UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Taylor Anders, et al., Plaintiffs, v. California State University, Fresno, et al., Defendants.	No. 1:21-cv-00179 KJM BAM ORDER

Plaintiffs bring a putative class action lawsuit against defendants, including Fresno State, alleging Fresno State violated Title IX by not effectively accommodating female varsity athletes and by not giving them equal treatment. They seek an injunction that requires Fresno State to abide by Title IX. Two motions are pending before the court. Fresno State moves to dismiss on grounds of mootness, while plaintiffs renew their motion for class certification. As described more fully below, the court **denies** Fresno State's motion to dismiss and **grants** plaintiffs' motion for class certification.

I. BACKGROUND

Fresno State decided to eliminate men's wrestling, men's tennis, and women's lacrosse at the end of the 2020–2021 academic year. Mem. of Law in Supp. of Pls.' Mot Prelim. Inj. at 6, ECF No. 2-1. On December 2, 2020, Taylor Anders, a female lacrosse player, signed a representation agreement with Bailey & Glasser, LLP, to represent her in a potential lawsuit

against Fresno State under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1689 (Title IX). Defs.' Unopposed Mot. for Leave to Supp. Sur-Reply in Opp'n to Pls.' Mot for Cert. of Lacrosse-Only Classes Ex. 1 (Bailey & Glasser Agreement), ECF No. 133-1. The agreement allowed third parties to advance costs and expenses but did not allow third parties control over the litigation. *See id.*

On February 21, 2021, members of Fresno State's women's lacrosse team, including Anders, filed the original complaint in this action against Fresno State alleging violations of Title IX. Compl., ECF No. 1. Arthur Bryant of Bailey & Glasser and Michael Caddell and Cynthia Chapman of Caddell & Chapman filed the complaint on plaintiffs' behalf. *See id.* These three lawyers also appear as signatories on other filings in this action.

The complaint alleged Fresno State failed to provide female students effective accommodation by not allowing them an opportunity to equally participate in varsity athletics, failing to provide female athletes with an equal allocation of financial aid and failing to provide female athletes with the same benefits given to male athletes. *See generally* Compl. Plaintiffs also moved for a preliminary injunction, asking the district court to stay the elimination of the women's lacrosse team and treat the women's lacrosse team equally with other teams for the academic year 2020–2021. *See generally* Mem. of Law in Supp. of Pls.' Mot. Prelim. Inj. The judge previously assigned to the case granted that motion in part and denied it in part. *See* Order (Apr. 21, 2021), ECF No. 35. Specifically, the judge did not block Fresno State from eliminating the women's lacrosse team but did impose a preliminary injunction mandating Fresno State treat the women's lacrosse team equally for the remainder of the 2020–2021 academic year. *See id.* at 34.

On May 2, 2021, the plaintiffs filed a first amended complaint, adding Courtney Walburger, a women's lacrosse team player and student at Fresno State, as a named plaintiff. *See* ECF No. 36. Fresno State moved to dismiss. ECF No. 42. The assigned judge denied the motion as to plaintiffs' effective accommodation claim and equal treatment claim but dismissed plaintiffs' financial aid claim without prejudice. *See* Order (July 22, 2021), ECF No. 57. Plaintiffs filed a second amended complaint—the now operative complaint—on August 12, 2021.

See ECF No. 59. Fresno State once again moved to dismiss, and the judge dismissed plaintiffs' financial aid claim, this time with prejudice. *See* Order (Oct. 29, 2021) ECF No. 73. Plaintiffs' effective accommodation and equal treatment claims remain.

On December 17, 2021, the assigned magistrate judge issued a preliminary scheduling order that mandated plaintiffs submit their motion for class certification by February 4, 2022. Order at 2, ECF No. 83. Plaintiffs filed an unopposed motion to continue the deadline until February 25, 2022. ECF No. 86. The magistrate judge granted the motion. *See* Order (Jan. 27, 2022), ECF No. 87. The plaintiffs filed their motion for class certification on February 25, 2022, which Fresno State opposed. Pls.' First Mot. for Class Cert., ECF No. 88; Defs.' Response Pls.' First Mot. for Class Cert., ECF No. 89.

In its order on class certification, the court examined the scope of plaintiffs' proposed class at length and ultimately defined two classes for plaintiffs, crafting the definition on its own without adopting the plaintiffs' proposed language:

> As to the equal treatment claim, the Court will define the class as current and future female Fresno State students who: (i) participate or have participated in women's varsity intercollegiate athletics at Fresno State; and/or (ii) are able and ready to participate in women's varsity intercollegiate athletics at Fresno State but have been deterred from doing so by the treatment received by female varsity intercollegiate student-athletes at Fresno State. And as to the effective accommodation claim, the Court will define the class as current and future female Fresno State students who: (i) have lost membership on a women's varsity intercollegiate athletics team at Fresno State; (ii) have sought but not achieved membership on a women's varsity intercollegiate athletics team at Fresno State; and/or (iii) are able and ready to seek membership on a women's varsity intercollegiate athletics team at Fresno State but have not done so due to a perceived lack of opportunity.

Order (Aug. 16, 2022) at 10, ECF No. 93. Using these class definitions, the court found plaintiffs had met the numerosity, commonality and typicality requirements of Rule 23(a). *See id.* at 10–17. But the court denied class certification without prejudice, ruling plaintiffs had not established the proposed named representatives, Anders and Walburger, were "adequate" because "there are discernible conflicts—reflected in the filings—between the interests of the proposed class

representatives as former members of the women's varsity lacrosse team and other members of Fresno State's female student population who are not represented in this action as currently configured." *Id.* at 20.

On August 30, 2022, plaintiffs filed a new motion for class certification, ECF No. 94, which the court construed as a motion for reconsideration and denied without prejudice. *See* Order (Nov. 22, 2022), ECF No. 107. In its denial, the court allowed plaintiffs to seek a class or subclass specific to women's lacrosse in a future motion for class certification. *See id.* at 18–19. On December 6, 2022, plaintiffs filed a Rule 23(f) petition with the Ninth Circuit Court of Appeals, challenging the district court's denial of class certification. *See* ECF No. 109. While the petition was pending, plaintiffs filed another motion for class certification in the district court in January 2023. *See* ECF No. 117. Fresno State in March 2023 filed a motion to dismiss plaintiffs' equal treatment claim for lack of standing. ECF No. 121. On April 25, 2023, the district court stayed the case pending the outcome of the appeal, after the Ninth Circuit accepted the 23(f) petition. *See* ECF No. 136. In the meantime, plaintiffs were departing Fresno State. Walburger had graduated in December 2022, while Anders finished at Fresno State after the spring semester of 2023. *See* Pls.' Opp'n Mot. Dismiss (Opp'n) at 7, ECF No. 154. Upon the retirement of the original presiding judge, the case was reassigned to a new district judge. *See* Order (May 3, 2023), ECF No. 137.

The Ninth Circuit issued a memorandum disposition on January 17, 2024, vacating the district court's denial of class certification, concluding the district court abused its discretion in denying class certification on both plaintiffs' effective accommodation claim and their individual treatment claim. *See Anders v. Cal. State Univ., Fresno*, No: 23-15265, 2024 WL 177332, at *2–3, (9th Cir. Jan. 17, 2024). The Circuit held the conflict between the named plaintiffs and the rest of the class with respect to the effective accommodation claim was speculative and the district court had not independently analyzed the equal treatment claim. *See id.* The Ninth Circuit remanded for the district court to consider whether a conflict may actually exist under the equal treatment claim between women's lacrosse players and the remainder of the class and to rule on

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the "propriety of the class definitions presented, the adequacy of class counsel, and whether plaintiffs satisfy Rule 23(b)(2)." *Id.* at *2.

In the summer of 2024, attorney Arthur Bryant changed law firms from Bailey & Glasser to the Clarkson Law Firm, *see* Notice of Change of Address, ECF No. 153, and Anders signed an agreement with Clarkson to represent her. Defs.' Ex. 4 (Clarkson Representation Agreement), ECF No. 167-5. Anders agreed to a fee waiver, but there is an exception: if she independently settles with Fresno State, Anders must pay attorneys' fees and costs. *See id.* The agreement also contains a provision that allows Clarkson to split fees with other attorneys. *See id.*

Fresno State moves to dismiss this action, now arguing that because all the named plaintiffs have graduated from Fresno State, their claims have become moot. *See* Mot. Dismiss on Grounds of Mootness (Defs.' Mot.), ECF No. 151. The motion is fully briefed. *See* Opp'n, ECF No. 154; Defs.' Reply, ECF No. 159. Plaintiffs have filed a renewed motion for class certification, using the class definitions the district court crafted in its earlier denial of class certification. *See* Pls.' Mem. P. & A. in Support of Renewed Mot. Class Cert. (Mem.) at 4, ECF No. 165-1. Plaintiffs seek to name Anders and Walburger as class representatives and Clarkson Law Firm and Caddell & Chapman as class counsel. *See id.* Plaintiffs no longer seek a lacrosse-only class. *See* Joint Status Rep. at 2, ECF No. 142. The issue is fully briefed. Response, ECF No. 167; Pls.' Reply, ECF No. 169.

This action was reassigned to the undersigned on October 11, 2024. *See* Order, ECF No. 162. The court ordered Fresno State's motion to dismiss be submitted without oral argument. Min. Order (Jan. 7, 2025), ECF No. 176. The court heard oral argument on plaintiffs' renewed motion for class certification on January 23, 2025. Arthur Bryant and Carey Alexander appeared for plaintiffs. Mins. Mot. Hr'g (Jan. 23, 2025), ECF No. 177. Scott Eldridge appeared for Fresno State. *Id.*

II. FRESNO STATE'S MOTION TO DISMISS

Fresno State argues the court should dismiss plaintiffs' operative complaint as moot because plaintiffs all have graduated from Fresno State. *See generally* Defs.' Mot. The court declines to dismiss on grounds of mootness.

Article III of the Constitution limits this court's jurisdiction to live "Cases" or "Controversies." *See* U.S. Const. art. III § 2 cl. 1. The controversy must remain live at all stages of the litigation. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). However, "[i]n the class action context, a 'controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.'" *Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020) (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). Named plaintiffs can, for example, continue to litigate a denial of class certification on appeal even after their individual claims became moot. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

One well-established application of this principle is when an injury is so inherently transitory it is "capable of repetition yet evading review." *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). Courts apply this inherently transitory principle even when claims of the named plaintiffs become moot before a court has decided to grant class certification. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011). Courts allow these claims to go forward if "(1) the duration of the challenged action is too short to allow full litigation" before the named plaintiffs' individual claims become moot and "(2) there is a reasonable expectation that the named plaintiffs could themselves suffer repeated harm or it is certain that other persons similarly situated will have the same complaint." *Belgau*, 975 F.3d at 949 (citing *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010)). Under the inherently transitory principle, named plaintiffs are party to a live controversy even though their individual case is moot, because they retain a "private attorney general" interest in the litigation. *See Geraghty*, 445 U.S. at 403–04. In these circumstances, the district court adopts a doctrine of relation back to the original filing of the complaint to "preserve the merits of the case for judicial resolution." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (citations omitted).

The parties agree that, as it pertains to equitable relief, Anders and Walburger's individual claims are now moot. *See*. Defs.' Mot. at 13–15; Opp'n at 15–17. The parties agree, further, that the plaintiffs did not file a motion for class certification until after the named plaintiffs' individual effective accommodation claims became moot. Defs.' Mot. at 15; Opp'n at 17–30. Further,

Anders and Walburger retained live individual injuries in the equal treatment claim until after plaintiffs filed a motion for class certification in February 2022. *See* Opp'n at 30–32.

The court finds the inherently transitory principle applies to the effective accommodation claim. Plaintiffs filed their initial complaint in February 2021. *See* Compl. The individual claims of the named plaintiffs expired four months after the filing of the complaint when Fresno State eliminated the women's lacrosse team. *See* Defs.' Mot. at 14. Under this timeline, it would have been difficult if not impossible for a district court to have ruled on a motion for class certification let alone to allow full litigation to have proceeded before the named plaintiffs' claims became moot. *See Belgau*, 975 F.3d at 1090. Even if the timeline were slightly longer, it would not be enough to encompass the span of time necessary for this complex litigation, which, as plaintiffs point out, has already involved a motion to dismiss, several motions for class certification, and an appeal to the Ninth Circuit. Opp'n at 6. The case is now almost four years old, and it has been almost three years since plaintiffs filed for class certification yet, as plaintiffs rightfully point out, the case is still in its relative "infancy." *Id.*

If the court were to dismiss on mootness grounds here, Fresno State would be allowed to continue to harm similarly situated female athletes by eliminating teams or subjecting them to unlawful treatment without facing any possibility of consequences. Recent decisions by district courts in the Ninth Circuit relating to class actions brought by student athletes adopt this view. *See Fisk v. Bd. of Trs. of the Cal. State Univ.*, No. 22-cv-173, 2023 WL 6051381, at *12 (S.D. Cal. Sept. 15, 2023) ("[G]iven the finite duration of a college student's time as a student-athlete . . . and the pace of this litigation thus far, the Court finds that the inherently transitory exception applies to this putative class action."); *A.B. by C.B. v. Haw. State Dep't of Educ.*, 334 F.R.D. 600, 605 (D. Haw. 2019), *rev'd and remanded on other grounds*, 30 F.4th 828 (9th Cir. 2022) ("Given the necessarily finite duration of a high school student's time as a student-athlete, and the potential for repetition of the claims from similarly situated students . . . these claims are inherently transitory."); *In re NCAA Athletic Grant-in-Aid Cap. Antitrust Litig.*, 311 F.R.D. 532, 539 (N.D. Cal. 2015) (finding inherently transitory principle applies to case brought by student

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athletes). In sum, the effective accommodation claims alleged by the plaintiffs in this case are capable of repetition yet evading review. *See, e.g., Gerstein*, 420 U.S. at 110 n.11.

The court finds plaintiffs' equal treatment claim is not moot for similar reasons. Because Walburger and Anders' individual claims were not moot when plaintiffs filed their motion for class certification, as a matter of law, they retain an interest in appealing the initial denial of certification and having the court decide the issue. *See Geraghty*, 445 U.S. at 404. Further, the inherently transitory principle applies to plaintiffs' equal treatment claim as well as this claim became moot less than two and a half years after the filing of this litigation, while it has taken the court nearly three years to resolve plaintiffs' class certification motion. *See Belgau*, 975 F.3d at 1090.

Fresno State argues first that plaintiffs incorrectly rely on *Belgau's* holding that the inherently transitory principle applies when litigation cannot conceivably be completed in the time before named plaintiffs' claims become moot. Defs.' Reply at 9–10. Fresno State argues *Pitts* is actually the controlling law of the Circuit and provides the inherently transitory principle applies when courts cannot in any way conceivably decide a class certification motion before named plaintiffs' claims become moot. *See id.* Fresno State's argument is unconvincing, as the rule in *Belgau* is the established precedent of the Ninth Circuit. *See Johnson*, 623 F.3d at 1019 (inherently transitory principle applies when "the duration of the challenged action is too short to allow full litigation before it ceases"); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002) (inherently transitory principle applies when "the duration of the challenged action is too short to allow full litigation before it ceases") (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1993)). *Pitts* is the outlier. . Even if Fresno State's argument were valid, plaintiffs would still prevail, as the named plaintiffs' individual claims became moot well before the period it has taken this court to come close to resolving the motion for class certification. The court could not have decided this motion earlier; the court denied plaintiffs' motion for class certification multiple times, and plaintiffs appealed to the Ninth Circuit, all taking time. *See generally* Background.

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Fresno State also argues plaintiffs failed to file a timely motion for class certification. Defs.' Mot. at 11–12; Defs.' Reply at 6. This argument also fails. Timeliness is ultimately determined by courts' local rules and their scheduling orders. *See Pitts*, 653 F.3d at 1093. Under Federal Rule of Civil Procedure Rule 23(c)(1)(A), it is the court—not the plaintiffs— that has a responsibility to determine at an early stage of the litigation "whether to certify the action as a class action." Further, under the local rules of this district—both at the time this action was filed and now—plaintiffs must file a motion for class certification "[w]ithin such time as the Court may direct pursuant to [an] order issued under Fed. R. Civ. P. 16(d)." E.D. Cal. L.R. 205(1). Here, the magistrate judge issued a scheduling order that mandated submission of a motion for class certification by February 4, 2022. Order (Dec. 17, 2021) at 2. The magistrate judge accepted plaintiffs' unopposed motion, *see* ECF No. 86, to move the due date to February 25, 2022. *See* Order (Jan. 27, 2022). Plaintiffs met the new deadline. *See* Pls.' First Mot. for Class Certification. Plaintiffs' motion was timely.

For these reasons, the court finds the class claims relate back to the original date of the filing of the complaint and are not moot. *See County of Riverside*, 500 U.S. at 52. The court denies Fresno State's motion to dismiss.

III. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs seek to certify two classes. For their effective accommodation claim, plaintiffs seek to certify a class that includes:

> Current and future female Fresno State students who: (i) have lost membership on a women's varsity intercollegiate athletics team at Fresno State; (ii) have sought but not achieved membership on a women's varsity intercollegiate athletics team at Fresno State; and/or (iii) are able and ready to seek membership on a women's varsity intercollegiate athletics team at Fresno State but have not done so due to a perceived lack of opportunity.

Mem. at 8. For their equal treatment claim, plaintiffs seek to certify a class that includes:

> Current and future female Fresno State students who: (i) participate or have participated in women's varsity intercollegiate athletics at Fresno State; and/or (ii) are able and ready to participate in women's varsity intercollegiate athletics at Fresno State but have been deterred

> from doing so by the treatment received by female varsity intercollegiate student-athletes at Fresno State.

Id. These proposed class definitions are identical to the classes proposed by the court in its order denying plaintiffs' first motion for class certification. *See* Order (Aug. 16, 2022), at 10. Plaintiffs propose Taylor Anders and Courtney Walburger as class representatives and Clarkson Law Firm, P.C., and Caddell & Chapman as class counsel. Mem. at 9. Fresno State opposes the certification of both classes, arguing they are not ascertainable and fail all the requirements of Rule 23(a) and 23(b)(2). *See generally* Response.

Plaintiffs must "affirmatively demonstrate" compliance with the Federal Rules that govern class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A proposed class can be certified only if the court is persuaded the class meets the requirements of Rule 23(a) and (b), and then only after a "rigorous analysis." *Id.* at 350–51 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Rule 23(a) sets out four prerequisites for every class:

> (1) the class is so numerous that joinder of all members is impracticable;
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> (2) there are questions of law or fact common to the class;
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> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
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> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(g) requires that a court consider these factors when deciding to appoint class counsel:

> (1) the work counsel has done in identifying or investigating potential claims in the action;
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> (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
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> (3) counsel's knowledge of the applicable law; and
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> (4) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g). Rule 23(b), in turn, defines three types of classes the court may certify.

Plaintiffs propose a class under Rule 23(b)(2). *See* Mem. at 19–21. The proponent of Rule 23(b)(2) must show "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

A. Numerosity, Commonality, Typicality

This court previously found, using the same class definitions plaintiffs advance in this renewed motion, that plaintiffs have established the numerosity, commonality, and typicality requirements for both the effective accommodation class and the equal treatment class. *See* Order (Aug. 16, 2022), at 10–17. At oral argument, the parties confirmed the record remains the same now as it did in 2022 and the court confirms its findings based on that record here. Both of plaintiffs' proposed classes meet the numerosity, commonality and typicality requirements of Rule 23(a).

In their opposition to plaintiffs' renewed motion for class certification, Fresno State makes identical arguments to those it made in opposition to plaintiffs' original motion for class certification: that plaintiffs have not adequately proven numerosity, that plaintiffs' failure to take into account sport-specific decisions at Fresno State shows they cannot establish commonality, and that because the named plaintiffs all played on the now defunct women's lacrosse team, their claims are not typical of the proposed classes, which include athletes who participate in other sports at Fresno State. *Compare* Defs.' Response Pls.' First Mot. for Class Cert. at 14–18 *with* Response at 19–22. At oral argument, Fresno State clarified it was making a request for reconsideration under Federal Rules of Civil Procedure 23(c)(1)(C), providing "an order that grants or denies class certification may be altered or amended before final judgment."

The court denies Fresno State's request. The court finds the prior order carefully explained why plaintiffs meet the numerosity, commonality and typicality requirements and does not find it necessary to revise its findings. *See* Order (Aug. 16, 2022) at 10–17. Fresno State argues the court should revisit numerosity, commonality and typicality because the court must conduct "a rigorous analysis . . . given the passage of time." Joint Status Rep. at 4. But Fresno State does not show how the passage of time might impact the court's analysis of these

requirements here. At oral argument, Fresno State admitted it has not provided updated data or any new evidence for the court's consideration. Instead, Fresno State simply argues that because the named plaintiffs are no longer students at Fresno State, they fail the typicality and commonality tests for the classes they propose to represent. However, because the court has found the inherently transitory principle applies to this case, as discussed above, the named plaintiffs retain their ability to continue in this case; as properly representative of students at Fresno State, they are both common and typical of the classes they seek to represent.

B. Adequacy

The court previously found plaintiffs' proposed class representatives were inadequate to represent both classes because the plaintiffs' affiliation with the women's lacrosse team favored the women's lacrosse team and its members over other women's sports teams and their members. *See* Order (Aug. 16, 2022) at 20. The Ninth Circuit reversed, finding clear error because the conflict the district court identified was only speculative. *Anders*, 2024 WL 177332, at *2. The Circuit instructed this court on remand "to specifically assess whether a conflict exists under the equal treatment claim" as well. *Id.* The Circuit also raised the possibility of a further amended complaint and motion practice related to "the justiciability of the equal treatment claim." *Id.* The Circuit suggested this court "may need to resolve those motions before considering whether a conflict exists under the equal treatment claim." *Id.* The court therefore turns to this issue first.

1. Amendments and Justiciability

In their renewed motion for class certification, plaintiffs argue that notwithstanding the Circuit's decision, they do not need to seek to further amend their complaint; they say "[n]o conflict exists" as plaintiffs "seek an injunction that only requires Fresno State to comply with Title IX." Mem. at 15. Fresno State argues plaintiffs improperly ignored the Ninth Circuit's suggestion they amend their complaint. Opp'n at 23. At oral argument, in an attempt to clarify the relief plaintiffs are seeking in their operative complaint, the court asked the parties if they could submit a stipulation and proposed order identifying the portions of the operative complaint

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that can be stricken given the procedural history of the case since it was filed. Mins. Mot. Hr'g (Jan. 23, 2025).

The parties have submitted declarations from their counsel on their unsuccessful efforts to arrive at a stipulated agreement. *See* Bryant Decl. (Jan. 30, 2025), ECF No. 179; Schwartz Decl. (Jan. 30, 2025), ECF No. 180. However, it is telling that plaintiffs, among other proposed edits to the complaint, are willing to strike a reference to the women's lacrosse team in paragraph C of the prayer for relief. *See* Bryant Decl. (Jan. 30, 2025) Ex. C at 4, ECF No. 179-3. This proposed edit appears to be consistent with the Ninth Circuit panel's assumption plaintiffs would need to amend their complaint. The only other reference remaining to the women's lacrosse team is in the prayer for relief, regarding plaintiffs' desire for equal treatment for women's lacrosse players for "this academic year"—2021. *See id.* This second request tracks the preliminary injunction the court previously granted in part and denied in part, before plaintiffs filed their operative complaint. *See* Order (Apr. 21, 2021). The remainder of the proposed revised prayer for relief seeks only that Fresno State abide by Title IX. *See* Bryant Decl. Ex. C.

Plaintiffs' most recent proposed revisions to the complaint are consistent with their statements and actions since the court's denial of plaintiffs' request to enjoin Fresno State from eliminating the women's lacrosse team. *See* Order (Apr. 21, 2021). They have been clear they are only seeking an injunction that mandates Fresno State abide by Title IX and are not seeking a reinstatement of the women's lacrosse team. *See* Mem. at 15–17; Anders Decl. (Aug. 30, 2022) ¶ 6, ECF No. 165-9; Walburger Decl. (Aug. 30, 2022) ¶ 6, ECF No. 165-11; Reply to Opp'n Renewed Mot. Class Cert. Ex. A, ECF No. 97-2 (plaintiffs' attempt to seek stipulation from Fresno State to make similar clarifying edits to operative complaint). Plaintiffs do not need to amend their complaint further and there is no conflict between the named plaintiffs for the effective accommodation claim and the named plaintiffs for the equal treatment claim, as they

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both seek to have Fresno State comply with Title IX. The court therefore considers whether plaintiffs have satisfied the adequacy requirements of Rule 23(a)(4).

2. Named Representatives' Adequacy

In applying Rule 23(a)(4), courts resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*, 564 U.S. at 338. Whether the proposed class representatives adequately represent the class is a "question of fact to be determined on the basis of all of the relevant circumstances regarding" the case. *Soc. Servs. Union, Local 535 Serv. Emps. Int'l Union, AFL-CIO v. Santa Clara County*, 609 F.2d 944, 947 (9th Cir. 1979). Any conflict must be "actual" and not "speculative." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003).

The court finds that Anders and Walburger are adequate named representatives for both the effective accommodation class and the equal treatment class. Both named plaintiffs recognize the remedy both classes seek is the enforcement of Title IX at Fresno State for all women athletes and not the reinstatement of the women's lacrosse team. As Anders testified in her 2022 deposition, "the thing that I would like to see most come out of this [case] is just overall the general fair treatment of everybody and . . . for Title IX to be a main priority of the schools." Bryant Decl. Ex. 2 (Anders Dep.) at 62, ECF No. 165-4. Similarly, Walburger desires "Fresno State [to] become[] [sic] in compliance with Title IX . . . ." Bryant Decl. Ex. 3 (Walburger Dep.) at 49, ECF 165-5. Further, both understand the main point of the case is to obtain an order that Fresno State stop discriminating against women athletes and come into compliance with Title IX. *See* Anders Decl. (Aug. 30, 2022) ¶ 6; Walburger Decl. (Aug. 30, 2022) ¶ 6. Finally, both plaintiffs have shown the capacity to pursue this action vigorously. Anders has stated she is inspired by her mother to "fight for what's right" and hopes to provide "an environment at Fresno State [where] everyone is going to be treated equally." Anders Dep. at 61. Walburger, similarly,

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wants to ensure that what she alleges happened to her does not happen to any other female athletes at Fresno State. Walburger Dep. at 47.

Fresno State argues the named plaintiffs are not adequate representatives because they have "repeatedly testified they have no knowledge whatsoever concerning the treatment and benefits of any other women's athletic team." Response at 23. Yet as plaintiffs point out, class representatives are not required to have knowledge of all the facts of the litigation. Pls.' Reply at 12. Instead, "[t]he threshold of knowledge required to qualify a class representative is low; a party must be familiar with the basic elements of her claim . . . , and will be deemed inadequate only if she is startlingly unfamiliar with the case." *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004) (internal marks and citations omitted). Here, both Anders and Walburger show an adequate awareness of the claims and proposed remedies in the case.

3. **Class Counsel**

As with the adequacy test for named representatives, when determining adequacy of class counsel, courts examine whether counsel have conflicts of interest and if counsel will prosecute the action vigorously on behalf of the class members. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018). In addition, under Rule 23(g), courts determine whether class counsel are "qualified, experienced, and generally capable to conduct the litigation[.]" *Id.* (internal marks and citations omitted).

The court finds Clarkson Law Firm and Caddell & Chapman meet the adequacy standard of Rule 23(a)(4) and appoints Clarkson as class counsel and Caddell & Chapman as co-counsel under Rule 23(g). The court finds no conflict that would prevent either law firm from representing the classes of plaintiffs in this case. Moreover, as plaintiffs point out, these class counsel have briefed responses to multiple challenges to the pleadings and have sought class certification multiple times already in this litigation. *See* Pls.' Reply at 12–13. They have litigated a Rule 23(f) appeal to the Ninth Circuit and successfully argued for a reversal of a previous denial of class certification. *See id*. They have an in-depth familiarity with the case.

Class counsel is qualified to pursue this litigation. Arthur Bryant, the head of Clarkson's Title IX practice, has litigated sex discrimination claims since 1983, including a large number of

complex Title IX cases in which he has represented female athletes. *See* Bryant Decl. Ex. 4 (Clarkson Firm Resume), ECF No. 165-6. Carey Alexander and Neda Saghafi, who work under Bryant, have both handled complex litigation as well. *See id.* Michael Caddell and Cynthia Chapman of Caddell & Chapman have significant experience in complex class actions. *See* Mem. at 18. Bryant, Caddell and Chapman have been with the case from the beginning and, given the time they have spent on the case and their deep familiarity with it, they clearly are willing to expend the resources needed to keep pursuing the action.

Fresno State makes a variety of arguments suggesting the proposed class counsel have conflicts that prevent them from adequately serving in this litigation. *See* Response at 23–27. First, Fresno State argues the proposed counsel has acted to the detriment of the general class of female athletes by also seeking to certify a subclass comprised only of women's lacrosse players. *Id.* at 24. As plaintiffs point out, however, this court expressly allowed plaintiffs' counsel to make such a motion. *See* Order (Nov. 22, 2022) at 18–19. Further, plaintiffs are not currently seeking to certify a women's-lacrosse-players-only subclass, so there is no potential for a current conflict in that respect. *See* Joint Status Rep. at 2. Second, Fresno State argues proposed counsel are more concerned with receiving high fees than with litigating on behalf of the classes. *See* Response at 24–25. Fresno State asserts the proposed counsel improperly allowed third parties to pay for fees, prevented Anders from obtaining an individual settlement without the approval of counsel and improperly engaged in fee sharing with other attorneys without the consent of the named plaintiffs, all activities that would help drive up the costs of litigation. *See id.*

In response to Fresno State's ethical objections, plaintiffs have obtained a declaration from an ethics expert, David Parker. *See* Parker Decl., ECF No. 169-6. At oral argument, Fresno State clarified it does not object to the declaration. Parker has been a member of the Los Angeles County Bar Association Committee on Professional Responsibility and Ethics for the last 25 years. *Id.* ¶ 3. As Parker points out, the earlier agreement between Anders and Bryant, when Bryant was working for Bailey & Glasser, does not allow third parties to pay for fees only to advance costs. *See* Bailey & Glasser Agreement. There is no ethical violation arising from third parties advancing costs. *See* Parker Decl. ¶ 15 (noting that neither California Rules of

Professional Conduct Rule 1.8.6 nor any other California Rule of Professional Conduct bars third parties from advancing costs). Moreover, the current agreement between Anders and Clarkson makes no reference to third parties. *See* Clarkson Representation Agreement. Second, Parker notes plaintiffs' counsel are not explicitly preventing Anders from settling. *Id.* ¶ 16. They did create an exception to the fee waiver, *see* Clarkson Representation Agreement, but there is nothing unethical about such a waiver in the class action context, *see id.* ¶ 16. Finally, Parker notes there is nothing unethical about plaintiffs' fee-sharing agreements provided the attorneys disclose the division and obtain consent from the client, and do not increase the overall fees as a consequence. *Id.* ¶ 17. In any event, Parker notes that fee-sharing provisions are more relevant "in the context of a classwide settlement" than they are in the class certification context, as a "fee sharing agreement merely presupposes a settlement or other recovery." *Id.*

The court finds Parker's declaration compelling and plaintiffs' arguments persuasive. The court expressly finds there are no relevant conflicts. The third-party provision is not in the current contract and, provided counsel fully discloses the nature of the fee arrangement, lawyers can make exceptions to a fee waiver. The court agrees that fee divisions are likely immaterial to the class certification context and, because Fresno State has not cited to any cases that suggest or hold otherwise, the court will not consider fee sharing agreements in determining class counsel adequacy.

Finally, Fresno State argues proposed counsel are not adequate because they are unlikely to prosecute the case vigorously. *See* Response at 26. Fresno State's main argument is that plaintiffs have not been able to progress in the litigation, and it is their lawyers' fault. *See id.* But for the reasons stated above in the court's dismissal of plaintiffs' motion to dismiss, the court is not persuaded. Plaintiffs have met the court's deadlines and successfully litigated an appeal at the Ninth Circuit. *See generally* Background. Any lack of progress is not the lawyers' fault. Fresno State also argues the Clarkson firm is inadequate because a district court in the Northern District of California determined the firm was inadequate in an earlier class action, *Kaur v. Things Remembered*. *See id.* Plaintiffs respond that while an attorney who eventually came to be employed at the firm worked on the Northern District case, he did not start at the firm until after

the case was decided. *See* Pls.' Reply at 15. Clarkson Decl. ¶¶ 3–6, ECF No. 169-2. Even if this attorney had been working at Clarkson, he is not named as counsel for this action. The court is unpersuaded that *Kaur* has any relevance to this litigation. Finally, Fresno State argues Caddell & Chapman has been inadequate as counsel because lawyers in the firm did not file motions or respond to motions while Arthur Bryant was transitioning to a new firm in the summer of 2024. Response at 27. But here too, the court is unpersuaded. Caddell & Chapman have appeared on all the dispositive motions in this now four-year-old case and generally have demonstrated diligence. *See, e.g.*, Pls.' Renewed Mot. Class Cert., ECF No. 94.

Plaintiffs have therefore satisfied the four prerequisites of Rule 23(a). The court turns next to the requirements of Rule 23(b).

C. 23(b)(2)

Plaintiffs seek certification under Rule 23(b)(2). To satisfy Rule 23(b)(2), "it is sufficient . . . that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010), *abrogated on other grounds as recognized by Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1199 (9th Cir. 2022). "The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Id.* There is no "freestanding administrative feasibility prerequisite to class certification," particularly when plaintiffs seek certification under Rule 23(b)(2). *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017); *see also, e.g.*, *Campbell v. Facebook Inc.*, 315 F.R.D. 250, 259 (N.D. Cal. 2016) (finding "ascertainability" to be irrelevant to Rule 23(b)(2) analysis).

The court finds both of plaintiffs' proposed classes meet the requirements of Rule 23(b)(2). Both classes comprise current and future female students at Fresno State who seek to participate in intercollegiate athletics. *See* Mem. at 8. Both classes seek the same remedy: that Fresno State abide by Title IX. *See* Anders Decl. (Aug. 30, 2022) ¶ 6. Fresno State's alleged wrongdoing, further, is a pattern or practice that is generally applicable to both classes, as female students who do play or who desire to play sports at Fresno State will be impacted if Fresno State fails to effectively accommodate women's sports teams and treat women's teams equally with

men's teams. *See generally* SAC. Some members of the proposed class—perhaps those who desire to play intercollegiate varsity athletics but would not make the team under any condition—may not be injured or may suffer only slight injuries in comparison to others—those, for example, who are currently playing women's sports at Fresno State. But disparities such as these do not prevent this court from certifying a class under 23(b)(2). *See Rodriguez*, 591 F.3d at 1125.

Fresno State argues in response the two classes fail because they are not ascertainable. It asks this court to address the issue, as, it says, "[t]his court has yet to rule on Fresno State's arguments concerning the ascertainability of the proposed classes." Response at 15 n.5. District courts within the Circuit have long refused to apply an "ascertainability" standard in Rule 23(b)(2) cases, *see, e.g.*, *Campbell*, 315 F.R.D. at 259, and the Ninth Circuit has held in a binding opinion that "ascertainability" is not a requirement under Rule 23, *see Briseno*, 844 F.3d at 1133. All that is required is that plaintiffs meet the demands of Rule 23(a), 23(g) and Rule 23(b). As noted above, the court finds plaintiffs have met these requirements, and that their two classes and counsel should be certified.

The court certifies plaintiffs' effective accommodation class and its equal treatment class and approves the Clarkson Law Firm and Caddell & Chapman as class counsel.

IV. CONCLUSION

For the reasons stated above, the court **denies** Fresno State's motion to dismiss and **grants** plaintiffs' renewed motion for class certification. A status conference is set for **April 10, 2025 at 2:30 p.m.** The parties shall meet and confer and file a joint status report with a proposed schedule for the case moving forward into the merits phase no later than fourteen (14) days before the status conference.

This order resolves ECF Nos. 151 and 165.

IT IS SO ORDERED.

DATED: March 7, 2025.

SENIOR UNITED STATES DISTRICT JUDGE