has been committed.” Lentini v. Cal. Cir. for the Arts, Escondido, 370 F.3d 837, 848–49 (9th Cir.2004).

There was sufficient evidence in the record to support the award. The district court’s conclusion that the proposed alternative restraint satisfied the Rule of Reason was based on testimony from at least four experts—including three experts presented by the NCAA—that providing student-athletes with small amounts of compensation above their cost of attendance most likely would not have a significant impact on consumer interest in college sports. O’Bannon, 7 F.Supp.3d at 976–77, 983–84, 1000–01. It was also based on the fact that FBS football players are currently permitted to accept Pell grants in excess of their cost of attendance, and the fact that Division I tennis recruits are permitted to earn up to $10,000 per year in prize money from athletic events before they enroll in college. Id. at 974, 1000. The majority characterizes the weight of this evidence as “threadbare.” Op. at 1077. I respectfully disagree.
The NCAA’s own expert witness, Neal Pilson, testified that the level of deferred compensation would have an effect on consumer demand for college athletics, but that paying student-athletes $5,000 per year in trust most likely would not have a significant impact on such demand. He also testified that any negative impact that paying student-athletes might have on consumer demand could be partially mitigated by placing the compensation in a trust fund to be paid out after graduation.

The majority dismisses this testimony because it was made in a very “offhand” manner, and because Pilson proffered the $5,000 amount on cross-examination “[w]hen pressed.” Op. at 1078. However, the NCAA presented this witness as an expert on the issue of whether paying college athletes will negatively impact consumer demand for college sports.2 Pilson testified at length on the topic, and his qualifications were not challenged. It is not appropriate for us on appeal to assess demeanor we did not see. As a result, I would take the testimony at face value, and the district court did not clearly err in crediting it.

The majority also dismisses the testimony given by expert witness Dr. Daniel Rascher demonstrating that consumer interest in major league baseball and the Olympics increased after baseball players’ salaries rose and professional athletes were allowed to compete in the Olympics. The majority characterizes our task at step three of the Rule of Reason as determining “whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses is ‘virtually as effective’ in preserving amateurism as not allowing compensation.” Op. at 1076 (emphasis added). This conclusion misstates our inquiry. Rather, we must determine whether allowing student-athletes to be compensated for their NILs is ‘virtually as effective’ in preserving popular demand for college sports as not allowing compensation. In terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest.

Moreover, Rascher also testified that consumer demand in sports such as tennis and rugby increased after the sports’ governing boards permitted athletes to receive payment. O’Bannon, 7 F.Supp.3d at 977. In my view, the majority errs in dismissing this testimony. The import of Rascher’s testimony was that consumer demand typically does not decrease when athletes are permitted to receive payment, and that this general principle holds true across a wide variety of sports and competitive formats. The district court did not clearly err in crediting it.

The district court accepted the testimony of multiple experts that small amounts of compensation would not affect consumer demand, and then used the lowest amount suggested by one of the NCAA’s experts. The district court was within its right to do so.3

II

The disagreement between my view and the majority view largely boils down to a difference in opinion as to the procompetitive interests at stake. The majority characterizes our task at step three of the Rule of Reason as determining “whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses is ‘virtually as effective’ in preserving amateurism as not allowing compensation.” Op. at 1076 (emphasis added). This conclusion misstates our inquiry. Rather, we must determine whether allowing student-athletes to be compensated for their NILs is ‘virtually as effective’ in preserving popular demand for college sports as not allowing compensation. In terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest.

The district court found that there are two, limited procompetitive benefits to the current rule. It found that limits on large amounts of student-athlete compensation preserve the popularity of the NCAA’s product, and that limits on large amounts of student-athlete compensation promote the integration of academics and athletics. O’Bannon, 7 F.Supp.3d at 1004–05. In reaching these conclusions, the district court explained:

*1082 [S]ome restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball. If the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA’s product—specifically, FBS football and Division I basketball telecasts, re-broadcasts, ticket sales, and merchandise—then the restrictions would be procompetitive. Id. at 1000 (emphasis added).

The district court recounted the testimony of NCAA expert witness Dr. J. Michael Dennis, who conducted a survey of consumer attitudes concerning college sports in
2013. The court found that “[w]hat Dr. Dennis’s survey does suggest is that the public’s attitudes toward student-athlete compensation depend heavily on the level of compensation that student-athletes would receive.” Id. at 1000–01. It noted that this conclusion “is consistent with the testimony of the NCAA’s own witnesses, including [Stanford athletic director Bernard] Muir and Mr. Pilson, who both indicated that smaller payments to student-athletes would bother them less than larger payments.” Id. at 1001.

The district court determined that “the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography.” Id. The court therefore concluded that:

the NCAA’s restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products. Although they might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses.

*1083* Plaintiffs are not required, as the majority suggests, to show that the proposed alternatives are “virtually as effective” at preserving the concept of amateurism as the NCAA chooses to define it. Indeed, this would be a difficult task, given that “amateurism” has proven a nebulous concept prone to ever-changing definition. See *O’Bannon*, 7 F.Supp.3d at 973–75 (describing the ways that the NCAA’s definition of amateurism has changed over time). Even today, the NCAA’s conception of amateurism does not fall easily into a bright line rule between paying student-athletes and not paying them. Tennis players are permitted to receive payment of up to $10,000 per year for playing their sport. A tennis player who begins competing at a young age could presumably earn upwards of $50,000 for playing his sport and still be considered an amateur athlete by the NCAA.5

The NCAA insists that consumers will flee if student-athletes are paid even a small sum of money for colleges’ use of their NILs. This assertion is contradicted by the district court record and by the NCAA’s own rules regarding amateurism. The district court was well within its right to reject it. Division I schools have spent $5 billion on athletic facilities over the past 15 years. The NCAA sold the television rights to broadcast the NCAA men’s basketball championship tournament for 12 years to CBS for $10.8 billion dollars. The NCAA insists that this multi-billion dollar industry would be lost if the teenagers and young adults who play for these college teams earn one dollar above their cost of school attendance. That is a difficult argument to swallow. Given the trial evidence, the district court was well within its rights to reject it.

**III**

The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law and under the appropriate standard of review. In the end, my disagreement with the majority is founded on the appropriate standard of review. After an extensive bench trial, the district court made a factual finding that payment of $5,000 in deferred compensation would not significantly reduce consumer demand for college sports. This finding was supported by extensive testimony from at least four expert witnesses. There was no evidence to the contrary. Therefore, on this record, I cannot agree with the majority that the district court clearly erred when it determined that paying
student-athletes up to $5,000 per year would be “virtually as effective” at preserving the pro-competitive benefits of the current rule. Therefore, I would affirm the district court in all respects.

*1084 For these reasons, I concur in part and dissent in part.

Footnotes

* The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

1 The Dreadnought was a British battleship that featured large, long-range guns. The term came to refer to a class of super battleship. In drawing this comparison, Mr. Richmond showed himself to be a historian ahead of his time. See generally Robert K. Massie, Dreadnought: Britain, Germany, and the Coming of the Great War (1991) (explaining how the naval arms race between Britain and Germany contributed to the outbreak of World War I).

2 The rise of the NCAA roughly paralleled that of the International Olympic Committee (IOC) and the Amateur Athletic Union (AAU), both in time and in philosophy. Like the NCAA, both organizations have had to adapt to increasing professionalization and commercialization in sports. In the late twentieth century, the IOC abandoned its amateurism experiment. The AAU, meanwhile, continues to operate as a sponsor of amateur sports programs and tournaments; it is currently best known for its many boys’ basketball teams, which have struggled to deal with the influence of professional agents and outside money. See, e.g., Jason Zengerle, Breaks of the Game, N.Y. Times, Dec. 26, 2010, at BR8 (calling it “a commonplace for sportswriters to describe A.A.U. basketball as a cesspool of corruption”).

3 The “cost of attendance” at a particular school includes the items that make up a grant in aid plus “[n]onrequired books and supplies, transportation, and other expenses related to attendance at the institution.” The difference between a grant in aid and the cost of attendance is a few thousand dollars at most schools.

4 As this class definition indicates, O’Bannon and Keller limited their suits only to high-level (Division I/FBS) college football and men’s basketball players. They likely did so in part because almost all of EA’s college sports video games have been football and men’s basketball games, and in part because those two sports generate far more revenue than any other college sports. See, e.g., Richard Sandomir & Pete Thamel, Tournament Stays at CBS, Adding Cable and 3 Teams, N.Y. Times, Apr. 23, 2010, at B9 (describing CBS’s agreement to pay $10.8 billion for the TV rights to the NCAA Division I men’s basketball tournament for a period of 13 years); Marc Tracy & Tim Rohan, What Made College Football More Like the Pros? $7.3 Billion, for a Start, N.Y. Times, Dec. 31, 2014, at A1 (describing ESPN’s agreement to pay $7.3 billion over 12 years to telecast seven [college football] games a year”); Nat’l Collegiate Ath. Ass’n, 2004–2013 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report, at 37 (2014), available at https://www.ncaapublications.com/p-4344-division-i-revenues-and-expenses-2004-2013.aspx. Thus, although NCAA member schools sponsor teams in a variety of other sports, both the district court’s analysis and our own focus on football and men’s basketball.

5 The NFL has never allowed high school players to enter its draft. The NBA did at one time, and a number of NBA stars (including LeBron James and Kobe Bryant) came to the league directly from high school, but in 2005, the NBA adopted a rule requiring draftees to be at least nineteen years old and one year out of high school, a rule it has retained to the present day. See Howard Beck, N.B.A. Draft Will Close Book on High School Stars, N.Y. Times, June 28, 2005, at D1.

6 Although the plaintiffs presented some evidence of other licensing opportunities for merchandise such as jerseys and bobbleheads, they abandoned these claims and the district court did not consider such markets further. O’Bannon, 7 F.Supp.3d at 968 n. 4.

7 The court acknowledged that the NCAA had recently terminated its relationship with EA by declining to renew its license for such video games, but the court found that there was no evidence that the NCAA would not renew the relationship in the future. O’Bannon, 7 F.Supp.3d at 970.

All Citations

The district court rejected a third proposal: permitting student-athletes to receive compensation from school-approved endorsements. *O'Bannon*, 7 F.Supp.3d at 984. The court found that this proposal would undermine the NCAA’s efforts to protect its student-athletes from commercial exploitation. *Id.*

Importantly, the Court was quite clear that the preservation of amateurism, standing alone, was not the justification for its decision to reject a per se analysis. *Bd. of Regents*, 468 U.S. at 100–01, 104 S.Ct. 2948 (“This decision [not to apply a per se rule] is not based on ... our respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics.”).

The NCAA appears at some places in its briefs to concede that the amateurism rules are subject to Rule of Reason analysis and merely to argue that *Board of Regents* “dictates the outcome” of that analysis. But we see no distinction between that position and an argument for blanket antitrust immunity.

The NCAA also asserts before us that it has no intent to license its intellectual property for use in video games in the future, but we place no weight on that assertion. Statements in appellate briefs are not evidence. See, e.g., *Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.*, 341 F.3d 987, 1002 (9th Cir.2003).

Even if the district court had not made this factual finding, we would be reluctant to conclude that the NCAA’s current moratorium on college sports video games precludes the plaintiffs' suit. When a defendant has voluntarily ceased “allegedly improper behavior in response to a suit, but is free to return to it at any time,” a challenge to the defendant’s behavior is generally not considered moot unless “there is no reasonable expectation that the illegal action will recur.” *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir.1994). Under this logic, the NCAA’s decision to terminate its relationship with video game companies should not moot the plaintiffs’ video game-related claims or show that the NCAA’s conduct does not injure the plaintiffs.

The NCAA also argues that the First Amendment would preclude any right-of-publicity claim arising out of a sports video game. We rejected that argument in *Keller*, 724 F.3d at 1284, and we will not consider it further in this appeal. *Accord Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 170 (3d Cir.2013) (holding that “the NCAA Football ... games at issue in this case do not sufficiently transform [student-athletes’] identit[i]es to escape [a] right of publicity claim”).

As we have explained, the district court alternatively characterized student-athletes as buyers of educational services from a cartel rather than sellers of labor to a monopsony. This different way of describing the college education market did not alter either the district court’s analysis of how the market functioned or its assessment that student-athletes are harmed by the NCAA’s compensation rules. *O'Bannon*, 7 F.Supp.3d at 973, 991–93.

Indeed, the *Catalano* defendants declined to “suggest a procompetitive justification for [their] horizontal agreement to fix credit.” *Catalano*, 446 U.S. at 646 n. 8, 100 S.Ct. 1925.

It may be that what the NCAA means by this argument is that its compensation rules make it possible for schools to fund more scholarships than they otherwise could and thereby increase the number of opportunities that recruits have to play college sports. To the extent the NCAA is making that argument, it is the functional equivalent of the NCAA’s argument that the rules increase output in the college education market. The district court found that argument unproved, and we have affirmed that finding.

The dissent suggests that during the second step the district court defined the procompetitive benefits as “limits on large amounts of student-athlete compensation preserve the popularity of the NCAA’s product.” Dissent at 1081, 1082. But this cannot be right. During the second step, the district court could only consider the benefits of the NCAA’s existing rule prohibiting NIL payments—it could not consider the potential benefits of an alternative rule (such as capping large payments). The correct inquiry under the Rule of Reason is: What procompetitive benefits are served by the NCAA’s existing rule banning NIL payments? The district court found that the NCAA’s existing ban provides the procompetitive benefit of preserving amateurism, and thus consumer demand. It is only in the third step, where the burden is on the plaintiffs, when the court could consider whether alternative rules provide a procompetitive benefit. And even then, the courts’ analysis is cabined to considering whether the alternative serves the same procompetitive interests identified in second step.

Although the NCAA now permits schools and conferences to elect to raise their scholarship caps to the full cost of
The majority concludes that the plaintiffs established antitrust injury in fact because the NCAA has foreclosed them from setting a cap any lower than the cost of attendance thus remains in effect, which means that the NCAA’s challenge to that portion of the injunction is not moot.

Although our analysis focuses on whether the alternative serves procompetitive purposes, our prior cases make clear that plaintiffs must prove that any alternative will not significantly increase costs to implement. Cnty. of Tuolumne, 236 F.3d at 1159. And the district court here failed to make any findings about whether allowing schools to pay students NIL cash compensation will significantly increase costs to the NCAA and its member schools.

The dissent suggests that the district court found amateurism itself has no procompetitive value, and that “[a]mateurism is relevant only insofar as popular demand for college sports is increased by consumer perceptions of and desire for amateurism.” Dissent at 1082. But this ignores that the district court found that the NCAA’s “current understanding of amateurism” helps “preserve[e] the popularity of the NCAA’s product.” Amateurism is not divorced from the procompetitive benefit identified by the court; it is its core element.

Elsewhere the dissent argues that “we are not tasked with deciding what makes an amateur an amateur,” Dissent at 1083 n. 5, and that “the distinction between amateur and professional sports is not for the court to delineate. It is a line for consumers to draw,” id. at 1082 n. 4. However, if we do not have some shared conception of what makes an amateur an amateur—or, more precisely, the difference between amateurs and professionals—then the district court’s findings on the role of amateurism in college sports make no sense. We may not agree on all the particulars, but the basic difference was spelled out by Neal Pilson, a witness the district court relied on when determining that small cash payments to students was a viable alternative: “if you’re paid for performance, you’re not an amateur.”

The district court also considered evidence that Division I tennis recruits are permitted to earn up to ten thousand dollars per year in prize money from athletic events before they enroll in college. O’Bannon, 7 F.Supp.3d at 974, 1000. Allowing college-bound tennis players to accept award money from outside athletic events implicates amateurism differently than allowing schools to pay student-tennis players directly.

Later in his cross-examination, Pilson was asked if “the public watches college sports because they perceive student athletes as playing for the love of the game and for the value and opportunities available to them from a college education?” Pilson responded that that was “one of the reasons that . . . would be jeopardized.” He then commented that “the public has . . . a sense of college sports that is different from professional [sports] and it’s at the bedrock of the popularity of college sports.”

The dissent contends that the record supports the finding that $5,000 payments to student-athletes will have little to no effect on consumer demand for college football. Dissent at 1081 n. 3, 1083 (suggesting the district court found “the distinction between offering student-athletes no compensation and offering them a small amount of compensation is so minor that it most likely will not impact consumer demand in any meaningful way”). But there is little evidence in the record about the impact of these $5,000 NIL payments. There is evidence only that small payments will be less harmful than larger payments, and that a single witness would not be as troubled by $5,000 payments. This is not enough for plaintiffs to meet their burden to show that payments to student-athletes will be as effective in preserving consumer demand as the NCAA’s current amateurism policy.

The district court suggested that compensating athletes beyond the full cost of attendance would not be problematic because student-athletes are already permitted to accept Pell grants that raise their total aid package above the cost of attendance. O’Bannon, 7 F.Supp.3d at 1000; Dissent at 1080. This reasoning was faulty because it improperly equates compensation intended for education-related expenses (i.e., Pell grants) with pure cash compensation. The fact that Pell grants (which are available to athletes and nonathletes alike) have not eroded the NCAA’s culture of amateurism says little about whether cash payments into trust funds to compensate student-athletes for their prowess on the gridiron or the court would do so.

The dissent criticizes us for citing “no record evidence to support [our] conclusion that paying student-athletes $5,000 in deferred compensation will significantly reduce consumer demand.” Dissent at 1081 n. 3. But we do not decide, and the NCAA need not prove, whether paying student athletes $5,000 payments will necessarily reduce consumer demand. The proper inquiry in the Rule of Reason’s third step is whether the plaintiffs have shown these payments will not reduce consumer demand (relative to the existing rules). And we conclude they have not.

from the market for the athletes’ names, images, and likenesses ("NILs") in video games. Because we are bound by In re NCAA Student–Athlete Name & Likeness Licensing Litig. ("Keller"), 724 F.3d 1268 (9th Cir.2013), a case in which I dissented, I agree that the plaintiffs have sufficiently established antitrust injury. However, absent Keller, there is a serious question as to whether the plaintiffs have established the requisite antitrust injury in fact.

Pilson’s testimony included the following exchanges:

Q: Okay. And let me just turn finally to your last opinion just briefly, Mr. Pilson, regarding whether paying basketball and football players in college threatens the popularity of college sports with the television audience. Just briefly sir, over the course of your career in the sports broadcast industry, have you come to have opinions about why viewers are interested in college sports on television?
A: Yes, I have.
Q: And how did you come to have those opinions?
A: I [sic] been in the industry for 40 years. I’ve acquired and telecast thousands of hours of college sports. I watch college sports and evaluate them, so I have a pretty good handle on the industry. Of course, I have personal opinions as well, but I certainly—I’ve worked in the industry a long time.

Q: Okay. Now, your opinions about why this would be damaging to the sport are based on your—what you think viewers appreciate, what the public perceives. I have that correct?
A: Yes. And I would suggest I’ve been in that business measuring viewers—my whole job at CBS over 20 years was to try to figure out what the viewers wanted to watch and give it to them, so I’m not a layman on that subject.

The majority states that it “cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand.” Op. at 1076. And yet the majority cites no record evidence to support its conclusion that paying student-athletes $5,000 in deferred compensation will significantly reduce consumer demand. Rather, the majority declares that it is a “self-evident fact” that “[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.” Op. at 1077, 1078. To the contrary, the district court concluded after a full bench trial that the distinction between offering student-athletes no compensation and offering them a small amount of compensation is so minor that it most likely will not impact consumer demand in any meaningful way. See O’Bannon, 7 F.Supp.3d at 976–77, 983–84, 1000–01.

The majority argues that “having found amateurism is integral to the NCAA’s market, the district court cannot plausibly conclude that being a poorly-paid professional athlete is ‘virtually as effective’ for that market as being an amateur. Or, to borrow the Supreme Court’s analogy, the market for college football is distinct from other sports markets and must be ‘differentiate[d]’ from professional sports lest it become ‘minor league [football].’ ” Op. at 1076–77. The district court found that amateurism played a limited role in preserving the popularity of college sports, and that other factors, such as school loyalty, served as the primary force driving interest in college athletics. O’Bannon, 7 F.Supp.3d at 1000. But I agree that an antitrust court should not eliminate the distinction between professional and college sports; to do so would undermine competition. However, in terms of antitrust analysis, the distinction between amateur and professional sports is not for the court to delineate. It is a line for consumers to draw. If consumers believe that paying college football players $5,000 to be held in trust for use of their NILs will convert college football into professional football, and as a consequence they stop watching college football, then the proposed alternative will not be virtually as effective as the current rule. But, taken to its literal extreme to prohibit even small, deferred payments, the idea that “if you’re paid for performance, you’re not an amateur,” Op. at 1076 n. 20, does not reflect consumer behavior. The district court made factual findings that modest payments, including those held in trust, would not significantly affect consumer demand. See O’Bannon, 7 F.Supp.3d at 976–77, 983–84, 1000–01. Therefore, I cannot conclude that the district court clearly erred.

The majority states that “in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs.” Op. at 1076. This is not true even under the NCAA’s current definition of the term. But more importantly, we are not tasked with deciding what makes an amateur an amateur. We are tasked with determining whether a proposed less-restrictive alternative restraint will affect consumer demand.
Synopsis

Background: Group of current and former college football and men’s basketball players brought antitrust class action against National Collegiate Athletic Association (NCAA), alleging Sherman Act violations for restraining trade in relation to players’ names, images, and likenesses.

Holdings: The District Court, Claudia Wilken, J., held that:

[1] colleges’ agreement to charge football and basketball recruits same price for bundle of educational and athletic opportunities that they offered was restraint of trade in college education market;

[2] agreement among colleges not to offer any football or basketball recruit more than value of full grant-in-aid for athletic services constituted restraint of trade in market for recruits’ athletic services;

[3] players did not identify any harm to competition in national submarket for group licenses to use players’ names, images, and likenesses in live game telecasts;

[4] players did not identify any harm to competition in national submarket for group licenses to use players’ names, images, and likenesses in videogames;

[5] players did not show that NCAA imposed any restraints in national submarket for group licenses to use players’ names, images, and likenesses in archival footage;

[6] NCAA’s purported procompetitive goals did not justify its sweeping prohibition on compensating players with any share of licensing revenue;

[7] NCAA produced sufficient evidence to support inference that some circumscribed restrictions on compensation to players could yield procompetitive benefits; and

[8] players identified two legitimate less restrictive alternatives to compensation prohibition for preserving popularity of NCAA product and improving quality of educational opportunities for student-athletes by integrating academics and athletics.

Ordered accordingly.

Attorneys and Law Firms


FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLAUDIA WILKEN, United States District Judge

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

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

I. Background

A. The NCAA
The NCAA was founded in 1905 by the presidents of sixty-two colleges and universities in order to create a uniform set of rules to regulate intercollegiate football. Docket No. 189, Stip. Undisputed Facts, at ¶ 6. Today, the association has roughly eleven hundred member schools and regulates intercollegiate athletic competitions in roughly two dozen sports. According to its current constitution, the association seeks to “initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit.” Ex. 2340, 2013–14 NCAA Division I Manual, at 15.¹

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

Since 1973, the NCAA’s member schools have been organized into three divisions—Divisions I, II, and III—based on the number and quality of opportunities that they provide to participate in intercollegiate athletics. Stip. Undisputed Facts ¶ 27. Division I schools provide the greatest number and highest quality of opportunities to participate in intercollegiate athletics because they sponsor more sports teams and provide more financial aid to student-athletes than schools in Divisions II and III.² To qualify for membership in Division I, a school must sponsor a minimum of fourteen varsity sports teams, including football, and distribute a baseline amount of financial aid to its student-athletes. Trial Tr. 2043:13–:25 (Delany); Ex. 2340 at 365, 367. Roughly three-hundred and fifty of the NCAA’s eleven hundred schools currently compete in Division I. Trial Tr. 1743:23 (Emmert).

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

In addition to the two football subdivisions, Division I schools are also organized into a number of conferences, which essentially function as smaller leagues within the NCAA. The conferences—most of which contain between eight and fifteen schools—typically have their own membership requirements. Most conferences also organize conference-specific games and events featuring their member schools, including regular season football games, regular season basketball games, and post-season basketball tournaments. Although the conferences are considered members of the NCAA and must comply with its constitution and bylaws, they operate independently for the most part and have the authority to generate their own revenue and set their own rules, provided those rules are consistent with NCAA policy. Ex. 2340 at 22.

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

A school or conference that seeks to propose a new rule or rule change typically does so by submitting the proposal to a designated committee or task force appointed by the Board. Trial Tr. 1745:20–1746:15. That committee or task force then considers the proposal and, if it approves, may forward the proposal to a body known as the Division I Legislative Council, which is made up of athletics administrators from schools in each of the thirty-two Division I conferences. Id.; Ex. 2340 at 37. The Legislative Council may then forward the proposal to the Board of Directors, which has the ultimate authority to approve the proposal by a majority vote. Trial Tr. 1746:20–1746:15. Actions by the Board may only be repealed through an override process that involves a vote
of sixty-two percent of the NCAA’s member institutions. *Id.* 1747:6–:20. The NCAA’s current president, *965 Dr. Mark Emmert,* does not have any voting power in this process. *Id.* 1746:19–:24.

B. Electronic Arts Inc. & Collegiate Licensing Company Electronic Arts Inc. (EA) is a corporation which develops and manufactures videogames. Stip. Undisputed Facts ¶ 35. It created and sold an annual NCAA-branded college football videogame every year between 1997 and 2013. *Id.* ¶ 39. It also created and sold an annual NCAA-branded college basketball game every year between 1998 and 2010. *Id.* ¶ 40. In order to create these games, it entered into licensing agreements with the NCAA and its member schools and paid them for permission to use their intellectual property, including their marks, in the videogames. *Id.* ¶¶ 37–38; Exs. 1125, 1126. Collegiate Licensing Company (CLC) is a Georgia corporation that licenses trademarks of the NCAA and several of its member schools and conferences. Stip. Undisputed Facts ¶¶ 32–34. Although Plaintiffs originally brought claims against both EA and CLC in this action, they subsequently agreed to settle those claims.

C. Plaintiffs

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

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as “University Division” before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I–A until 2006) men’s 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.


II. The Relevant Markets

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

A. College Education Market

The evidence presented at trial, including testimony from both experts and lay witnesses, establishes that FBS football and Division I basketball schools compete to recruit the best high school football and basketball players. Trial Tr. 9:1–:7 (O’Bannon); 114:21–117:17 (Noll); 831:8–:11 (Rascher); 1759:21–: 22 (Emmert); Ex. 2530. Specifically, these schools compete to sell unique bundles of goods and services to elite football and basketball recruits. The bundles include scholarships to cover the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services. Trial Tr. 40:2–:20 (O’Bannon); 582:6–:18 (Prothro); 1741:10–:20 (Emmert); *966 Ex. 2340 at 207. They also include access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences. Trial Tr. 13:4–:12 (O’Bannon); 556:8–558:2 (Prothro); 1157:20–1158:7 (Staurowsky); 1721:3–1722:19 (Emmert). In exchange for these unique bundles of goods and services, football and basketball recruits must provide their schools with their athletic services and acquiesce in the use of their names, images, and likenesses for commercial and promotional purposes. *Id.* 109:5–110:12 (Noll). They also implicitly agree to pay any costs of attending college and participating in intercollegiate athletics that are not covered by their...
scholarships. See Ex. 2340 at 207.

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

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

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

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

Dr. Noll also analyzed the Rivals.com data to show that FBS schools almost always defeated non-FBS schools in head-to-head recruiting contests for the same football recruit between 2007 and 2011. Id. 116:6–118:11, 474:23–475:14; Ex. 2530. His analysis of head-to-head recruiting contests for basketball players revealed the same discrepancy between Division I and non-Division I schools. Trial Tr. 116:6–118:11. Notably, he did not observe this discrepancy when comparing head-to-head recruiting contests among FBS football schools or Division I basketball schools. Id.; Ex. 2530 at 3. Even when he compared the success of the schools within the five major Division I conferences—namely, the Pacific 12 Conference (Pac 12), Big 12 Conference, Atlantic Coast Conference, Southeastern Conference (SEC), and Big 10 Conference—to that of schools in less prominent Division I conferences, he found that they were still in competition with each other. Trial Tr. 116:9–13 (“And unlike the finding for other divisions and junior colleges and NAIA and all the rest that was in the first picture, what we find here is that although the major conferences win more than they lose, in competing against the lesser conferences,
there is considerable competitive overlap."). Thus, the bundles of goods and services offered by schools in FCS, Divisions II and III, and other non-NCAA collegiate athletics associations are not substitutes for the bundles of goods and services offered by FBS football and Division I basketball schools.

Nor are the opportunities offered by the professional leagues that the NCAA has identified here. Dr. Noll noted that elite football and basketball recruits rarely forego opportunities to play FBS football or Division I basketball in order to play professionally. Neither the National Football League (NFL) nor the National Basketball Association (NBA) permits players to enter the league immediately after high school. Id. 68:17–69:6 (O’Bannon). Although other professional leagues—such as the NBA Development League (D–League), the Arena Football League (AFL), and certain foreign football and basketball leagues—permit players to join immediately after high school, recruits do not typically pursue opportunities in those leagues. Id. 482:11–13 (Noll). When Dr. Noll was asked why he did not conduct an analysis of recruits who chose to play professionally in these leagues, he replied that too few had ever done so to conduct such an analysis. Id. 484:19–485:13 (“It would be hard to do an analysis of zero.”). He also noted that many recruits may not even be given an opportunity to play in these leagues. Id. 482:14–17 (“The opportunity is not given to very many high school athletes to play in Europe.”).

What’s more, none of these leagues offers the same opportunity to earn a higher education that FBS football and Division I basketball schools provide. For all of these reasons, the Court finds that there are no professional football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide. These schools comprise a relevant college education market, as described above.

B. Group Licensing Market

Professional athletes often sell group licenses to use their names, images, and likenesses in live game telecasts, videogames, game re-broadcasts, advertisements, and other archival footage. Plaintiffs allege that, in the absence of the NCAA’s challenged rules, FBS football and Division I basketball players would also be able to sell group licenses for the use of their names, images, and likenesses. Specifically, they contend that members of certain FBS football and Division I basketball teams would be able to join together to offer group licenses, which they would then be able to sell to their respective schools, third-party licensing companies, or media companies seeking to use student-athletes’ names, images, and likenesses. Plaintiffs have identified three submarkets within this broader group licensing market: (1) a submarket for group licenses to use student-athletes’ names, images, and likenesses in live football and basketball game telecasts; (2) a submarket for group licenses to use student-athletes’ names, images, and likenesses in videogames; and (3) a submarket for group licenses to use student-athletes’ names, images, and likenesses in game re-broadcasts, advertisements, and other archival footage.

1. Submarket for Group Licenses to Use Student–Athletes’ Names, Images, and Likenesses in Live Game Telecasts

The Court finds that a submarket exists in which television networks seek to acquire group licenses to use FBS football and Division I basketball players’ names, images, and likenesses in live game telecasts. Television networks frequently enter into licensing agreements to use the intellectual property of schools, conferences, and event organizers—such as the NCAA or a bowl committee—in live telecasts of football and basketball games. In these agreements, the networks often seek to acquire the rights to use the names, images, and likenesses of the participating student-athletes during the telecast. For instance, the NCAA’s 1994 licensing agreement granting CBS the rights to telecast the Division I men’s basketball tournament every year from 1995 to 2002 includes a “Name & Likeness” provision that states:

The Network, its sponsors, their advertising representatives and the stations carrying the telecasts of the games will have the right to make appropriate references (including without limitation, use of pictures) to NCAA and the universities and colleges of the teams, the sites, the games and the participants in and others identified with the games and in the telecasting thereof, provided that the same do not constitute endorsements of a commercial product.
Ex. 2104 at 16 (emphasis added). A 1999 agreement between the NCAA and CBS for the rights to teleteach certain Division I basketball games contains a “Name & Likeness” provision with nearly identical language. Ex. 2116 at 17 (granting the “right to make appropriate references (including without limitation, use of pictures) to ... the participants in and others identified with the games” (emphasis added)). An agreement between the FBS conferences, the University of Notre Dame, and Fox Broadcasting Company for the rights to teleteach certain 2007, 2008, and 2009 bowl games similarly provides that the event organizer will be solely responsible for ensuring that Fox has “the rights to use the name and likeness, photographs and biographies of all participants, game officials, cheerleaders” and other individuals connected to the game. Ex. 2162 at 9. Plaintiffs also provided 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 non-conference opponent the “right ... to use its respective players’ names, likenesses, and that school’s trademarks, logos and other items in promoting, advertising and Telecasting any such game”). These contracts demonstrate that there is a demand for these rights among television networks.

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

The NCAA’s broadcasting industry expert, Neal Pilson, testified that sports broadcasters need not acquire the rights to use student-athletes’ names, images, and likenesses and that the primary reason they enter into licensing agreements with event organizers is to gain exclusive access to the facility where the event will occur. Trial Tr. 720:5–:17. This testimony is not convincing. Mr. Pilson admitted that broadcasters must acquire certain rights even from visiting teams who do not control access to the event facility. Id. 803:5–804:8. He also acknowledged that broadcasting agreements—like those quoted above—sometimes refer expressly to name, image, and likeness “rights.” Id. 805:2–:16. Accordingly, the Court finds that, absent the challenged NCAA rules, teams of FBS football and Division I basketball players would be able to create and sell group licenses for the use of their names, images, and likenesses in live game telecasts.

*970 2. Submarket for Group Licenses to Use Student–Athletes’ Names, Images, and Likenesses in Videogames

Like television networks, videogame developers would seek to acquire group licenses to use the names, images, and likenesses of FBS football and Division I basketball players if the NCAA did not prohibit student-athletes from selling such licenses. EA seeks to make all of its sports-themed videogames “as authentic as possible.” Trial Tr. 1656:7 (Linzner). One of the company’s vice presidents, Joel Linzner, explained, “We have found that it is pleasing to our customers to be able to use the real athletes depicted as realistically as possible and acting as realistically as possible.” Id. 1658:3–:6; see also Ex. 2007 at 50–54 (describing demand for use of student-athletes’ names, images, and likenesses in videogames). To do this, the company typically negotiates licenses with professional sports leagues and teams to use their trademarks, logos, and other intellectual property in videogames. Trial Tr. 1656:10–1657:25. It also negotiates with groups of professional athletes for licenses to use their names, images, and likenesses. Id. EA would be interested in acquiring the same rights from student-athletes in order to produce college sports-themed videogames, if it were permitted to do so. Id. 1669:24–1670:24. Accordingly, the Court finds that, absent the challenged NCAA rules, there would be a demand among videogame developers for group licenses to use student-athletes’ names, images, and likenesses.
The NCAA asserts that such demand would not exist because it has ceased licensing its intellectual property for use in videogames, making it unlikely that any developer would seek to develop a videogame using the names, images, and likenesses of student-athletes. This assertion is not supported by the trial record. Although the NCAA recently declined to renew its license with EA, it has not presented any evidence suggesting that it will never enter into such an agreement again in the future. None of its current bylaws preclude it from entering into such an agreement. Furthermore, the evidence presented at trial demonstrates that, prior to this litigation, the NCAA found it profitable to license its intellectual property for use in videogames. Indeed, it continued to renew its annual licensing agreement with EA, even as the company evaded the NCAA's rules prohibiting it from using student-athletes’ images and likenesses in videogames. Throughout the late 2000s, EA’s NCAA-branded videogames featured playable avatars that could easily be identified as real student-athletes despite the NCAA’s express prohibition on featuring student-athletes in videogames. The EA avatars played the same positions as their real-life counterparts, wore the same jersey numbers and uniform accessories, hailed from the same home state, and shared the same height, weight, handedness, and skin color. Trial Tr. 27:14–28:11 (O’Bannon); 568:6–569:24 (Prothro); 930:5–931:7 (Rascher). For all of these reasons, the Court finds that a submarket would exist for group licenses to use student-athletes’ names, images, and likenesses in videogames if student-athletes were permitted to receive compensation for such licenses.

3. Submarket for Group Licenses to Use Student–Athletes’ Names, Images, and Likenesses in Game Re–Broadcasts, Advertisements, and Other Archival Footage

Plaintiffs have shown that television networks, advertisers, and third-party licensing companies seek to use archival footage of student-athletes in game re-broadcasts, commercials, and other products. Several of the live telecasting agreements discussed *above* included provisions granting the television network the rights to use archival footage, as well. See, e.g. Ex. 3078 at 2–3 (granting the Big 10 Network the rights to use certain student-athletes’ names and likenesses in “promoting, advertising and Telecasting” a game); Ex. 2230 at 2 (granting Fox Sports Net the “right to re-Telecast the Selected Events,” the “right to distribute highlights of the Selected Events,” and the specific right to use the “names and likenesses of the players” to promote certain games as well as the network itself). Tyrone Prothro, a former wide receiver for the University of Alabama, saw footage in a commercial of a famous catch that he made during a game. Trial Tr. 565:24–566:8. Finally, one of the NCAA’s vice presidents, Mark Lewis, established that the NCAA has licensed all of its archival footage from past NCAA championships to a third-party licensing company, T3Media, which acts as the association’s agent in licensing that footage for use in game re-broadcasts, advertisements, and any other products. Id. 3206:13–25. Although T3Media is not permitted to license footage of current student-athletes, it still acquires the rights to this footage while the student-athletes are in school for later use (after acquiring the student-athletes’ consent). This is enough to show that demand for this footage exists. Based on this evidence, the Court finds that, absent the NCAA’s challenged rules, there would be a demand among television networks, third-party licensing companies, and advertisers for group licenses to use student-athletes in game re-broadcasts, advertisements, and other archival footage.

III. The Challenged Restraint

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

The NCAA imposes strict limits on the amount of compensation that student-athletes may receive from their schools. Most importantly, it prohibits any student-athlete from receiving “financial aid based on athletics ability” that exceeds the value of a full “grant-in-aid.” Ex. 2340 at 208. The bylaws define a full “grant-in-aid” as “financial aid that consists of tuition and fees, room and board, and required course-related books.” Id. at 207. This amount varies from school to school and from year to year. Any student-athlete who receives financial aid in excess of this amount forfeits his athletic eligibility. Id. at 208.

In addition to this cap on athletics-based financial aid, the NCAA also imposes a separate cap on the total amount of financial aid that a student-athlete may receive. Specifically, it prohibits any student-athlete from
receiving financial aid in excess of his “cost of attendance.” Ex. 2340 at 208. Like the term “grant-in-aid,” the term “cost of attendance” is a school-specific figure defined in the bylaws. It refers to “an amount calculated by [a school]’s financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance” at that school. Id. at 206. Because it covers the cost of “supplies, transportation, and other expenses,” the cost of attendance is generally higher than the value of a full grant-in-aid. The gap between the full grant-in-aid and the cost of attendance varies from school to school but is typically a few $972 thousand dollars.\footnote{O’Bannon v. National Collegiate Athletic Association, 7 F.Supp.3d 955 (2014) 2014-2 Trade Cases P 78,865, 308 Ed. Law Rep. 1049}

The NCAA also prohibits any student-athlete from receiving compensation from outside sources based on his athletic skills or ability.\footnote{Id.} Thus, while a student-athlete may generally earn money from any “on- or off-campus employment” unrelated to his athletic ability, he may not receive “any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.” Id. at 211. Student-athletes are also barred from endorsing any commercial product or service while they are in school, regardless of whether or not they receive any compensation to do so. Id. at 86.

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

Dr. Noll’s opinions are consistent with the opinions of the NCAA’s own economic expert, Dr. Daniel Rubinfeld, who testified that the NCAA operates as a “joint venture which imposes restraints” on trade. Id. 2922:20–21. Dr. Rubinfeld specifically acknowledged that “the NCAA does impose a restraint, the restraint we have been discussing in this case.” Id. 2921:8–9. Although he opined that this restraint was lawful because it serves procompetitive purposes, he never denied that the NCAA restricts competition among its members for recruits. In fact, his own economics textbook specifically refers to the NCAA as a “cartel,” which he defined during his testimony as “a group of firms that impose a restraint.” Id. 2975:3–4. Although the NCAA’s other economic expert, Dr. Lauren Stiroh, testified that the NCAA does not restrain competition in any market, her opinions were based on the theory that anticompetitive effects cannot arise unless consumers in a “downstream market” are harmed. Id. 2766:16–22. In this case, those consumers would be people who watch or attend college football and basketball games or purchase goods using the names, images, and likenesses of student-athletes. The Court rejects Dr. Stiroh’s theory that Plaintiffs cannot show any anticompetitive effects caused by the alleged restraint without demonstrating some harm to these consumers. The evidence cited above demonstrates \footnote{Id.} that student-athletes themselves are harmed by the price-fixing agreement among FBS football and Division I basketball schools. In the complex exchange represented by a recruit’s decision to attend and play for a particular school, the school provides tuition, room and board, fees, and book expenses, often at little or no cost to the school. The recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect. Thus, the Court finds that the NCAA has the power—and exercises that power—to fix prices and restrain competition in the college education market that Plaintiffs have identified.

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

IV. Asserted Purposes of the Restraint

The NCAA asserts that the challenged restrictions on student-athlete compensation are reasonable because they are necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product.

A. Preservation of Amateurism

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

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

No student shall represent a College or University in an intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial *974 concession or emolument as past or present compensation for, or as prior consideration or inducement to play in, or enter any athletic contest, 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.

Stip. Undisputed Facts ¶¶ 6–7. This rule would have barred even today’s athletic scholarships. Despite the breadth of this written prohibition, the IAA’s member schools recruited students using “player subsidies” and other illicit forms of payment. Id. ¶ 10.

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

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

In 1956, the NCAA enacted a new set of amateurism rules permitting schools to award athletic scholarships to student–athletes. Id. ¶ 25. These rules established a national standard governing athletics-based financial aid and imposed a limit on the size of athletic scholarships that schools were permitted to offer. Id. That limit—now known as a full “grant-in-aid”—precluded student-athletes from receiving any financial aid beyond that needed for “commonly accepted educational expenses,” including tuition, fees, room and board, books, and cash for incidental expenses such as laundry. Id.

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

The amateurism provision in the NCAA’s current constitution states that student-athletes “shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by *975 education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” Ex. 2340 at 18. This conception of amateurism stands in stark contrast to the definitions set forth in the NCAA’s early bylaws. Indeed, education—which the NCAA now considers the primary motivation for participating in intercollegiate athletics—was not even a recognized motivation for amateur athletes during the years when the NCAA prohibited athletic scholarships. The Court finds that the NCAA’s current restrictions on student-athlete compensation, which cap athletics-based financial aid below the cost of attendance, are not justified by the definition of amateurism set forth in its current bylaws.

Although the NCAA sought to establish the importance of these restrictions by asserting that they increase consumer interest in FBS football and Division I basketball, its evidence supporting this assertion is unpersuasive. It presented testimony from a survey research expert, Dr. J. Michael Dennis, who conducted a survey of consumer attitudes concerning college sports in 2013. Dr. Dennis surveyed 2,455 respondents across the United States and observed that they generally opposed the idea of paying college football and basketball players. Trial Tr. 2613:24–2614:6. His survey contained an initial question that apparently affected many respondents’ answers to the survey’s substantive questions. The initial open-ended question asked respondents what they had heard about student-athletes being paid. Id. 2716:15–2717:7; Exs. 2629, 2630. Plaintiffs’ survey expert, Hal Poret, noted that the “single most common response” to this question was that respondents had heard about student-athletes receiving some form of illegal or illicit payments. Trial Tr. 2714:2–:20; Ex. 2629. Many other respondents mentioned paying student-athletes a salary. Trial Tr. 2714:21–2715:2 (Poret); Ex. 2630. Although Dr. Dennis testified that his results remained the same even after he removed these specific 274 respondents from his sample, the fact that these respondents expressly mentioned illicit payments or salaries at the start of the survey strongly suggests that the question primed respondents to think about such illicit payments when answering the other survey questions.

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

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

While these questions are more germane to consumer behavior than the survey’s findings about respondents’ general opinions about compensating student-athletes, they still do not credibly establish that the specific rules challenged here contribute to consumer demand. Dr. Dennis did not ask respondents for their opinions about paying student-athletes with a share of licensing revenue generated from the use of their own names, images, and likenesses. *Id.* 2669:15–18 (Dennis); 2709:6–18 (Poret). Nor did he ask their opinions about paying student-athletes the full cost of attendance, or any amount less than $20,000 per year. Dr. Dennis also failed to ask respondents how their behavior would be affected if small or large amounts of compensation for the use of student-athletes’ names, images, and likenesses were held in trust for them until they left school—one of Plaintiffs’ proposed alternatives here. *Id.* 2686:18–2687:3 (Dennis); 2711:21–2712:9, 2718:19–2714:12 (Poret).

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

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

Plaintiffs presented other evidence illustrating the limits of opinion surveys as predictors of consumer demand for sports-entertainment products. Their expert on sports management, Dr. Daniel Rascher, described how opinion surveys conducted between 1970 and the present consistently showed that the public overwhelmingly opposed rising baseball player salaries but continued to watch, listen to, and attend Major League Baseball games at a high rate even as player salaries rose during this period. *Id.* 901:12–903:24; Ex. 2549. He specifically noted that many people felt *977* that the removal of the reserve clause in the 1970s—which ultimately enabled players to become free agents, thus leading to higher salaries—would undermine the popularity of professional baseball. However, despite these predictions and fans’ stated opposition to rising salaries, Major League Baseball revenues continued to rise after the removal of the reserve clause. *Id.* 903:13–16 (“So even though the fans in polls say, ‘Hey, we don’t want the players to make so much money,’ ultimately they continue to watch on television, you know, buy tickets, concessions, the whole thing.” (internal quotation marks added)). Dr. Rascher highlighted another survey showing public opposition to the decision of the International Olympic Committee (IOC) to permit professional athletes to compete in the Olympics, even as consumer interest in the Olympics remained high and revenues generated by the event continued to rise during the same period. *Id.* 904:22–905:18; see also *id.* 226:15–227:17 (testimony of Dr. Noll that the Olympics are “much more popular now than they were [when] amateur”). In addition to the Olympics, Dr. Rascher also pointed to various other formerly amateur sports associations—such as those governing rugby and tennis—whose events grew in popularity after they began to allow their athletes to accept payments. *Id.* 903:25–904:21.

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

Other historical evidence suggests that the NCAA’s restrictions on student-athlete compensation have not contributed significantly to the popularity of FBS football and Division I basketball. The NCAA’s former president, the late Walter Byers, testified during his 2007 deposition, for instance, that the NCAA’s decision to remove incidental expenses from the grant-in-aid coverage in 1975 was not motivated by a desire to increase consumer demand for its product. Byers Depo. 21:21–22:14, 24:6–17. In fact, he specifically noted that NCAA sports experienced a tremendous growth in popularity during the period between 1956 and 1975 when grants-in-aid still covered the full cost of attendance. Id. 25:15–26:8. None of the evidence in the trial record suggests that the removal of incidental expenses or any other changes to the grant-in-aid limit had an impact on the popularity of college sports during this time.

Thus, the Court finds that the NCAA’s restrictions on student-athlete compensation are not the driving force behind consumer demand for FBS football and Division I basketball-related products. Rather, the evidence presented at trial suggests that consumers are interested in college sports for other reasons. Mr. *978 Plonsky testified, for instance, that the popularity of college sports is driven by feelings of “loyalty to the school,” which are shared by both alumni and people “who live in the region or the conference.” Trial Tr. 757:20–758:13. Similarly, Christine Plonsky, an associate athletics director at the University of Texas (UT), testified that UT sports would remain popular as long as they had “anything in our world to do with the University of Texas.” Id. 1414:23–24; see also id. 1376:13 (“Longhorns are pretty loyal.”). Dr. Emmert himself noted that much of the popularity of the NCAA’s annual men’s basketball tournament stems from the fact that schools from all over the country participate “so the fan base has an opportunity to cheer for someone from their region of the country.” Id. 1757:1–9; see also id. (“It’s become extremely popular at least in part because there’s someone from your neighborhood likely to be in the tournament.”). He testified that college bowl games have the same appeal. Id. 1757:16–19. This evidence demonstrates that the NCAA’s restrictions on student-athlete pay is not the driving force behind consumer interest in FBS football and Division I basketball. Thus, while consumer preferences might justify certain limited restraints on student-athlete compensation, they do not justify the rigid restrictions challenged in this case.

B. Competitive Balance

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

The Court finds that the NCAA’s current restrictions on student-athlete compensation do not promote competitive balance. As Dr. Noll testified, since the 1970s, numerous sports economists have studied the NCAA’s amateurism rules and nearly all have concluded that the rules have no discernible effect on the level of competitive balance. Trial Tr. 229:8–234:2. He noted that one of the more recent articles addressing the subject, a 2007 study by economist Jim Peach published in the Social Science Journal, found that there is “‘little evidence that the NCAA rules and regulations have promoted competitive balance in college athletics and no a priori reason to think that eliminating the rules would change the competitive balance situation.’” Id. 232:22–233:1 (quoting Peach article). Dr. Rascher reached the same conclusion based on his review of the economics literature. Id. 920:9–922:16. He specifically cited one of the leading textbooks in the field of sports economics, by Rod Fort, which found that the NCAA’s restrictions on student-athlete pay do not appear to have any impact on competitive balance. Id. 921:10–18.

The academic consensus on this issue is not surprising given that many of the NCAA’s other rules and practices suggest that the association is unconcerned with achieving competitive balance. Several witnesses testified that the restrictions on student-athlete compensation lead many schools simply to spend larger portions of their athletic budgets on coaching, recruiting, and training facilities. Id. 296:14–297:18 (Noll); 865:11–866:2, 910:2–911:7 (Rascher). In the major conferences, for instance, the average salary for a head football coach exceeds $1.5 million. Id. 1151:20–1152:14 (Staurowsky). The fact that high-revenue schools are able to spend freely in these other areas cancels out whatever leveling effect the restrictions on student-athlete pay might otherwise *979 have. The NCAA does not do anything to rein in spending by the high-revenue schools or minimize existing disparities in revenue and recruiting. In fact, Dr. Emmert
specifically conceded that it is “not the mission of the association to ... try and take away the advantages of a university that’s made a significant commitment to facilities and tradition and all of the things that go along with building a program.” Trial Tr. 1774:23–1775:6.

This same sentiment underlies the NCAA’s unequal revenue distribution formula, which rewards the schools and conferences that already have the largest athletic budgets. Revenues generated from the NCAA’s annual Division I men’s basketball tournament are distributed to the conferences based on how their member schools performed in the tournament in recent years. Docket No. 207, Stip. Re: Broadcast Money, at ¶ 10. As a result, the major conferences—and the highest revenue schools—typically receive the greatest payouts, which hinders, rather than promotes, competitive balance.

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

Even if the NCAA had presented some evidence of a causal connection between its challenged rules and its current level of competitive balance, it has not shown that the current level of competitive balance is necessary to maintain its current level of consumer demand. Trial Tr. 228:20–229:2 (Noll). It is undisputed that the ideal level of competitive balance for a sports league is somewhere between perfect competitive balance (where every team has an equal chance of winning every game) and perfect imbalance (where every game has a predictable outcome). Id. 453:8–:22 (Noll); 3127:2–:21 (Rubinfeld). The NCAA has not even attempted to identify the specific level of competitive balance between those extremes that is ideal or necessary to sustain its current popularity. Given the lack of such evidence in the record, the Court finds that the NCAA’s challenged rules are not needed to achieve a level of competitive balance necessary, or even likely, to maintain current levels of consumer demand for FBS football and Division I basketball.

C. Integration of Academics and Athletics
The NCAA contends that its restrictions on student-athlete compensation are reasonable and procompetitive because they promote the integration of academics and athletics. In particular, it asserts that its challenged rules ensure that student-athletes are able to obtain all of the educational benefits that their schools provide and participate in their schools’ academic communities. According to the NCAA, the integration of academics and athletics increases the quality of the educational services its member schools provide to student-athletes in the college education market that Plaintiffs have identified.

For support, the NCAA relies on evidence showing that student-athletes receive both short-term and long-term benefits from being student-athletes. One of its experts, Dr. James Heckman, testified that participation in intercollegiate athletics leads to better academic and labor market outcomes for many student-athletes as compared to other members of their socioeconomic groups. Trial Tr. 1493:13–1494:25. Dr. Heckman found that these benefits are particularly pronounced for student-athletes from disadvantaged backgrounds. Id. The NCAA presented additional evidence, including its own data on student-athlete graduation rates, to show that student-athletes enjoy substantial benefits from participating in intercollegiate athletics. However, none of this data nor any of Dr. Heckman’s observations suggests that student-athletes benefit specifically from the restrictions on student-athlete compensation that are challenged in this case. To the contrary, Dr. Heckman specifically testified that the long-term educational and academic benefits that student-athletes enjoy stem from their increased access to financial aid, tutoring, academic support, mentorship, structured schedules, and other educational services that are unrelated to the challenged rules in this case. Id. 1512:23–1516:17. FBS football and Division I basketball schools offer most of these services to their student-athletes independently and are not compelled to do so by the NCAA, particularly not by the challenged rules.

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

The only evidence that the NCAA has presented that suggests that its challenged rules might be necessary to promote the integration of academics and athletics is the testimony of university administrators, who asserted that paying student-athletes large sums of money would potentially “create a wedge” between student-athletes and others on campus. Id. 1591:2–:20 (Pastides). These administrators noted that, depending on how much compensation was ultimately awarded, some student-athletes might receive more money from the school than their professors. Student-athletes might also be inclined to separate themselves from the broader campus community by living and socializing off campus.

It is not clear that any of the potential problems identified by the NCAA’s witnesses would be unique to student-athletes. In fact, when the Court asked Dr. Emmert whether other wealthy students—such as those who come from rich families or start successful businesses during school—raise all of the same problems for campus relations, he replied that they did. Id. 1790:18–:22. It is also not clear why paying student-athletes would be any more problematic for campus relations than paying other students who provide services to the university, such as members of the student government or school newspaper. Nonetheless, the Court finds that certain limited restrictions on student-athlete compensation may help to integrate student-athletes into the academic communities of their schools, which may in turn improve the schools’ college education product.

Plaintiffs have produced anecdotal and statistical evidence suggesting that the NCAA’s current rules do not serve to integrate FBS football players or Division I basketball players into the academic communities at their schools. For example, Ed O’Bannon, the former UCLA basketball *981 star, testified that he felt like “an athlete masquerading as a student” during his college years. Id. 33:11–:14. Plaintiffs also presented testimony from Dr. Ellen Staurowsky, a sports management professor, who studied the experiences of FBS football and Division I basketball players and concluded that the time demands of their athletic obligations prevent many of them from achieving significant academic success. Id. 1175:12–1176:21. Some of this evidence conflicts with the NCAA’s data on student-athlete graduation rates and Dr. Heckman’s observations surrounding academic outcomes for student-athletes. However, the Court need not resolve these factual disputes because, regardless of how they are resolved, the restraints on student-athlete compensation challenged in this case generally do not serve to enhance academic outcomes for student-athletes.

D. Increased Output

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

The Court finds that the NCAA’s restrictions on student-athlete compensation do nothing to increase this output. The number of schools participating in FBS football and Division I basketball has increased steadily over time and continues to increase today, Stip. Undisputed Facts ¶ 42–49. This is because participation in FBS football and Division I basketball typically raises a school’s profile and leads to increased athletics-based revenue. Trial Tr. 872:1–874:20 (Rascher). Although Dr. Emmert and other NCAA and conference officials say that this trend is not the result of increased Division I revenues but, rather, because of schools’ philosophical commitment to amateurism, this theory is implausible. Id. 1783:2–:14; 2080:11–:23 (Delany); 2418:5–:25 (Sankey); 3188:25–3189:17 (Lewis). Schools in some of the major conferences have specifically undertaken efforts to change the NCAA’s existing scholarship rules, which suggests that the rules are not the reason that they choose to participate in Division I. Ex. 2095 at 4 (2013 presentation by representatives of the five major conferences requesting autonomy to raise existing scholarship limits); Ex. 2527 at 2 (2014 letter from Pac 12 urging other major conferences to support rule changes, including raising the grant-in-aid limit). What’s more, there is no evidence to suggest that any schools joined Division I originally because of its amateurism rules. These schools had numerous other options to participate in collegiate sports associations that restrict compensation for student-athletes, including the NCAA’s lower divisions and the NAIA. Indeed, schools in FCS, Division II, and Division III are bound by the same amateurism provisions of the NCAA’s constitution as the schools in Division I. The real difference between schools in Division I and schools in other divisions and athletics associations, as explained above, is the amount of resources that Division I schools commit to athletics.
V. Alternatives to the Restraint

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

The Court finds that Plaintiffs’ first proposed alternative—allowing schools to award stipends—would limit the anticompetitive effects of the NCAA’s current restraint without impeding the NCAA’s efforts to achieve its stated purposes, provided that the stipends do not exceed the cost of attendance as that term is defined in the NCAA’s bylaws. A stipend capped at the cost of attendance would not violate the NCAA’s own definition of amateurism because it would only cover educational expenses. Indeed, as noted above, the NCAA’s member schools used to provide student-athletes with similar stipends before the NCAA lowered its cap on grants-in-aid. The Court finds that the challenged rules do not increase the number of opportunities for schools or student-athletes to participate in Division I.

None of the evidence presented at trial suggests that consumer demand for the NCAA’s product would decrease if schools were permitted to provide such stipends to student-athletes once again. Nor does any of the evidence suggest that providing such stipends would hinder any school’s efforts to educate its student-athletes or integrate them into the academic community on

Dr. Rascher offered similar testimony and documented that participation in FBS football and Division I basketball generates significant revenue and is highly profitable for most schools. These revenues are what enable them to spend so much on coaches and training facilities. Dr. Rascher also noted that most FBS football schools used to spend even more on their student-athletes before the NCAA lowered its team scholarship cap from 105 to eighty-five. Furthermore, Dr. Noll testified that some of the schools that currently compete in FBS and Division I do so without providing the maximum amount of financial aid permitted under NCAA rules.
 campus. If anything, providing student-athletes with such stipends would facilitate their integration into academic life by removing some of the educational expenses that they would otherwise have to bear, such as school supplies, which are not covered by a full grant-in-aid. Ex. 2340 at 207. Raising the grant-in-aid cap to allow for such stipends also would not have any effect on the NCAA’s efforts to achieve competitive balance or increase its output because, as explained above, its existing restrictions on student-athlete compensation do not advance these goals.

Plaintiffs’ second proposed less restrictive alternative—allowing schools to hold payments in trust for student-athletes—would likewise enable the NCAA to achieve its goals in a less restrictive manner, provided the compensation was limited and distributed equally among team members. The NCAA’s own witness, Mr. Pilson, testified that he would not be troubled if schools were allowed to make five thousand dollar payments to their student-athletes and that his general concerns about paying student-athletes would be partially assuaged if the payments were held in trust. Trial Tr. 770:25–771:18. Stanford’s athletic director, Bernard Muir, similarly acknowledged that his concerns about paying student-athletes varied depending on the size of the payments that they would receive. Id. 254:3–:18 (“Where I set the dollar limit, you know, that varies, but it does concern me when we’re talking about six figures, seven figures in some cases.”). This testimony is consistent with Dr. Dennis’s general observation that, if the NCAA’s restrictions on student-athlete pay were removed, the popularity of college sports would likely depend on the size of payments awarded to student-athletes. The Court therefore finds that permitting schools to hold limited payments to student-athletes above the cost of attendance would not harm consumer demand for the NCAA’s product—particularly if the student-athletes were not paid more or less based on their athletic ability or the quality of their performances and the payments were derived only from revenue generated from the use of their own names, images, and likenesses.

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

Although Drs. Emmert and Rubinfeld suggested that student-athletes could potentially monetize these future earnings while they are still in school by taking out loans against the trust, the NCAA could easily prohibit such borrowing, just as it currently prohibits student-athletes from borrowing against their future earnings as professional athletes. See Ex. 2340 at 236 (prohibiting student-athletes from accepting any loan issued based on the “student-athlete’s athletics reputation, skill or pay-back potential as a future professional athlete”). None of the NCAA’s witnesses testified that its current rules would not suffice to prevent student-athletes from borrowing against their future compensation. Nor did they rule out that the NCAA and its member schools could place the money in a special account, such as a spendthrift trust, to prevent such borrowing. Accordingly, the Court finds that allowing FBS football and Division I basketball schools to hold in trust a limited and equal share of licensing revenue for their recruits would provide a less restrictive means of achieving the NCAA’s stated purposes.

Plaintiffs’ third proposed alternative, however—allowing student-athletes to receive money for endorsements—does not offer a less restrictive way for the NCAA to achieve its purposes. Allowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools to protect against the “commercial exploitation” of student-athletes. Although the trial record contains evidence—and Dr. Emmert himself acknowledged—that the NCAA has not always succeeded in protecting student-athletes from commercial exploitation, this failure does not justify expanding opportunities for commercial exploitation of student-athletes in the future. Plaintiffs themselves previously indicated that they were not seeking to enjoin the NCAA from enforcing its current
rules prohibiting such endorsements. In light of this record, the Court finds that Plaintiffs’ third proposed less restrictive alternative does not offer the NCAA a viable means of achieving its stated goals.

CONCLUSIONS OF LAW

I. Legal Standard under the Section 1 of the Sherman Act
Section 1 of the Sherman Act makes it illegal to form any “contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1. To prevail on a claim under this section, a plaintiff must show “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.” Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir.2001) (citing *985 Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318 (9th Cir.1996)).

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

II. Anticompetitive Effects in the Relevant Markets
Proof that defendant’s activities had an impact upon competition in the relevant market is ‘an absolutely essential element of the rule of reason case.’ Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1405 (9th Cir.1986) (citations omitted). *986 The term “relevant market,” in this context, encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition ...
The recruits must also pay for any other costs of their names, images, and likenesses while they are enrolled. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand."

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

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

A. College Education Market

1. Market Definition

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

The NCAA contends that it does not restrain competition in this market. In particular, it argues that FBS football and Division I basketball schools lack the power to fix prices in this market because they must compete with other colleges and universities—such as those in other divisions and college athletic associations—in supplying educational and athletic opportunities to elite recruits.

The NCAA also points to foreign professional sports leagues and domestic minor leagues which might likewise provide alternatives to playing FBS football or Division I basketball. By failing to account for these other schools and leagues, the NCAA argues, Plaintiffs have defined the field of competition in the college education market too narrowly.

[8] [9] [10] [11] The “field of competition” within a given product market consists of “the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.” Thurman Indus., Inc. v. Pay ‘N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir.1989). This group is not limited to producers of the particular “product at issue” but also includes the producers of “all economic substitutes for the product.” *987 Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir.2008). To determine whether a product has economic substitutes, courts typically consider two factors: “first, [the product’s] reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another.” Los Angeles Memorial Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1393 (9th Cir.1984); see also Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”). This analysis requires an examination of the price, use, and qualities of all potential substitutes for the product at issue. See Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1163 (9th Cir.2003) (“For antitrust purposes, a ‘market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.’ ” (citations omitted)). An analysis of these factors in the present case demonstrates that Plaintiffs have properly defined the scope of a relevant college education market.

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

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

In sum, the qualitative differences between the opportunities offered by FBS football and Division I basketball schools and those offered by other schools and sports leagues illustrate that FBS football schools and Division I basketball schools operate in a distinct market. See Rock v. NCAA, 2013 WL 4479815, at *13 (S.D.Ind. Aug. 16, 2013) (finding plaintiff’s allegations regarding “the superior competition, institutional support, overall preference, higher revenue, and more scholarship opportunities provided in Division I football, as opposed to Division II or NAIA football” sufficient to support his assertion that “Division II and NAIA football are not adequate substitutes for Division I football and, thus, not part of the same relevant market”); White v. NCAA, Case No. 06–999, Docket No. 72, at 3, 2006 WL 8066802 (C.D.Cal. Sept. 20, 2006) (finding plaintiff’s allegations that student-athletes had no reasonably interchangeable alternatives for the “unique combination of coaching-services and academics” offered by FBS football and Division I basketball schools sufficient to plead a relevant market). So, too, does the fact that historic fluctuations in the price of attending FBS and Division I schools resulting from changes in the grant-in-aid limit have not caused large numbers of FBS football and Division I basketball recruits to migrate toward other schools or professional leagues. See Trial Tr. 127:4–:17 (Noll); Lucas Auto. Engineering, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 767 (9th Cir.2001) (“The determination of what constitutes the relevant product market hinges, therefore, on a determination of those products to which consumers will turn, given reasonable variations in price.”). Taken together, this evidence shows that the various schools and professional leagues that the NCAA has identified lack the power to deprive FBS football and Division I basketball schools of a significant number of recruits. Accordingly, these other schools and leagues are not suppliers in the market that Plaintiffs have identified.

2. The Challenged Restraint

[12] Because FBS football and Division I basketball schools are the only suppliers in the relevant market, they have the power, when acting in concert through the NCAA and its conferences, to fix the price of their product. They have chosen to exercise this power by forming an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit’s athletic services along with the use of his name, image, and likeness while he is in school. If any school seeks to lower this fixed price—by offering any recruit a cash rebate, deferred payment, or other form of direct compensation—that school may be subject to sanctions by the NCAA.

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

Despite this undisputed evidence, the NCAA contends that its conduct does not amount to price-fixing because the price that most student-athletes actually pay is “at or close to zero” due to their athletic scholarships. This argument mischaracterizes the commercial nature of the transactions between FBS football and Division I
basketball schools and their recruits. While it is true that many FBS football and Division I basketball players do not pay for tuition, room, or board in a traditional sense, they nevertheless provide their schools with something of significant value: their athletic services and the rights to use their names, images, and likenesses while they are enrolled. They must also pay the incidental expenses of their college attendance. The Seventh *989 Circuit recently observed that these “transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.” Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir.2012). The court reasoned that “the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions.” Id. at 340.

A court in the Central District of California similarly concluded that these transactions take place within a cognizable antitrust market. In White, the court found that a group of student-athletes had stated a valid Sherman Act claim against the NCAA by alleging that its cap on the value of grants-in-aid operated as a price-fixing agreement among FBS football and Division I basketball schools. Case No. 06–999, Docket No. 72, at 4. The court specifically rejected the NCAA’s argument that the plaintiffs had failed to allege a sufficient harm to competition. It explained, Id. (citations omitted). The same reasoning governs here, where Plaintiffs have shown that FBS football and Division I basketball schools have fixed the price of their product by agreeing not to offer any recruit a share of the licensing revenues derived from the use of his name, image, and likeness.

[13] The fact that this price-fixing agreement operates by undervaluing the name, image, and likeness rights that the recruits provide to the schools—rather than by explicitly requiring schools to charge a specific monetary price—does not preclude antitrust liability here. Federal antitrust law prohibits various kinds of price-fixing agreements, even indirect restraints on price. See United States v. Socony–Vacuum Oil Co., 310 U.S. 150, 223, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (“[T]he machinery employed by a combination for price-fixing is immaterial. Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”). In Catalano, Inc. v. Target Sales, Inc., for instance, the Supreme Court held that an agreement among beer wholesalers to cease providing interest-free credits to retailers was “merely one form of price fixing” and could therefore be “presumed illegal” under § 1 of the Sherman Act. 446 U.S. 643, 650, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980). The Court reasoned that the “agreement to terminate the practice of giving credit is [ ] tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing.” Id. at 648, 100 S.Ct. 1925; see also id. (“[C]redit terms must be characterized as an inseparable part of the price.”). It noted that, prior to their agreement, the “wholesalers had competed with each other with respect to trade credit, and the credit terms for individual retailers had varied substantially.” Id. at 644–45, 100 S.Ct. 1925. The agreement to eliminate this practice thus “extinguish[ed] *990 one form of competition among the sellers” and could be presumed unlawful, even though it did not ultimately require the sellers to set their prices at some specific, pre-determined level. Id.

Like the wholesalers’ agreement in Catalano, the agreement among FBS football and Division I basketball schools not to offer recruits a share of their licensing revenue eliminates one form of price competition. Although this agreement may operate to fix prices indirectly, rather than directly, it is nevertheless sufficient to satisfy Plaintiffs’ initial burden under the rule of reason. Plaintiffs need not identify an agreement as obviously unlawful as the wholesalers’ agreement in

Plaintiffs’ [complaint] alleges that student-athletes are consumers of the higher education and coaching services that the NCAA schools provide. Plaintiffs allege that the GIA [grant-in-aid] cap operates to restrict the price at which student-athletes purchase those services by forcing student-athletes to bear a 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.

Catalano to establish a per se violation, let alone to meet the lower burden imposed by the first step of a rule of reason analysis. See 446 U.S. at 644–45, 100 S.Ct. 1925 (“[W]e have held agreements to be unlawful per se that had substantially less direct impact on price than the agreement alleged in this case.”).

Indeed, in another case involving concerted action by members of a sports league, then-Judge Sotomayor observed that an antitrust plaintiff may sometimes meet its burden by identifying an agreement to fix prices indirectly. See Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 337 (2d Cir.2008) (Sotomayor, J., concurring). In that case, the plaintiff sought to challenge an agreement among Major League Baseball teams to license their trademarks and other intellectual property exclusively through a designated third party called Major League Baseball Properties (MLBP). The plaintiff alleged that the agreement violated the Sherman Act because it eliminated price competition among the teams as suppliers of intellectual property. A three-judge panel of the Second Circuit rejected this claim, finding that the agreement did not constitute price-fixing. In a separate concurrence, then-Judge Sotomayor noted that, although she agreed that the licensing arrangement was lawful, she believed that the majority had endorsed “an overly formalistic view of price fixing.” Id. at 334. She reasoned, “While the MLBP agreement does not specify a price to be charged, the effect of the agreement clearly eliminates price competition between the [teams] for trademark licenses. An agreement to eliminate price competition from the market is the essence of price fixing.” Id. at 335; see also id. at 336–37 (“In other words, an agreement between competitors to ‘share profits’ or to make a third party the exclusive seller of their competing products that has the purpose and effect of fixing, stabilizing, or raising prices may be a per se violation of the Sherman Act, even if no explicit price is referenced in the agreement.”). Then-Judge Sotomayor also noted that such an agreement could be unlawful, even if it was only meant to bind members of a joint venture. She explained,

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

Id. at 336. Although she ultimately concluded that the MLBP agreement served a procompetitive purpose, because it increased *991 the total number of licenses sold, her opinion nevertheless illustrates that price-fixing agreements take many forms and may be unlawful even if they are implemented by members of a joint venture.

Although Plaintiffs have characterized FBS football and Division I basketball schools as sellers in the market for educational and athletic opportunities, in their post-trial brief they argued that the schools could alternatively be characterized as buyers in a market for recruits’ athletic services and licensing rights. The relevant market would be that for the recruitment of the highest ranked male high school football and basketball players each year. Viewed from this perspective, Plaintiffs’ antitrust claim arises under a theory of monopsony, rather than monopoly, alleging an agreement to fix prices among buyers rather than sellers. Such an agreement, if proven, would violate § 1 of the Sherman Act just as a price-fixing agreement among sellers would. See generally Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 705 (7th Cir.2011) (“Ordinarily, price-fixing agreements exist between sellers who collude to set their prices above or below prevailing market prices. But buyers may also violate § 1 by forming what is sometimes known as a ‘buyers’ cartel.’ ”); Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir.1984) (“Just as a sellers’ cartel enables the charging of monopoly prices, a buyers’ cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint.” (citations omitted)). The Supreme Court has noted that the “kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.” Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 322, 127 S.Ct. 1069, 166 L.Ed.2d 911 (2007) (citing Roger G. Noll, “ ‘Buyer Power’ and Economic Policy,” 72 Antitrust L.J. 589, 591 (2005)).

[14] In recent years, several courts have specifically recognized that monopsonistic practices in a market for athletic services may provide a cognizable basis for relief under the Sherman Act. See, e.g., Rock, 2013 WL 4479815, at *11 (finding that plaintiff had identified a cognizable market in which “buyers of labor (the schools)
are all members of NCAA Division I football and are competing for the labor of the sellers (the prospective student-athletes who seek to play Division I football)”; *In re NCAA I–A Walk–On Football Players Litig.* 398 F.Supp.2d 1144, 1150 (W.D.Wash.2005) (“Plaintiffs have alleged a sufficient ‘input’ market in which NCAA member schools compete for skilled amateur football players.”). Indeed, the Seventh Circuit recently noted in *Agnew* that the “proper identification of a labor market for student-athletes ... would meet plaintiffs’ burden of describing a cognizable market under the Sherman Act.” 683 F.3d at 346. Given that Plaintiffs’ alternative monopsony theory mirrors their monopoly price-fixing theory, the evidence presented and facts found above are sufficient to establish a restraint of trade in a market for recruits’ athletic services just as they are to establish a restraint of trade in the college education market. As explained above, viewed from this perspective, the sellers in this market are the recruits; the buyers are FBS football and Division I basketball schools; the product is the combination of the recruits’ athletic services and licensing rights; and the restraint is the agreement among schools not to offer any recruit more than the value of a full grant-in-aid. In the absence of this restraint, schools would compete against one another by offering to pay more for *992* the best recruits’ athletic services and licensing rights—that is, they would engage in price competition.

The NCAA argues that Plaintiffs cannot prevail under a monopsony theory because they have not presented evidence of an impact on price or output in a “downstream market.” Trial Tr. 2766:16–22 (Stiroh). They cite Dr. Stiroh’s testimony that the only way that a restraint on an input market—such as a market for recruits’ athletic services and licensing rights—can give rise to an anticompetitive harm is if that restraint ultimately harms consumers by reducing output or raising prices in a downstream market. Whatever merit Dr. Stiroh’s views might have among economists, they are not supported by the relevant case law. The Supreme Court has indicated that monopsonistic practices that harm suppliers may violate antitrust law even if they do not ultimately harm consumers. In *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948), the Supreme Court considered whether an agreement among sugar refiners to fix the prices they paid for sugar beets constituted a violation of the Sherman Act. It concluded that “the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured ... are sellers, not customers or consumers.” *Id.* at 235, 68 S.Ct. 996. Notably, the Court reached this conclusion despite a vehement dissent from Justice Jackson noting that the price of sugar had not been affected by the refiners’ agreement. *Id.* at 247, 68 S.Ct. 996. The majority’s decision, thus, “strongly suggests that suppliers ... are protected by antitrust laws even when the anti-competitive activity does not harm end-users.” *Telecor Communications, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir.2002); see also *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir.2000) (“The Supreme Court’s references to the goals of achieving ‘the lowest prices, the highest quality and the greatest material progress’ and of ‘assur[ing] customers the benefits of price competition’ do not mean that conspiracies among buyers to depress *acquisition* prices are tolerated. Every precedent in the field makes clear that the interaction of competitive forces, not price-ripping, is what will benefit consumers.” (emphasis added)).

This is consistent with a long line of cases, including some decided by the Ninth Circuit, recognizing that restraints on competition within a labor market may give rise to an antitrust violation under § 1 of the Sherman Act. See, e.g., *Anderson v. Shipowners’ Ass’n*, 272 U.S. 359, 365, 47 S.Ct. 125, 71 L.Ed. 298 (1926) (holding that a multi-employer agreement among ship owners restrained trade in a labor market for sailors); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir.2001) (Sotomayor, J.) (holding that a conspiracy among oil industry employers to set salaries at “artificially low levels” restrained trade in a labor market and noting that “a horizontal conspiracy among buyers [of labor] to stifle competition is as unlawful as one among sellers”); *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 740 (9th Cir.1984) (holding that a multi-employer agreement in the paper lithograph label industry may restrain trade in a “market for personal services”). It is also consistent with the many recent cases, some of which are cited above, recognizing the validity of antitrust claims against the NCAA based on anticompetitive harms in a labor market. See, e.g., *Agnew*, 683 F.3d at 346 (recognizing that the NCAA’s scholarship rules may restrain trade in a “labor market for student-athletes” and noting that “labor markets are cognizable under the Sherman Act”); *993 Law v. NCAA*, 134 F.3d 1010, 1015 (10th Cir.1998) (finding that an NCAA rule capping compensation for entry-level coaches restrained trade in a “labor market for coaching services” and noting that “[i]lower prices cannot justify a cartel’s control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises”); *In re NCAA I–A Walk–On Football Players Litig.* 398 F.Supp.2d at 1150 (recognizing that the
NCAA’s scholarship rules may restrain trade in an “‘input’ market in which NCAA member schools compete for skilled amateur football players”). In fact, a court in the Southern District of Indiana recently rejected the NCAA’s argument that a student-athlete would need to plead a “‘market-wide impact on the price or output of any commercial product’” in order to state a valid Sherman Act claim challenging its former prohibition on multi-year football scholarships. Rock, 2013 WL 4479815, at *14 (S.D.Ind.) (quoting NCAA’s brief). The court in that case found that the student-athlete’s complaint “adequately plead[ ] anticompetitive effects of the challenged bylaws” in the “‘nationwide market for the labor of Division I football student athletes’” based on his allegations that, in the absence of the challenged scholarship rules, the schools competing for his services would have offered him a multi-year scholarship. Id. at *3, *15 (quoting complaint). The court specifically noted that the plaintiff had identified a cognizable harm to competition by alleging that removing the challenged restraint would “would force the schools to ‘compete’ for recruits.” Id. at *15. Plaintiffs here have presented sufficient evidence to show an analogous anticompetitive effect in a similar labor market. Accordingly, they have shown a cognizable harm to competition under the rule of reason.

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

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

As noted above, television networks compete for the rights to telescast live FBS football and Division I basketball games. In order to secure these rights, networks typically purchase licenses to use the intellectual property of the participating schools and conferences during the game telescast as well as the names, images, and likenesses of the participating student-athletes. Because student-athletes are not permitted by NCAA rules to license the rights to use their names, images, and likenesses, the networks deal exclusively with schools and conferences when acquiring the student-athletes’ rights.

As the Court found above, in the absence of the NCAA’s restrictions on student-athlete compensation, student-athletes on certain FBS football and Division I basketball teams would be able to sell group licenses for the use of their names, images, and likenesses to television networks. They would either sell those licenses to the television networks directly or do so through some intermediate buyer—such as their school or a third-party licensing company—which would bundle the group license with other intellectual property and performance rights and sell the full bundle of rights to the network. Regardless of whether the student-athletes would sell their group licenses to the networks directly or through some intermediate buyer, however, a submarket for such group licenses would exist.

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

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

The sellers in this market would be the student-athletes. Plaintiffs have not presented any evidence to show that, in the absence of the challenged restraint, teams of student-athletes would actually compete against one another to sell their group licenses. In fact, the evidence in the record strongly suggests that such competition would not occur. This is because any network that seeks to telecast a particular athletic event would have to obtain a group license from every team that could potentially participate in that event. For instance, a network seeking to telecast a conference basketball tournament would have to obtain group licenses from all of the teams in that conference. Under those circumstances, none of the teams in the conference would compete against each other as sellers of group licenses because the group licenses would constitute perfect complements: that is, every group license would have to be sold in order for any single group license to have value. See generally Herbert Hovenkamp, “Implementing Antitrust’s Welfare Goals,” 81 *Fordham L. Rev.* 2471, 2487 (2013) (“Perfect complements are goods that are invariably used together—or, more technically, situations in which one good has no value unless it can be consumed together with the other good.”). At the same time, the teams in that conference would never have to compete with teams outside of the conference because those teams—as non-participants in the conference tournament—would not be able to sell their group licenses with respect to that event in the first place. Thus, in this scenario, teams of student-athletes would never actually compete against each other as sellers of group licenses, even if the challenged NCAA rules no longer existed.

The same outcome would result whenever any network sought to telecast any other FBS football and Division I basketball event. Although the specific set of group licenses required for each event would vary, the lack of competition among student-athlete teams would remain constant: in every case, the network would need to acquire group licenses from a specific set of teams, none of which would have any incentive to compete either against each other or against any teams whose group licenses were not required for the telecast. These conditions would hold regardless of whether the student-athlete teams sold their group licenses to the television networks directly or through some intermediary, such as their schools, because the demand for group licenses would be dictated primarily by the identity of the teams eligible to participate in each event. To the extent that entire conferences might compete against each other in order to secure a specific telecasting contract with a particular network, the challenged NCAA rules do not inhibit this type of competition. Conferences are already free to compete against each other in this way. So, too, are any individual pairs of schools whose teams are scheduled to play against each other in specific regular season games. Like the conferences, these pairs may freely compete against other pairs of schools whose games are scheduled for the same time in order to secure a contract with whatever networks can show games during that time slot. In any event, *Plaintiffs have not presented sufficient evidence to show that student-athlete teams would actually compete against each other in any of these ways if they were permitted to sell group licenses to use their names, images, and likenesses.*

Plaintiffs have also failed to identify any situation in which buyers of group licenses might compete against each other. As noted above, there are two sets of potential buyers in this market: the television networks, which would buy group licenses directly from the student-athlete teams, and intermediate buyers, which would bundle those licenses with other rights and sell those bundles of
rights to the networks. The first set of potential buyers—the television networks—already compete freely against one another for the rights to use student-athletes’ names, images, and likenesses in live game telecasts. Although they may not be able to purchase these rights directly from the student-athletes, they nevertheless compete to acquire these rights from other sources, such as schools and conferences. The fact that the networks do not compete to purchase these rights directly from the student-athletes is due to the assurances by the schools, conferences, and NCAA that they have the authority to grant these rights. Such assurances might constitute conversion by the schools of the student-athletes’ rights, or otherwise be unlawful, but they are not anticompetitive because they do not inhibit any form of competition that would otherwise exist.12 Allowing student-athletes to seek compensation for group licenses would not increase the number of television networks in the market or otherwise enhance competition among them.

Nor would it increase competition among any potential intermediate buyers in this market, such as third-party licensing companies and schools. Third-party licensing companies are, like television networks, already free to compete against one another to acquire the rights to use student-athletes’ names, images, and likenesses in live game telecasts. They may be barred from purchasing these rights directly from the student-athletes but they are not barred from competing to acquire these rights through other channels.

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

17Accordingly, Plaintiffs have failed to show that the challenged NCAA rules *997 harm competition in this submarket. Although they have presented sufficient evidence to establish that they were injured by the NCAA’s conduct, as noted above, “[i]njury to an antitrust plaintiff is not enough to prove injury to competition.” O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1469 (9th Cir.1986). Plaintiffs have shown an injury to competition only in the college education market or the market for recruits’ athletic services and licensing rights.

2. Submarket for Group Licenses to Use Student–Athletes’ Names, Images, and Likenesses in Videogames

18Plaintiffs have presented sufficient evidence to establish that, absent the challenged NCAA rules, a national submarket would exist in which videogame developers would compete for group licenses to use student-athletes’ names, images, and likenesses. This submarket is analogous to the live telecasting submarket discussed above. As in that submarket, the sellers of group licenses in the videogame submarket would be student-athletes on certain FBS football and Division I basketball teams. The buyers would either be videogame developers or intermediate buyers who would bundle the student-athletes’ rights with other parties’ rights and sell those bundles to videogame developers.

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

This argument overstates the significance of the decisions of the NCAA and some of its member conferences not to license their intellectual property to videogame developers. To begin with, videogame developers do not need the intellectual property rights of both the NCAA and all of its conferences in order to produce a college sports videogame. If a sufficient number of schools and conferences were willing to license their intellectual property for use in videogames, a submarket for student-athletes’ group licenses would likely exist. Indeed, Mr. Linzner specifically testified at trial that EA
remains interested in acquiring the rights to use student-athletes’ names, images, and likenesses and would seek to acquire them if not for the NCAA’s challenged rules and the present litigation. This testimony suggests that the recent decisions of the NCAA and some of its conferences not to license their intellectual property has not permanently eliminated the demand for group licenses to use student-athletes’ names, images, and likenesses. Accordingly, these decisions—which could have been adopted due to this litigation and could be reversed at any time—do not establish the lack of a videogame submarket.

Nevertheless, Plaintiffs have not identified any injury to competition within this submarket. Just as in the live telecasting submarket, the ultimate buyers in this submarket—videogame developers—would need to acquire group licenses from a specific set of teams in order to create their product. This set might include all of the teams within Division I, all of the teams within the major conferences, or some other set of teams that the videogame developer believed would be necessary to produce a marketable product. Regardless of which teams were included within that set, those teams would not compete against each other as sellers of group licenses, even in the absence of the challenged rules, because they would all share an interest in ensuring that the videogame developer acquired each of the group licenses required to create its product. These teams would also not compete against any teams outside of the set because the videogame developer determined that those other teams’ group licenses were not required to produce the videogame. Indeed, competition between teams (or conferences) is even less likely in the videogame submarket than the live telecasting submarket because videogame developers—unlike television networks—are not constrained by the number of group licenses that they could use to produce their product. The evidence presented at trial demonstrates that videogame companies could, and often did, feature nearly every FBS football and Division I basketball team in their videogames. Under these circumstances, competition among individual teams and conferences to sell group licenses is extremely unlikely. And, to the extent that it happens (or would happen), it is not restrained by the challenged NCAA restrictions on student-athlete compensation. Thus, just as with the live telecasting submarket, the challenged rules do not suppress competition in this submarket.

3. Submarket for Group Licenses to Use Student–Athletes’ Names, Images, and Likenesses in Game Re–Broadcasts, Highlight Clips, and Other Archival Footage

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

III. Procompetitive Justifications

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

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

A. Amateurism

As noted in the findings of fact, the NCAA asserts that its restrictions on student-athlete compensation are necessary to preserve the amateur tradition and identity of college sports. It contends that this tradition and identity contribute to the popularity of college sports and help distinguish them from professional sports and other forms of entertainment in the marketplace. For support, it points to historical evidence of its commitment to amateurism, recent consumer opinion surveys, and testimony from various witnesses regarding popular perceptions of college sports. Although this evidence could justify some limited restrictions on student-athlete compensation, it does not justify the specific restrictions challenged in this case. In particular, it does not justify the NCAA’s sweeping prohibition on FBS football and Division I basketball players receiving any compensation for the use of their names, images, and likenesses.

Although the NCAA has cited the Supreme Court’s decision in Board of Regents as support for its amateurism justification, its reliance on the case remains unavailing. As explained in previous orders, Board of Regents addressed limits on television broadcasting, not payments to student-athletes, and “does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images, and likenesses.” Oct. 25, 2013 Order at 15. The Supreme Court’s suggestion in Board of Regents that, in order to preserve the quality of the NCAA’s product, student-athletes “must not be paid,” 468 U.S. at 102, 104 S.Ct. 2948, was not based on any factual findings in the trial record and did not serve to resolve any disputed issues of law. In fact, the statement ran counter to the assertions of the NCAA’s own counsel in the case, who stated during oral argument that the NCAA was not relying on amateurism as a procompetitive justification and “might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs.” Oral Arg. Tr. at 25, Board of Regents, 468 U.S. 85. He further argued, “When the NCAA says, we are running programs of amateur football, it is probably reducing its net profits.” Id. (emphasis added); see also id. (“The NCAA might be able to increase its intake if it abolished or reduced the academic standards that its players must meet.”). Plaintiffs have also presented *ample evidence here to show that the college sports industry has changed substantially in the thirty years since Board of Regents was decided. See generally Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir.1992) (Flaum, J., concurring in part and dissenting in part) (“The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed.”). Accordingly, the Supreme Court’s incidental suggestion in Board of Regents does not establish that the NCAA’s current restraints on compensation are procompetitive and without less restrictive alternatives.

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

The association’s current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism. A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of “core principles.”

Nonetheless, some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball. If the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA’s products—specifically, FBS football and Division I basketball telecasts, re-broadcasts, ticket sales,
and merchandise—then the restrictions would be procompetitive. See Board of Regents, 468 U.S. at 120, 104 S.Ct. 2948 (recognizing that “maximiz[ing] consumer demand for the product” is a legitimate procompetitive justification). Attempting to make this showing, the NCAA relies on consumer opinion surveys, including the survey it commissioned from Dr. Dennis specifically for this case. As noted above, however, this survey—which contained several methodological flaws and did not ask respondents about the specific restraints challenged in this case—does not provide reliable evidence that consumer interest in FBS football and Division I basketball depends on the NCAA’s current restrictions on student-athlete compensation. Further, Plaintiffs offered evidence demonstrating that such surveys are inevitably a poor tool for accurately predicting consumer behavior. Dr. Rascher highlighted various polls and surveys which documented widespread public opposition to rule changes that ultimately led to increased compensation for professional baseball players and Olympic athletes even as Major League Baseball and the IOC were experiencing periods of massive revenue growth. This evidence counsels strongly against giving any significant weight to Dr. Dennis’s survey results. What Dr. Dennis’s survey does suggest is that the public’s attitudes toward student-athlete compensation *1001 depend heavily on the level of compensation that student-athletes would receive. This is consistent with the testimony of the NCAA’s own witnesses, including Mr. Muir and Mr. Pilson, who both indicated that smaller payments to student-athletes would bother them less than larger payments.

Ultimately, the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography. Mr. Pilson explained that college sports tend to be more popular in places where college teams are located. Similarly, Ms. Plonsky noted that popular interest in college sports was driven principally by the loyalty of local fans and alumni. She testified, “I would venture to say that if we [UT] offered a tiddlywinks team, that would somehow be popular with some segment of whoever loves our university.” Trial Tr. 1414:25–1415:2.

The Court therefore concludes that the NCAA’s restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products. Although they might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses.

B. Competitive Balance
The NCAA asserts that its challenged rules are justified by the need to maintain the current level of competitive balance among its FBS football and Division I basketball teams in order to maintain their popularity. This Court has previously recognized that a sports league’s efforts to achieve the optimal competitive balance among its teams may serve a procompetitive purpose if promoting such competitive balance increases demand for the league’s product. See April 11, 2014 Order at 33; American Needle, 560 U.S. at 204, 130 S.Ct. 2201 (“We have recognized, for example, ‘that the interest in maintaining a competitive balance’ among ‘athletic teams is legitimate and important.’ ” (citing Board of Regents, 468 U.S. at 117, 104 S.Ct. 2948)). As the Supreme Court has explained, the “hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product.” Board of Regents, 468 U.S. at 119–20, 104 S.Ct. 2948.

[24] Here, the NCAA has not presented sufficient evidence to show that its restrictions on student-athlete compensation actually have any effect on competitive balance, let alone produce an optimal level of competitive balance. The consensus among sports economists who have studied the issue, as summarized by Drs. Noll and Rascher, is that the NCAA’s current restrictions on compensation do not have any effect on competitive balance. Although Dr. Rubinfeld disagreed with this conclusion, he could not identify another economist who shared his view and did not offer any testimony to rebut the specific findings of the academic literature cited by Drs. Noll and Rascher. When the Court asked him whether his opinions were based on any academic literature, Dr. Rubinfeld directed the Court to the economic articles cited in his most recent report on competitive balance. But none of the articles cited in that report found that the NCAA’s restrictions on student-athlete compensation promote competitive balance. *1002 In fact, the only article his report cited that actually examined competitive balance in college sports was a 2004 article by Katie Baird, which Dr. Noll quoted...
during his testimony. As Dr. Noll testified, that article concluded, “‘[L]ittle evidence supports the claim that NCAA regulations help level the playing field. At best, they appear to have had a very limited effect, and at worst they have served to strengthen the position of the dominant teams.’” Trial Tr. 230:18–231:11 (quoting Baird article). Dr. Rubinfeld’s independent analysis of competitive balance was also unpersuasive because it did not show a causal link between the NCAA’s challenged rules and competitive balance. More importantly, his analysis did not show that consumer demand for the NCAA’s product would decrease if FBS football or Division I basketball teams were less competitively balanced than they currently are. As found above, the popularity of college sports is driven primarily by factors such as school loyalty and geography. Neither of these is dependent on competitive balance.

In its post-trial brief, the NCAA cites a passage from Board of Regents which states that the district court in that case found that the NCAA’s “restrictions designed to preserve amateurism” served to promote competitive balance. 468 U.S. at 119, 104 S.Ct. 2948 (citing district court order, 546 F.Supp. 1276, 1296, 1309–10 (W.D.Okla.1982)). That factual finding is not binding on this Court and, more importantly, is contrary to the evidence presented in this case. The record in this case shows that revenues from FBS football and Division I basketball have grown exponentially since Board of Regents was decided and that, as a result of this growth, many schools have invested more heavily in their recruiting efforts, athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes. This trend, which several witnesses referred to as an “arms race,” has likely negated whatever equalizing effect the NCAA’s restraints on student-athlete compensation might have once had on competitive balance. These changed factual circumstances—in addition to the wealth of academic studies concluding that the restraints on student-athlete compensation do not promote competitive balance—preclude this Court from giving any significant weight to the district court’s factual findings in Board of Regents.

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

C. Integration of Academics and Athletics

The NCAA asserts that its restrictions on student-athlete compensation help educate student-athletes and integrate them into their schools’ academic communities. It argues that the integration of academics and athletics serves to improve the quality of educational services provided to student-athletes in the restrained college education market. Courts have recognized that this goal—improving product quality—may be a legitimate procompetitive justification. See County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir.2001) (recognizing that improving product quality may be a legitimate procompetitive justification); Law, 134 F.3d at 1023 (recognizing that “increasing output, creating operating efficiencies, making a new product available, enhancing service or quality, and widening consumer choice” may be procompetitive justifications).

The evidence presented by the NCAA suggests that integrating student-athletes into the academic communities at their schools improves the quality of the educational services that they receive. As noted above, several university administrators testified about the benefits that student-athletes derive from participating in their schools’ academic communities. Plaintiffs confirmed that they appreciated receiving these educational benefits when they were student-athletes, while Dr. Heckman testified that these benefits also carry long-term value.

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

As found above, the only way in which the challenged rules might facilitate the integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community. Limited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal. As with the NCAA’s amateurism justification, however, the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation, paid now or in the future, from licensing revenue generated from the use of student-athletes’ names, images, and likenesses.

D. Increased Output

[24] The NCAA argues that the challenged restraint increases the output of its product. Courts have recognized that increased output may be a legitimate procompetitive justification. See Board of Regents, 468 U.S. at 114, 104 S.Ct. 2948; Law, 134 F.3d at 1023.

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

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

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

IV. Less Restrictive Alternatives

[27] As outlined above, the NCAA has produced sufficient evidence to support an inference that some circumscribed restrictions on student-athlete compensation may yield procompetitive benefits. First, it presented evidence suggesting that preventing schools from paying FBS football and Division I basketball players large sums of money while they are enrolled in school may serve to increase consumer demand for its product. Second, it presented evidence suggesting that this restriction may facilitate its member schools’ efforts to integrate student-athletes into the academic communities on their campuses, thereby improving the quality of educational services they offer. Thus, because the NCAA has met its burden under the rule of reason to that extent, the burden shifts back to Plaintiffs to show that these procompetitive goals can be achieved in “other and better ways”—that is, through “less restrictive alternatives.” Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 n. 4 (9th Cir.1991) (citations omitted).

[28] [29] As part of their burden to show the existence of less restrictive alternatives, [1005] [ ] plaintiffs must also
show that ‘an alternative is substantially less restrictive and is virtually as effective in serving the legitimate objective without significantly increased cost.’” County of Tuolomne, 236 F.3d at 1159 (citations omitted; emphasis in original). In addition, any less restrictive alternatives “should either be based on actual experience in analogous situations elsewhere or else be fairly obvious.” Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1913b (3d ed. 2006). A defendant may show that a proffered less restrictive alternative is not feasible with “evidence that the proffered alternative has been tried but failed, that it is equally or more restrictive, or otherwise unlawful.” Id.

[30] A court need not address the availability of less restrictive alternatives for achieving a purported procompetitive goal “when the defendant fails to meet its own obligation under the rule of reason burden-shifting procedure.” Id.; see also Law, 134 F.3d at 1024 n.16 (“Because we hold that the NCAA did not establish evidence of sufficient procompetitive benefits, we need not address question of whether the plaintiffs were able to show that comparable procompetitive benefits could be achieved through viable, less anticompetitive means.”). Thus, in the present case, the Court does not consider whether Plaintiffs’ proposed less restrictive alternatives would promote competitive balance or increase output because the NCAA failed to meet its burden with respect to these stated procompetitive justifications.15 Rather, the Court’s inquiry focuses only on whether Plaintiffs have identified any less restrictive alternatives for both preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism and improving the quality of educational opportunities for student-athletes by integrating academics and athletics.

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

The NCAA notes that Dr. Noll did not discuss a system of holding payments in trust for student-athletes in his expert reports or during his testimony. However, this does not bar Plaintiffs from proposing such a system as a less restrictive alternative here. As noted above, courts may consider any less restrictive alternatives that are “based on actual experience in analogous situations elsewhere” or otherwise “fairly obvious.” Areeda & Hovenkamp, Antitrust Law ¶ 1913b. Plaintiffs’ proposal for holding payments in trust falls squarely within this category. One of Plaintiffs’ experts, Dr. Rascher, discussed the creation of a trust in his opening report, which was disclosed to the NCAA more than eight months before trial. See Sept. 2013 Rascher Report ¶¶ 80, 86. Although the Court does not rely on the content of Dr. Rascher’s report here, it notes that the report provided the NCAA with ample notice of this proposal.16 Plaintiffs’ counsel also raised the issue repeatedly during trial and several of the NCAA’s key witnesses—including Dr. Emmert, Mr. Pilson, and Dr. Rubinfeld—were specifically given an opportunity to respond to the idea. None of these witnesses provided a persuasive explanation as to why the NCAA could not implement a trust payment system like the one Plaintiffs propose. The Court therefore concludes that a narrowly tailored trust payment system—which would allow schools to offer their FBS football and Division I basketball recruits a limited and equal share of the licensing revenue generated from the use of their names, images, and likenesses—constitutes a less restrictive means of achieving the NCAA’s stated procompetitive goals.

V. Summary of Liability Determinations
For the reasons set forth above, the Court concludes that the NCAA’s challenged rules unreasonably restrain trade in violation of § 1 of the Sherman Act. Specifically, the association’s rules prohibiting student-athletes from receiving any compensation for the use of their names, images, and likenesses restrains price competition among FBS football and Division I basketball schools as suppliers of the unique combination of educational and athletic opportunities that elite football and basketball recruits seek. Alternatively, the rules restrain trade in the market where these schools compete to acquire recruits’
VI. Remedy

[32]“The several district courts of the United States are invested with jurisdiction to prevent and restrain violations” of § 1 of the Sherman Act. 15 U.S.C. § 4. Although the NCAA asserts that Plaintiffs must make a showing of irreparable harm in order to obtain permanent injunctive relief here, it failed to cite any authority holding that such a showing is required in an action brought under the Sherman Act. The Sherman Act itself gives district courts the authority to enjoin violations of its provisions and does not impose any additional requirements on plaintiffs who successfully establish the existence of an unreasonable restraint of trade. Accordingly, this Court will enter an injunction to remove any unreasonable elements of the restraint found in this case.\(^\text{17}\)

[33]Consistent with the less restrictive alternatives found, the Court will enjoin the NCAA from enforcing any rules or *1008 bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws.

The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires. Although the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust, it will prohibit the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically eligible to compete. The NCAA’s witnesses stated that their concerns about student-athlete compensation would be minimized or negated if compensation was capped at a few thousand dollars per year. This is also comparable to the amount of money that the NCAA permits student-athletes to receive if they qualify for a Pell grant and the amount that tennis players may receive prior to enrollment. None of the other evidence presented at trial suggests that the NCAA’s legitimate procompetitive goals will be undermined by allowing such a modest payment. Schools may offer lower amounts of deferred compensation if they choose but may not unlawfully conspire with each another in setting these amounts. To ensure that the NCAA may achieve its goal of integrating academics and athletics, the injunction will not preclude the NCAA from enforcing its existing rules—or enacting new rules—to prevent student-athletes from using the money held in trust for their benefit to obtain other financial benefits while they are still in school. Furthermore, consistent with Plaintiffs’ representation that they are only seeking to enjoin restrictions on the sharing of group licensing revenue, the NCAA may enact and enforce rules ensuring that no school may offer a recruit a greater share of licensing revenue than it offers any other recruit in the same class on the same team. The amount of compensation schools decide to place in trust may vary from year to year. Nothing in the injunction will preclude the NCAA from continuing to enforce all of its other existing rules which are designed to achieve its legitimate procompetitive goals. This includes its rules prohibiting student-athletes from endorsing commercial products, setting academic eligibility requirements, prohibiting schools from creating

athletic services and licensing rights.

The challenged rules do not promote competitive balance among FBS football and Division I basketball teams, let alone produce a level of competitive balance necessary to sustain existing consumer demand for the NCAA’s FBS football and Division I basketball-related products. Nor do the rules serve to increase the NCAA’s output of Division I schools, student-athletes, or football and basketball games. Although the rules do yield some limited procompetitive benefits by marginally increasing consumer demand for the NCAA’s product and improving the educational services provided to student-athletes, Plaintiffs have identified less restrictive ways of achieving these benefits.

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

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

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

CONCLUSION

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

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

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

IT IS SO ORDERED.

All Citations


Footnotes

1 All exhibit citations in this order are to the page numbers provided by the parties at trial, which do not necessarily correspond to the page numbers created by the original author of the exhibit.

2 The NCAA’s bylaws define financial aid to mean “funds provided to 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.

3 Prior to 2006, FBS was known as Division I–A and FCS was known as 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.

4 Plaintiffs presented some evidence at trial of a market for licenses to use student-athletes’ names, images, and likenesses in other merchandise, such as jerseys and bobbleheads. The Court does not 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.

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

6 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.
The NCAA’s objections to this testimony under Federal Rules of Evidence 602 and 701 are overruled. Walter Byers was the executive 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.

This market could be divided into two submarkets—one in which Division I basketball schools compete for elite basketball recruits and 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.

The Supreme Court recently relied on this language from then-Judge Sotomayor’s concurrence in another Sherman Act case involving a challenge to concerted action by members of a sports league. American Needle, 560 U.S. at 202, 130 S.Ct. 2201 (“C)ompetitors ‘cannot simply get around’ antitrust liability by acting ‘through a third-party intermediary or “joint venture.”’”) (quoting Salvino, 542 F.3d at 336 (Sotomayor, J., concurring)).

As discussed in the findings of fact, when a third party—such as a bowl committee or the NCAA itself—has organized a particular athletic event, the networks may also purchase a separate license from 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.

The evidence presented at trial suggests that most telecasting contracts, even for regular season games, are negotiated at the 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.

Plaintiffs voluntarily dismissed all of their claims against the NCAA for “individual damages, disgorgement of profits, and an 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.

The NCAA’s other argument—that videogame developers would not need to acquire group licenses because their use of student-athletes’ names, images, and likenesses is protected under the First Amendment—was rejected by the Ninth Circuit earlier in this litigation. In re NCAA Student–Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir.2013) (concluding that “EA’s use of the likenesses of 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”).

In its post-trial brief, the NCAA argues that the integration of academics and athletics also increases consumer demand for its other product—FBS football and Division I basketball games. It presented 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.

The Court notes, however, that the NCAA could easily adopt several less restrictive rules if it wished to increase competitive balance or output. With respect to competitive balance, for instance, the NCAA could adopt a more equal revenue distribution formula. As noted above, its current formula primarily rewards the schools that already have the largest athletic budgets. This uneven distribution of revenues runs counter to the association’s stated goal of promoting competitive balance. See, e.g., Salvino, 542 F.3d at 333 (noting that “disproportionate distribution of licensing income would foster a competitive imbalance” among Major League Baseball teams); Smith v. Pro 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.

The Court also notes that, over the past two decades, numerous commentators have suggested that the NCAA could
hold payments in trust for its student-athletes without violating generally accepted understandings of amateurism used by other sports organizations. See, e.g., Sean Hanlon & Ray Yasser, “J.J. Morrison and His Right of Publicity Lawsuit Against the NCAA,” 15 Vill. Sports & Ent. L.J. 241, 294 (2008) (“Searching for a solution to the problem posed by this Comment, commentators have suggested a ‘have-your-cake-and-eat-it-too’ approach whereby a trust would be created, allowing student-athletes the ability to preserve their amateur status while their athletic eligibility remains. The money generated through the use of the commercial value of their identity would be placed in a trust until the expiration of their athletic eligibility.”); Kristine Mueller, “No Control over Their Rights of Publicity: College Athletes Left Sitting the Bench,” 2 DePaul J. Sports L. & Contemp. Probs. 70, 87–88 (2004) (“One suggestion put forth is to create a trust for the athletes, which would become available to them upon graduation. [This proposal] allows the athletes to reap the financial benefits of their labors, 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.”).
In Re: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION..., 2014 WL 6685647...

2014 WL 6685647 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California.
Oakland Division

In Re: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST
LITIGATION.
This Document Relates to: JENKINS, et al.,
v.
NCAA, et al.

MDL-2541.

Nos. 4:14-md-02541-CW, 4:14-cv-02758-CW.
September 18, 2014.

Date: October 9, 2014
Time: 2:00 pm
Courtroom: 2, 4th Floor

Plaintiffs' Opposition to Defendants' Motion to Dismiss

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Before: Claudia Wilken.

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I. PRELIMINARY STATEMENT

Defendants do not deny that the Jenkins Complaint states a federal antitrust claim. Instead, Defendants’ motion is exclusively based on a challenge to the availability and scope of the injunctive remedy that the Jenkins Plaintiffs may obtain after trial. But the availability of a particular remedy provides no legal basis for Defendants’ Rule 12(b)(6) motion (“Motion”), which fails at the threshold, as a matter of law.

Defendants’ Motion is also based on a fundamental misconstruction of what this Court decided in O’Bannon. It brazenly portrays the Court’s trial decision as an NCAA victory on the antitrust merits that affords Defendants blanket antitrust immunity for any NCAA restraint that does not conflict specifically with the terms of the Court’s O’Bannon injunction. No such per se lawful rule can be found in O’Bannon or anywhere else in the history of antitrust law. The Jenkins Plaintiffs challenge NCAA restraints on compensation for athletic services, i.e., for playing for a team, that were expressly not litigated in the O’Bannon name, image, and likeness (“NIL”) case.

Finally, Defendants recycle the familiar string of out-of-date and out-of-circuit cases for the purported proposition that Defendants’ self-defined “eligibility rules”—including restraints on student-athlete compensation—are “presumptively procompetitive.” Defendants thus try to wish away the fact that this Court just found the NCAA’s restraints on NIL compensation—which would themselves be “presumptively procompetitive” under Defendants’ argument—to be illegal. The claim that all restraints on compensating players are per se procompetitive and lawful, and immune from any normal antitrust analysis, must be rejected out of hand.

II. BACKGROUND

The Jenkins Plaintiffs challenge, under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (“Section 1”), certain restrictions currently imposed by Defendants—the NCAA and the five Power Conferences—to prevent their members from providing current and future Division I football and men’s basketball athletes with various forms of economic compensation for their athletic services. Jenkins Compl. at ¶ 7. Plaintiffs seek to represent two injunctive-relief-only classes comprising top-level college football and men’s basketball athletes. Id. at ¶¶ 27-28.

This litigation is thus completely different from O’Bannon, where the plaintiffs challenged NCAA restraints concerning compensation for student-athletes’ NIL rights—not their athletic services. As the NCAA explained in its O’Bannon pretrial brief:

According to [Antitrust Plaintiffs (“APs”)], their claims are directed at only one aspect of these rules: the rules that prohibit [student-athletes (“SAs”)] from being paid for the commercial use of their name, image or likeness. Indeed, APs have made clear that they are not challenging the NCAA’s rules against SAs being paid in other ways. Rather, APs have claimed that they are challenging the rules to the extent that they prohibit group licenses of supposed rights of publicity in SAs’ NIL.
The Jenkins Complaint alleges an unlawful agreement to eliminate price competition for the athletic services of Division I men’s basketball and football players by fixing the compensation for their services at nothing beyond a grant-in-aid. Jenkins Compl. ¶ 6. The Jenkins classes are subject to these unreasonable restraints, in the bogus name of “amateurism,” while all around them, Defendants reap billions of dollars in revenue from the athletic services of student-athletes. Id. ¶¶ 37-8. Defendants tout their rules for “provid[ing] a minimum of 200 grants-in-aid or $4 million in athletically related grants-in-aid to student-athletes across the minimum sixteen different varsity intercollegiate sports” (Motion at 3-4)—but that is less than what many colleges pay to a single coach.

There is no dispute about the existence or terms of these horizontal agreements among schools competing for Plaintiffs’ services. Patent horizontal price fixing of this type is usually regarded as a per se illegal restraint of trade. NCAA v. Bd. of Regents, 468 U.S. 85, 100 (1984). However, whether the restraints challenged by Jenkins should be judged under the per se or rule of reason test is a question for another day because, either way, Defendants do not dispute that the Jenkins Complaint pleads sufficient facts to plausibly state a Section 1 claim.5

III. ARGUMENT

Defendants’ motion to dismiss must be denied. “On a motion under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.” In re NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1000-01 (N.D. Cal. 2013) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). To state a Section 1 claim, a plaintiff must only allege “(1) that there was a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.” Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (citations omitted). Nowhere do Defendants argue that the Jenkins Complaint fails to satisfy a single Tanaka pleading requirement for a Section 1 claim.6

A. DEFENDANTS’ CHALLENGE TO THE AVAILABILITY AND SCOPE OF THE REQUESTED INJUNCTIVE REMEDY IS LEGALLY IRRELEVANT ON A MOTION TO DISMISS.

Defendants premise their Motion on a single, irrelevant legal contention: that the injunction sought by the Jenkins Plaintiffs is purportedly unavailable in light of O’Bannon. See, e.g., Motion at 2 (asserting that Plaintiffs cannot plausibly obtain “the relief they seek”) and, therefore, “Plaintiffs’ complaints ... should be dismissed for failure to state a claim for which relief can be granted.” But “[t]he test of a complaint pursuant to a motion to dismiss lies in the claim, not the demand.” Palantir Techs., Inc. v. Palantir.net, Inc., No. C 10-04283-CRB, 2011 WL 3047327, at *3 (N.D. Cal. July 25, 2011) (internal quotation marks and citations omitted).

While dismissal is appropriate where a claim lacks substantive merit as a matter of law, “a meritorious claim will not be rejected for want of a prayer for relief ...” Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 66 (1978) (citing Fed. R. Civ. P. 54(c)); A judgment “should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”) As this Court has squarely held, a motion to dismiss will not be granted even where “a plaintiff requests a remedy to which he is not entitled.” Caplan v. CNA Short Term Disability Plan, 479 F. Supp. 2d 1108, 1111 (N.D. Cal. 2007) (citing Massey v. Banning Unified Sch. Dist., 256 F. Supp. 2d 1090, 1092 (C.D. Cal. 2003)). In other words, “[i]t need not appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted.” Massey, 256 F. Supp. 2d at 1092 (quoting Doe v. U.S. Dept. of Justice, 753 F. 2d 1092, 1104 (D.C. Cir. 1985)); Palantir Techs., Inc., 2011 WL 3047327, at *3 (same) (emphasis in original).

This governing principle alone requires denial of Defendants’ Motion. The Jenkins Plaintiffs have clearly stated a claim for individual damages, and the proper scope of the injunctive relief to which the Jenkins classes will be entitled is a subject for
B. THE COURT’S O’BANNON INJUNCTION DOES NOT FORECLOSE THE INJUNCTIVE RELIEF REQUESTED IN JENKINS.

Even if it were proper for the Court to assess now the feasibility of the injunctive relief pleaded in the Jenkins Complaint, Defendants’ Motion would still have to be denied because O’Bannon does not preclude it. Under Defendants’ fanciful argument, the Court’s ruling in O’Bannon would have the effect of rendering all NCAA rules not enjoined in O’Bannon to be per se legal under the antitrust laws.

Specifically, Defendants wrongly conclude that because O’Bannon permitted the NCAA and its members to “lawfully adopt and enforce some limitations” on NIL compensation, any and all other limitations Defendants impose on compensation for Division I men’s basketball and football players are lawful and this case should therefore be dismissed. Motion at 14 (emphasis added). In so arguing, Defendants focus on this Court’s statement that “[n]othing in the injunction will preclude the NCAA from continuing to enforce all of its other existing rules ...” Id. at 8 (quoting O’Bannon, 2014 WL 3899815, at *37). But “not precluding” other NCAA rules which this Court did not consider or rule upon in O’Bannon is not the same as the Court finding such unadjudicated restraints to be lawful. This Court was crystal clear that its O’Bannon injunction was crafted to be “consistent with Plaintiffs’ representation that they are only seeking to enjoin restrictions on the sharing of group licensing revenue”; this Court properly did not address any NCAA rules “which [were] not challenged.” O’Bannon, 2014 WL 3899815, at *37. For example, this Court expressly stated that nothing in its injunction would “preclude the NCAA from enforcing its current rules limiting the total number of football and basketball scholarships each school may award, which are not challenged here.” Id. (emphasis added). That did not mean, however, that this Court held such scholarship limitations to be lawful.

To the contrary, the only liability determination that this Court made in O’Bannon was that the challenged NCAA rules on NIL compensation were illegal. Defendants’ attempt to turn the NCAA’s liability “loss” into a liability “victory” defies imagination. Simply put, O’Bannon cannot be read as ruling upon the antitrust legality of every rule in the 400-plus-page NCAA Division I Manual—or of future restraints—that were never litigated in O’Bannon. Rather, as this Court stated, “[t]o the extent other criticisms have been leveled against the NCAA and college policies and practices, those are not raised and cannot be remedied based on the antitrust causes of action in this lawsuit.” O’Bannon, 2014 WL 3899815, at *37.

Nor can there be any doubt that the restraints adjudicated in O’Bannon related only to NIL compensation. NCAA Trial Br. at 1-2 (supra); In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967-CW, 2014 WL 1410451, at *1 (N.D. Cal. Apr. 11, 2014); O’Bannon, 2014 WL 3899815, at *18 (describing plaintiffs as challenging “the set of rules that preclude FBS football players and Division I men’s basketball players from receiving any compensation, beyond the value of their athletic scholarships, for the use of their names, images, and likenesses in videogames, live game telecasts, re-broadcasts, and archival game footage.”) (emphasis added). The Court enjoined only “the specific violations found in th[at] case” and, accordingly, limited its injunction to preventing “the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conference from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid.” O’Bannon, 2014 WL 3899815, at *36.

Unlike the NIL claims in O’Bannon, the Jenkins Plaintiffs challenge restraints imposed by Defendants only insofar as they prohibit any compensation to student-athletes, beyond the price-fixed grant-in-aid, for their athletic services. Jenkins Compl. ¶ 42. For example, the Jenkins Plaintiffs challenge Bylaw 15.1, which expressly limits remuneration provided to athletes for their athletic services to the value of a full grant-in-aid. O’Bannon did not adjudicate or evaluate the legality of Bylaw 15.1 et al., nor, for that matter, did O’Bannon adjudicate or evaluate any other NCAA restraint outside of the narrow context of compensation for NIL rights.

To be sure, the Court’s trial and other rulings in O’Bannon address several issues relevant to the adjudication of Jenkins.
Defendants make much of the Court’s finding in *O’Bannon* that plaintiffs there plausibly pleaded and then proved relevant markets in which schools—absent Defendants’ restraints—would engage in price competition “for the best recruits’ athletic services and licensing rights.” Motion at 8 (quoting *O’Bannon*, 2014 WL 3899815, at *23). But the Court’s conclusion that restraints litigated in *O’Bannon* restrain competition in markets substantially similar to, or even the same as, the relevant markets pleaded in *O’Bannon* does not foreclose eventual injunctive relief against restraints inflicting different anticompetitive harm in such markets, having nothing to do with NIL compensation.

C. THERE IS NO BASIS TO CONCLUDE THAT THE CHALLENGED RESTRAINTS ARE PROCOMPETITIVE AS A MATTER OF LAW.

Section II of Defendants’ Motion, advocating that all of their eligibility rules are “presumptively procompetitive,” is presented as though the Court’s rulings in *O’Bannon* were never issued. The restraints on NIL compensation challenged in *O’Bannon*—which also concerned student-athlete eligibility and the “NCAA’s commitment to amateurism”—were not held presumptively lawful. They were held illegal. And the question of whether the NCAA’s eligibility requirements were pro- or anticompetitive was held to be a factual contention requiring proof at trial—not a legal presumption susceptible to determination on a motion to dismiss or even on summary judgment. *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 1005; *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 WL 1410451, at *13.

That said, Defendants’ recycled arguments that the “NCAA’s commitment to amateurism” and the Supreme Court’s dicta in *Board of Regents* provide antitrust immunity for all of their rules have been repeatedly and conclusively rejected by this Court. *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 1003; *O’Bannon*, 2014 WL 3899815, at *29. Defendants’ reliance on *Law v. NCAA* and *McCormack v. NCAA* fails for the same reason—these cases merely recite *Board of Regents* dicta that this Court has held “does not preclude Plaintiffs’ claims.” *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 1003.

Further, Defendants’ attempt to cast themselves as parties to a “joint venture”—just as the NCAA unsuccessfully argued in *Board of Regents*—provides protection for all of their rules have been repeatedly and conclusively rejected by this Court. *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 1003; *O’Bannon*, 2014 WL 3899815, at *29. Defendants’ reliance on *Law v. NCAA* and *McCormack v. NCAA* fails for the same reason—these cases merely recite *Board of Regents* dicta that this Court has held “does not preclude Plaintiffs’ claims.” *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 1003.

Defendants are even less like the joint venture in *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006), where the Supreme Court merely declined to invalidate the joint venture’s pricing scheme as per se unlawful. In *Dagher*, the joint venture members were economically integrated and participated in the relevant market solely through the joint venture and pooled their capital and shared all profits and losses. And, even so, *Dagher* did not hold that that individual members of such a joint venture were a single entity immune from *Section 1* scrutiny. *Id.* at 196-97. This ruling applies a fortiori to the far less economically integrated NCAA and Power Conference Defendants.

By contrast, Defendants compete in the Division I men’s basketball and football businesses in every way—both economically and on the playing field. Their joint conduct relevant here is Defendants’ collusion to fix the compensation each may offer student-athletes for their athletic services. Cf. *Am. Needle*, 560 U.S. at 198 (“[I]llegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties.”) Whatever shared interests there may be among the schools for some purposes, they remain “separate, profit-maximizing entities” whose agreements in restraint of trade are subject to *Section 1* review. *Bd. of Regents*, 468 U.S. at 104-13 (subjecting NCAA restraints to *Section 1* scrutiny); *Am. Needle*, 560 U.S. at 199 (“The mere fact that the teams operate jointly in some sense does not mean that they are immune.”).
The remaining cases Defendants cite dealt with very different restraints than those challenged here. And, despite Defendants’ assertion that White v. NCAA is “irrelevant to the instant motion,” it is the only case they cite that challenged NCAA rules capping athletic scholarships. Case No. 06-999, Docket. No. 72, slip op. at 3 (C.D. Cal. Sept. 20, 2006). In White, the court denied the NCAA’s motion to dismiss an antitrust suit challenging “a horizontal agreement to adhere to a grant-in-aid ... cap [in schools’] financial aid awards to student athletes.” Id. at 1.

Defendants also cite Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998), Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008), and Bowers v. NCAA, 9 F. Supp. 2d 460 (D.N.J. 1998) to support the assertion that NCAA eligibility and recruiting rules prohibiting compensation for student-athletes are “noncommercial.” But this assertion—which is ludicrous as applied to the multi-billion-dollar businesses of Division I men’s basketball and football—has already been rejected by this Court. O’Bannon, 2014 WL 3899815, at *21 (“This argument mischaracterizes the commercial nature of the transactions between FBS football and Division I basketball schools and their recruits.”); see also Agnew, 683 F.3d at 340 (Seventh Circuit holding that “[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program. Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions.”); Rock v. NCAA, 928 F. Supp. 2d 1010, 1025-26 (S.D. Ind. 2013).

IV. CONCLUSION

The Jenkins Plaintiffs respectfully request that Defendants’ Motion be denied.

Dated: September 18, 2014

Respectfully submitted,

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Footnotes


2  In filing this Opposition, co-lead counsel for Jenkins and the Consolidated Actions coordinated so that their respective opposition briefs would not collectively exceed twenty-five pages.

3  Def. NCAA’s Trial Br. at 1-2, Docket No. 184 (“NCAA Trial Brief”), O’Bannon (internal citations omitted).

4  Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) (“There is no question that all NCAA member schools have agreed to abide by the Bylaws; the first [Section 1] showing of an agreement or contract is therefore not at issue in this case.”)

5  For example, the Jenkins Complaint pleads facts to plausibly establish relevant markets (¶¶ 54-68) in the event the rule of reason governs.

6  Remarkably, Defendants never even address the fact that the Jenkins Plaintiffs also have asserted claims for individual (i.e., non-class) damages.

7  Defendants’ reliance on In re Century Aluminum Co. Securities Litig., 729 F.3d 1104 (9th Cir. 2013), is misplaced. Century has nothing to do with the availability of specific relief based on earlier decided cases, but instead stands for the unremarkable proposition that a plaintiff bears the burden of alleging facts to state a claim. The specific question in Century was whether plaintiffs had plausibly alleged that they could trace their aftermarket stock back to its secondary offering, as required to state their claim under the Securities Act of 1933. Id. at 1107. The court explained that because “experience and common sense [as well as previous cases] tell us” that such tracing is often impossible, plaintiffs bore the burden of alleging facts to demonstrate that their situation was different. Id. at 1107-08.

8  Plaintiffs do not oppose Defendants’ motion for judicial notice of the NCAA Division I Manual.

9  By way of further example, in finding that a consumer survey utilized by the NCAA in O’Bannon was irrelevant to the restraints being challenged in that case, the Court observed that the NCAA’s expert had focused broadly on whether student-athletes should be paid but “did not ask respondents for their opinions about providing student-athletes with a share of licensing revenue generated from the use of their own names, images, and likenesses.” O’Bannon, 2014 WL 3899815, at *11.

10  For this reason, Defendants are flat wrong in arguing that the injunctive relief sought in Jenkins would be “contrary to the injunction this Court entered in O’Bannon,” permitting the NCAA to set rules limiting NIL payments not less than $5,000 per student per year. See Motion at 5. The Jenkins Plaintiffs are not challenging NIL-based compensation rules—they are challenging restraints on compensation for their athletic services.

11  In finding the NCAA guilty of violating the antitrust laws, the Court held: “Specifically, the association’s rules prohibiting student-athletes from receiving any compensation for the use of their names, images, and likenesses restrains price competition among FBS football and Division I basketball schools as suppliers of the unique combination of educational and athletic opportunities that elite football and basketball recruits seek. Alternatively, the rules restrain trade in the market where these schools compete to acquire recruits’ athletic services and licensing rights.” O’Bannon, 2014 WL 3899815, at *36.

12  This Court observed in O’Bannon that the hallmark of Defendants’ purported “commitment to amateurism” has not been adherence to core principles but “how malleable the NCAA’s definition of amateurism has been since its founding.” O’Bannon, 2014 WL 3899815, at *30.

13  Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998); McCormack v. NCAA, 845 F.3d 1338, 1343- 1344 (5th Cir. 1988).

14  See Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992) and Gaines v. NCAA, 746 F. Supp 738 (M.D. Tenn. 1990) (both challenging NCAA rules regarding draft entry and use of agents); Marucci Sports, LLC v. NCAA, 751 F.3d 368 (5th Cir. 2014) (challenging NCAA regulations governing use of non- wood bats in baseball games); Justice v. NCAA, 577 F. Supp. 366 (D. Ariz. 1983)
(challenging NCAA-imposed sanctions on the University of Arizona football team); In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash 2005) (challenging NCAA limits on the number of football scholarships per team).

15 Motion at 13 n.13.
2014 WL 8771892 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California.
Oakland Division

In re NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST
LITIGATION.
This Document Relates to: All Actions.
Martin Jenkins, et al., Plaintiffs,
v.
National Collegiate Athletic Association, et al., Defendants.
Nos. 14-md-02541-CW, 14-cv-02758-CW.
September 25, 2014.

Reply Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss the Complaints

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Hon. Claudia Wilken.

Date: October 9, 2014

Time: 2:00 p.m.

Courtroom: Courtroom 2, 4th Floor

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**PRELIMINARY STATEMENT**

This Court’s decision in *O’Bannon v. NCAA*, No. C 09-3329 CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014), leaves no room for doubt that the National Collegiate Athletic Association (“NCAA”), the Conference defendants and their respective members lawfully may agree to appropriate limits on the payments that may be made to student-athletes. For that reason alone, plaintiffs’ theory of antitrust liability--that the antitrust laws categorically forbid any agreement among the NCAA and its members imposing any limits on the compensation student-athletes may receive for their participation in amateur intercollegiate athletics--is not plausible. Their complaints should therefore be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Plaintiffs’ oppositions never offer an adequate explanation for how the basic premise of their claims can be reconciled with the decision in *O’Bannon*. Instead, plaintiffs contend that defendants’ motion to dismiss is premised on the availability or scope of the particular remedies plaintiffs seek. But the remedies sought by plaintiffs are irrelevant to the issue of whether they have stated a plausible antitrust claim. Because they have not, plaintiffs are entitled to no relief whatsoever.

Plaintiffs attempt to construe the *O’Bannon* decision too narrowly, and mischaracterize the claims in their complaints as
factually and legally distinct from the issues decided in that case. The Jenkins plaintiffs even suggest that the primary NCAA bylaw they seek to invalidate was not at issue in O’Bannon despite the fact that the Court expressly addressed it in its written decision. But, plaintiffs cannot escape dismissal of their claims on the purported ground that the antitrust analysis of O’Bannon applies only to compensation of student-athletes for the use of their names, images or likenesses. While the plaintiffs’ claim in O’Bannon certainly involved the issue of compensation for the use of student-athletes’ names, images and likenesses, the decision in O’Bannon encompasses the restraint, the relevant market and the alleged anticompetitive effects asserted here--i.e., the allegation that NCAA Bylaw 15.1 unreasonably and illegally restricts the payments that student-athletes can receive in a market for their “athletic services.”

consistent with prior federal court decisions endorsing NCAA limitations on payments to student-athletes, clearly rejected the premise on which the current complaints are founded--that any NCAA limit on payments to student-athletes constitutes an antitrust violation. Hence, plaintiffs’ federal antitrust claims, as well as the consolidated plaintiffs’ California Unfair Competition Act claim which relies upon the same implausible theory, should be dismissed. The Unfair Competition Act claim also should be dismissed for the independent reason that plaintiffs are not eligible as a matter of law for injunctive or restitutionary relief, the only forms of relief authorized under that statute.

ARGUMENT

I. DEFENDANTS’ MOTION CHALLENGES THE PLAUSIBILITY OF THE THEORY OF PLAINTIFFS’ ANTITRUST CLAIMS, NOT THE AVAILABILITY OF THE RELIEF THEY SEEK

Defendants do not assert that plaintiffs’ antitrust claims should be dismissed on the basis of the remedies that plaintiffs seek. Rather, as defendants made clear in their opening brief, defendants move to dismiss the complaints under Rule 12(b)(6) because, in light of this Court’s rejection in O’Bannon of the notion that the NCAA and its member schools cannot impose any limit on the amount of compensation that can be paid to student-athletes while they are in school, plaintiffs’ theory of antitrust liability is not plausible.1

A. Plaintiffs’ Claims are Implausible Based on this Court’s Decision in O’Bannon

Plaintiffs cannot and do not dispute that, to state a claim upon which relief can be granted, a plaintiffs’ claim must be plausible on its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Nor do plaintiffs dispute that a complaint that fails to state a cognizable legal theory under existing precedents cannot survive a motion to dismiss. Iqbal, 556 U.S. at 679; see also In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104, 1107 (9th Cir. 2013). Instead, defendants simply choose not to address the primary argument set forth in defendants’ motion to dismiss—that plaintiffs’ claims are implausible, and must be dismissed, because they do not state a cognizable legal theory.

Plaintiffs’ complaints allege that Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits the NCAA’s member institutions from agreeing to limit compensation provided to student-athletes for their athletic services. (CAC Br. at 3 (citing CAC ¶ 7 (“The NCAA and Conference Defendants have agreed to unlawfully cap the value of a grant-in-aid at an amount substantially below what a football or basketball player would receive for his or her services in a competitive market, and at an amount below what it costs to attend school. This agreement violates the Sherman Act.”)); Jenkins Br. at 1-2 (citing JC ¶ 7 (“These agreements to price-fix players’ compensation, and to boycott any institutions or players who refuse to comply with the price fixing agreement, are per se illegal acts under Section 1 of the Sherman Act, 15 U.S.C. § 1. They also constitute an unreasonable restraint of trade under the rule of reason.”))). To state a Section 1 claim that can survive a motion to dismiss, plaintiffs must substantiate the proposition that any agreement among the NCAA and its member institutions to limit payments to student-athletes for their athletic services “unreasonably restrain[s] trade.” Tanaka v. University of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001). This plaintiffs simply cannot do.
In *O'Bannon*, this Court held that the legitimate procompetitive goals of maximizing consumer demand for the NCAA’s amateur sports product and integrating student-athletes into their academic communities are furthered by appropriate agreed-upon limits on student-athlete compensation. Although the Court found that the challenged rules were overly restrictive, it then “en-ter [ed] an injunction to remove any unreasonable elements from the restraint,” while preserving the NCAA’s lawful discretion to impose appropriate limits on the financial payments that student-athletes may receive. *O'Bannon*, 2014 WL 3899815, at *36. In explaining the contours of its decision, the Court expressly held that its ruling did “not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance.” *Id.*

The *O'Bannon* decision thus necessarily holds that the NCAA and its members may adopt and enforce some rules limiting student-athlete compensation without unreasonably restraining trade. Plaintiffs’ complaints, however, rest on the legal theory that the NCAA and its members may not agree to *any* limits on compensation to student-athletes for their athletic services. Because plaintiffs’ theory of antitrust liability directly conflicts with this Court’s holding in *O'Bannon*, plaintiffs have failed to state a plausible Section 1 claim.

Under plaintiffs’ theory of liability, if defendants complied with this Court’s injunction in *O'Bannon* and adopted the very limitations on student-athlete compensation endorsed there, defendants nonetheless would unreasonably restrain trade in violation of Section 1. That is an implausible result. Moreover, plaintiffs have not in any way explained how a restraint from which this Court expressly “remove[d] any unreasonable elements” can still be an unreasonable restraint of trade. *Id.* Instead, they assert that defendants are arguing that the *O'Bannon* injunction affords them blanket antitrust immunity for *any* NCAA restraint that does not conflict with the injunction’s terms, or that all rules not enjoined in *O'Bannon* are *per se* procompetitive and lawful. (Jenkins Br. at 4-5 (“*O'Bannon* cannot be read as ruling upon the antitrust legality of every rule in the 400-plus-page NCAA Division I Manual-- or of future restraints--that were never litigated in *O'Bannon*.”).) Defendants have made no such arguments. Defendants’ arguments are limited to the implausibility of plaintiffs’ allegation that no NCAA restriction on student-athlete payments is permissible under the Sherman Act given this Court’s contrary conclusion in *O'Bannon*.

Finally, with respect to the putative class of women’s Division I basketball players, it is irrelevant that those plaintiffs were not parties in the *O'Bannon* litigation. Defendants’ arguments regarding the plausibility of plaintiffs’ claims apply equally to all plaintiffs, whether or not they are members of the *O'Bannon* class, and therefore the claims of all plaintiffs, including the women’s basketball players, should be dismissed.

### B. Defendants’ Motion to Dismiss is Not Based on the Remedies Sought by Plaintiffs

Plaintiffs claim that defendants are improperly contesting the availability and scope of the remedies that plaintiffs may obtain in the event that the Court finds their claims meritorious. (CAC Br. at 2, 5-6; Jenkins Br. at 1, 3-4.) But defendants are arguing no such thing. Rather, defendants assert that where—as here—a plaintiff’s complaint rests on an implausible theory of liability, the plaintiff is not entitled to *any* relief, whether an injunction or damages on an individual or class-wide basis.

Consolidated plaintiffs claim that defendants mischaracterize their request for relief by ignoring that they seek a “less-restrictive alternative [that would] allow the Conference Defendants to compete among themselves . . . as to the financial aid terms that conference members will make available to college players.” (CAC Br. at 8 (quoting CAC ¶ 10).) Even if the particular form of requested relief mattered on a motion to dismiss for failure to state a legally cognizable antitrust claim—and as plaintiffs themselves assert, it does not—this Court in *O'Bannon* already held that the NCAA and all Division I member schools do not violate the antitrust laws by adopting and enforcing rules imposing appropriate limits on student-athlete compensation. Thus, plaintiffs’ claims are implausible on their face and the Court need not reach the question of whether available remedies or less-restrictive alternatives.

Nor is it relevant that the consolidated plaintiffs claim to limit their request for class-wide damages to the difference between the grants-in-aid awarded and cost of attendance for each putative class member. (CAC Br. at 7-8.) Consolidated plaintiffs’
theory of liability, as alleged, is not that defendants have violated the antitrust laws by adopting and enforcing financial aid rules that result in student-athletes receiving financial aid packages that fall short of their full cost of attendance. Instead, like the Jenkins plaintiffs, consolidated plaintiffs seek “a truly competitive market” (CAC ¶¶ 221, 502), and the invalidation of any and all NCAA limits on student-athlete compensation, including those expressly approved by this Court’s O’Bannon decision.

II. THESE ACTIONS INVOLVE THE SAME ALLEGED RESTRAINT AS O’BANNON

Plaintiffs contend that these actions challenge a different restraint from that at issue in O’Bannon because, in their view, O’Bannon was limited to the narrow issue of name, image and likeness. (CAC Br. at 6; Jenkins Br. at 5-6.) Defendants do not believe the Court intended the O’Bannon decision to be so limited. As this Court explained, the decision in O’Bannon resolved “whether the NCAA violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men’s basketball and FBS football players any more than the current association rules allow.” 2014 WL 3899815, at *37.

A comparison of the restraint as described in the operative complaints with this Court’s decision in O’Bannon demonstrates that the restraint challenged in the instant cases and O’Bannon is the same. For example, the CAC describes the challenged restraint as the NCAA and Conference defendants’ agreement “that no college will pay an athlete any amount for his or her work that exceeds the value of a grant-in-aid.” (CAC ¶ 1.) Similarly, plaintiffs in Jenkins describe the challenged restraint as “an artificial and unlawful ceiling on the remuneration that players may receive for their services . . . defined by the NCAA as a ‘full grant-in-aid.’ ” (JC ¶ 6.) This Court’s description of the restraint at issue in O’Bannon is substantively indistinguishable: “[T]he restraint is the agreement among schools not to offer any recruit more than the value of a full grant-in-aid.” 2014 WL 3899815, at *23.

In fact, these coordinated and consolidated actions challenge the very same bylaw identified as the basis for the restraint in O’Bannon. Both complaints in this action specifically challenge NCAA Bylaw 15.1, which states:

A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2. A student-athlete may receive institutional financial aid based on athletics ability (per Bylaw 15.02.4.1) and educational expenses awarded per Bylaw 15.2.6.4 up to the value of a full grant-in-aid, plus any other financial aid up to the cost of attendance. (See Bylaws 15.01.6.1, 16.3, 16.4 and 16.12.)

(CAC ¶ 297; JC ¶ 42.) And contrary to plaintiffs’ assertion that “O’Bannon did not adjudicate or evaluate the legality of Bylaw 15.1” (Jenkins Br. at 6), this Court expressly cited to and quoted Bylaw 15.1 in describing the “challenged restraint” in O’Bannon. See 2014 WL 3899815, at *7-8 (“[The NCAA] prohibits any student-athlete from receiving ‘financial aid based on athletics ability’ that exceeds the value of a full ‘grant-in-aid.’ . . . [T]he NCAA also imposes a separate cap on the total amount of financial aid that a student-athlete may receive. Specifically, it prohibits any student-athlete from receiving financial aid in excess of his ‘cost of attendance.’ ”). The Court went on to hold that its “injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance.” Id. at *36. Such a ruling necessarily encompasses plaintiffs’ challenge to NCAA Bylaw 15.1 here.

The anticompetitive effects alleged in these actions also are addressed in the O’Bannon decision. Specifically, the CAC alleges that absent the grant-in-aid cap, “the Conference Defendants’ member schools and those of their co-conspirator conferences would compete vigorously to attract talent using increased financial aid and other direct forms of compensation.” (CAC ¶ 220.) Likewise, Jenkins alleges that “Defendants’ member institutions would, absent the restrictions at issue in this action, compete with each other for the services of athletes” and thus plaintiffs “would have received and would receive greater remuneration for [their] services.” (JC ¶¶ 36, 114.) Those allegations are indistinguishable from this Court’s conclusion regarding the anticompetitive effects in O’Bannon: “In the absence of this restraint, schools would compete
against one another by offering to pay more for the best recruits’ athletic services and licensing rights—that is, they would engage in price competition.” 2014 WL 3899815, at *23. As this Court further explained, “[i]f the grant-in-aid limit were higher, schools would compete for the best recruits by offering them larger grants-in-aid. Similarly, if total financial aid was not capped at the cost of attendance, schools would compete for the best recruits by offering them compensation exceeding the cost of attendance.” Id. at *8 (relying on testimony of plaintiffs’ expert).

These actions do not, as consolidated plaintiffs contend, “frame[] different antitrust markets” than those involved in O’Bannon. (CAC Br. at 3.) Both the CAC and Jenkins complaint describe the relevant markets as those for student-athlete “player services.” (CAC ¶ 1; JC ¶ 54.) This Court in O’Bannon similarly described the relevant market under plaintiffs’ alternative monopsony theory as the “market for recruits’ athletic services.” 2014 WL 3899815, at *23. Indeed, the Jenkins plaintiffs concede that the present cases involve “markets substantially similar to, or even the same as, the relevant markets pleaded in O’Bannon.” (Jenkins Br. at 7.)

Consolidated plaintiffs also acknowledge the overlap between the procompetitive justifications evaluated in O’Bannon and those likely to be at issue here. (CAC Br. at 4; see also CAC ¶¶ 477-90.) Yet, plaintiffs ignore this Court’s conclusion that the NCAA’s legitimate procompetitive goals of maximizing consumer demand for intercollegiate amateur sports and integrating student-athletes into their academic communities justify certain limits on compensation to student-athletes. O’Bannon, 2014 WL 3899815, at *12, 15, 29-34.

Just as the Ninth Circuit in Century Aluminum affirmed dismissal for failure to state a plausible claim when plaintiffs did not allege facts showing “that their situation [was] different” from earlier precedent, plaintiffs here have not alleged facts showing that their challenge is substantively different than O’Bannon. Century Aluminum, 729 F.3d at 1107-08. In light of this Court’s conclusion in O’Bannon that certain legitimate, procompetitive goals permit the NCAA and its members lawfully to adopt and enforce rules imposing appropriate limits on student-athlete compensation, plaintiffs’ claim that any and all such rules constitute a violation of the Sherman Act is not plausible on its face, and thus plaintiffs’ claims should be dismissed.

III. PLAINTIFFS MISCHARACTERIZE DEFENDANTS’ JOINT VENTURE AND RULE OF REASON ARGUMENTS

In addition to establishing that this Court’s decision in O’Bannon definitively rejected plaintiffs’ fundamental legal theory, defendants’ motion to dismiss further explains that foundational antitrust principles permit the NCAA to adopt and enforce eligibility rules—including the rules at issue in this case—because those rules allow the NCAA as a joint venture to define and maintain its product: intercollegiate amateur athletics. (NCAA Br. at 9-10, 14 (citing Texaco, Inc. v. Dagher, 547 U.S. 1 (2006), and American Needle, Inc. v. National Football League, 560 U.S. 183 (2010))). In stating as much, defendants are not seeking blanket antitrust immunity under principles of joint venture law. Nor are defendants contending that plaintiffs’ actions should be dismissed on the basis that the NCAA and its members are a single economic entity that by definition cannot violate Section 1 of the Sherman Act. (CAC Br. at 8-9; Jenkins Br. at 8.)

Defendants’ moving brief simply demonstrates that O’Bannon’s conclusion that the NCAA and its members may lawfully adopt and enforce appropriate limits on payments to student-athletes is consistent with extensive and uniform Supreme Court and federal court precedent. See O’Bannon, 2014 WL 3899815, at *30-31 (relying on the Supreme Court’s decision in NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984), in holding that “some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball,” and thus would not violate the antitrust laws). Under this precedent, this Court need not conduct a full rule of reason analysis to determine that the NCAA may adopt appropriate limits on payments to student-athletes. Rather, those limits should be found lawful “in the twinkling of an eye.” See American Needle, Inc., 560 U.S. at 203 (quoting Bd. of Regents, 468 U.S. at 109 n.39); Agnew v. NCAA, 683 F.3d 328, 343 n.7, 347 n.8 (7th Cir. 2012). These cases further demonstrate the implausibility of plaintiffs’ theory of antitrust liability, and support dismissal of their claims. 7
IV. CONSOLIDATED PLAINTIFFS’ UNFAIR COMPETITION ACT CAUSE OF ACTION FAILS TO STATE A CLAIM AND SHOULD BE DISMISSED

A. Consolidated Plaintiffs Have Failed to Plead Legally Unlawful or Unfair Conduct

Consolidated plaintiffs fail to plead any predicate acts legally capable of constituting unlawful or unfair conduct under the Unfair Competition Act, Cal. Bus. & Prof. Code § 17200, et seq. ("UCL"). The primary basis for plaintiffs’ claim is that the NCAA’s and Pac-12’s conduct violates the antitrust laws. (CAC Br. at 14-15.) Where, as here, plaintiffs’ alleged predicate is a failed statutory claim that does not qualify as “unlawful” conduct, they may not manufacture a UCL claim simply by calling the underlying conduct “unfair.” See Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375 (2001); DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1146-47 (N.D. Cal. 2010). Because the antitrust claims should be dismissed for the reasons explained above, the UCL claim should be dismissed as well. LiveUniverse, Inc. v. MySpace, Inc., 304 F. App’x 554, 557-58 (9th Cir. 2008).

The only conduct plaintiffs allege that differs from their antitrust claims is based on California’s Student Athlete Bill of Rights. Plaintiffs claim that the NCAA and Pac-12 violated the “policy and spirit” of that law, alleging that it requires universities to provide student-athletes with the “financial resources to meet their budgetary needs,” and thus, by implication, requires them to provide the full cost of attendance. (CAC Br. at 15.) Plaintiffs’ selective citation to a few words in a single section of the Student Athlete Bill of Rights does not support their argument, as that section relates solely to the provision of financial and budgeting information to student-athletes, and in no way plausibly requires--in policy or spirit--any payments to student-athletes. Plaintiffs have failed to allege any unlawful or unfair conduct, and thus their UCL claim should be dismissed.

B. Consolidated Plaintiffs Are Not Entitled to Any Relief Authorized by the UCL

Independent of the fate of their antitrust claims, consolidated plaintiffs’ UCL cause of action also fails to state a claim because they have not alleged and cannot allege any basis for entitlement to relief available under the UCL. Unlike their antitrust claims, plaintiffs do not contest that courts may, and routinely do, dismiss UCL claims on this basis at the motion to dismiss stage. See, e.g., Ice Cream Distribs. of Evansville, LLC v. Dreyer’s Grand Ice Cream, Inc., No. 09-5815 CW, 2010 WL 3619884, at *9 (N.D. Cal. Sept. 10, 2010) (Wilken, J.), aff’d, 487 F. App’x 362 (9th Cir. 2012); Berman v. Knife River Corp., No. C 11-3698 PSG, 2012 WL 646068, at *7 (N.D. Cal. Feb. 28, 2012). Only injunctive and restitutionary relief are authorized under the UCL, and plaintiffs are entitled to neither. (See NCAA Br. at 16-17.) The injunction entered by this Court in O’Bannon already provides plaintiffs with all the relief that the Court deemed warranted in connection with the restraints alleged in this case, and specifically addresses cost of attendance, which consolidated plaintiffs now claim is the aim of the injunctive relief they seek with respect to their UCL claim. (CAC Br. at 16.) Plaintiffs are not entitled to a second injunction prohibiting the same conduct. See Feitelberg v. Credit Suisse First Boston, LLC, 134 Cal. App. 4th 997, 1022 (2005); Madrid v. Perot Sys. Corp., 130 Cal. App. 4th 440, 465-66 (2005).

Consolidated plaintiffs also have no basis for restitution because they have not paid any sums to defendants and have not been denied any payments to which they were contractually entitled. Plaintiffs’ argument is not supported by the cases they cite. The damages they seek are not “earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code” (Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 178 (2000)), benefits owed pursuant to a contract (Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 733-34 (9th Cir. 2007)), “concrete, quantifiable” payments for endorsement of commercial products (Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 812 (N.D. Cal. 2011)), or profits unlawfully obtained through false advertisements (POM Wonderful LLC v. Coca Cola Co., No. CV 08-06237, 2009 WL 6254619, at *2-3 (C.D. Cal. Sept. 15, 2009)). Rather, plaintiffs seek damages to which they are not entitled under any provision of statute, contract, or any other appropriate measure of restitution, and thus do not have the “vested interest in the money [they] seek to recover,” required for restitution. Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149-50 (2003). Accordingly, consolidated plaintiffs’ UCL claim should be dismissed.
CONCLUSION

The Supreme Court in Twombly directed lower courts that deficiencies in plaintiffs’ claims “should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court,” particularly in antitrust cases, which tend to be time-consuming and costly. 550 U.S. at 558. That directive fully applies here, where plaintiffs cannot allege a plausible theory of liability under existing precedents. Accordingly, defendants’ motion to dismiss the complaints in these coordinated actions should be GRANTED with prejudice and without leave to amend.

DATED: September 25, 2014

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Footnotes

1 The CAC, the Jenkins complaint and the O’Bannon decision repeatedly use the word “compensation” to describe the financial aid and support that NCAA schools provide to student-athletes. Defendants used that shorthand in their moving brief and herein, but do not agree that it is an accurate characterization.


3 To the extent consolidated plaintiffs are now seeking to reformulate their theory of liability so that their antitrust claim is limited only to the assertion that it is illegal to set a cap below the cost of attendance (but legal to set a cap at or above the cost of attendance), that new theory of liability should be ignored because plaintiffs cannot amend their theory of liability through their opposition to defendants’ motion to dismiss. Parker v. Nishiyama, 438 F. App’x 642, 643 (9th Cir. 2011) (“In determining the
propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s motion to dismiss.” (quoting Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003)); Toro v. Napolitano, No. 12-CV-2804, 2013 WL 4102158, at *3 (S.D. Cal. Aug. 13, 2013) (dismissing claim with prejudice because “Plaintiff’s statements in his opposition brief cannot amend the Complaint” (quoting Fabbrini v. City of Dunsmuir, 544 F. Supp. 2d 1044, 1050 (E.D. Cal. 2008))).

4 See, e.g., CAC ¶ 8 (“In the highly competitive marketplace of Division I FBS football and basketball, every player unquestionably would receive a grant-in-aid that actually covers the Cost of Attendance. . . . Moreover, if collusion among conferences were eliminated, every player likely would receive further additional compensation above the Cost of Attendance.” (emphasis in original)); id. ¶ 15 (“The artificial cap on grants-in-aid is set well below what schools would choose to offer to athletes in the absence of collusion. And it is clear that among members of the Conference Defendants, non-collusive scholarship offers would rise to at least cover the full Cost of Attendance, and likely much more. The NCAA thus arbitrarily restricts athletics financial aid to amounts that are less than the athletes would receive in a competitive market.”) (emphasis added)); id. ¶ 316 (“If a given conference felt that payment in excess of this new Cost of Attendance level were in its best financial interest, it could make such an offer. On the other hand, if a conference felt that such payments would be detrimental to overall demand, then even absent a national collusive cap, that conference need not offer more, and would live with the quality of team it could attract with a Cost of Attendance offer.”); see also infra p. 8 and note 6.

5 The Jenkins plaintiffs challenge at least 19 NCAA bylaws relating to limitations on financial aid, benefits and recruiting visits, “including but not limited to NCAA Bylaws 12.01.4, 12.1.2, 12.1.2.1, 13.2.1.1, 13.5.1, 13.5.2, 13.6.2, 13.6.4, 13.6.7.1, 13.6.7.4, 13.6.7.5, 13.6.7.7, 15.02.2, 15.02.5, 15.1, 16.02.3, 16.1.4, and 16.11.2 (individually, and as interpreted and applied in conjunction with each other).” (JC ¶ 42.) The Jenkins plaintiffs also quote in their entirety NCAA Bylaws 12.1.2 and 16.02.3 that prohibit “any payment to athletes on the basis of the athletic services that they provide” and “benefits on the basis of athletic ability.” (JC ¶¶ 44, 46.)

6 See also CAC ¶ 221 (“The demand for college athletics is such that, absent the unlawful athletics grant-in-aid cap, the colleges and universities in the Football Bowl Subdivision Labor Market would have competed against one another by offering higher amounts of athletics-based financial aid to college athletes, up to and likely past the true Cost of Attendance. Grants-in-aid are therefore artificially ‘capped’ by the common scheme imposed by the NCAA at amounts lower than the amounts that would prevail in a truly competitive market.”); id. ¶ 308 (“Without the grant-in-aid cap, the colleges and universities that sponsor college football and basketball and compete in the relevant markets would provide athletic scholarships in an amount in line with the college athlete’s value in a competitive market. The same competitive forces that drive schools to provide coaches with million-dollar salaries and build lavish athletic facilities would also compel those schools to provide athletics-based grants-in-aid at a truly competitive level. . . . At least some student-athletes would likely gravitate toward schools that would ‘pay’ them the most amount of money.”).

7 Defendants have not, as plaintiffs contend, moved to dismiss these actions on the independent ground that the challenged rules are non-commercial. (CAC Br. at 11; Jenkins Br. at 9.) Instead, Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998), vacated on other grounds, 525 U.S. 459 (1999), and Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008), simply add to the federal precedent refusing—on one ground or another—to question the procompetitive nature of the NCAA’s eligibility rules.

8 California Education Code Section 67452(b) provides that “[e]ach athletic program shall conduct a financial and life skills workshop” and mandates that, among other things, “[t]his workshop shall include, but not be limited to, information concerning financial aid, debt management, and a recommended budget for full- and partial-scholarship student athletes living on or off campus during the academic year and the summer term based on the current academic year’s cost of attendance.”