

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4

5 IN RE NCAA STUDENT-ATHLETE
6 NAME & LIKENESS LICENSING
7 LITIGATION

No. C 09-1967 CW

ORDER GRANTING IN
PART AND DENYING
IN PART MOTION FOR
CLASS
CERTIFICATION
(Docket No. 651)

8 _____/
9
10 Plaintiffs, a group of current and former college athletes,
11 move for class certification to pursue their antitrust claims
12 against Defendant National Collegiate Athletic Association
13 (NCAA).¹ The NCAA opposes the motion. After considering the
14 parties' submissions and oral argument, the Court grants in part
15 the motion for class certification and denies it in part.

16 BACKGROUND

17 The procedural history and factual background of this case
18 are described at length in the Court's order denying the NCAA's
19 motion to dismiss. Docket No. 876, at 1-7. Accordingly, this
20 order provides only the background necessary to resolve the
21 instant motion.

22 Plaintiffs are twenty-five current and former student-
23 athletes who played for NCAA Division I men's football and
24 basketball teams between 1953 and the present. Docket No. 832,
25 Third Consol. Class Action Compl. (3CAC) ¶¶ 25-233. Four of these

26 _____
27 ¹ Plaintiffs initially also filed suit against the videogame
28 developer, Electronic Arts, Inc. (EA), and the marketing firm,
Collegiate Licensing Company (CLC), but subsequently agreed to settle
their claims against those parties.

1 Plaintiffs (Right-of-Publicity Plaintiffs) allege that the NCAA
2 misappropriated their names, images, and likenesses in violation
3 of their statutory and common law rights of publicity. The other
4 twenty-one Plaintiffs (Antitrust Plaintiffs) allege that the NCAA
5 violated federal antitrust law by conspiring with EA and CLC to
6 restrain competition in the market for the commercial use of their
7 names, images, and likenesses. In the pending motion, Antitrust
8 Plaintiffs² seek class certification to pursue their claims
9 arising under the Sherman Antitrust Act, 15 U.S.C. §§ 1 et seq.

10 Plaintiffs' antitrust claims arise from the NCAA's written
11 and unwritten rules, which allegedly prohibit student-athletes
12 from receiving compensation for the commercial use of their names,
13 images, and likenesses. 3CAC ¶¶ 12-15. According to the 3CAC,
14 these rules preclude student-athletes from entering into group
15 licensing arrangements with videogame developers and broadcasters
16 for the use of their names, likenesses, and images. Plaintiffs
17 allege that these rules restrain competition in "two relevant
18 markets: (a) the student-athlete Division I college education
19 market in the United States (the 'education market'); and (b) the
20 market for the acquisition of group licensing rights for the use
21 of student-athletes' names, images, and likenesses in the
22 broadcasts or rebroadcasts of Division I basketball and football
23 games and in videogames featuring Division I basketball and
24 football in the United States (the 'group licensing market')." Id. ¶ 391.

25
26
27 ² All subsequent references to "Plaintiffs" in this order allude
28 specifically to the twenty-one Antitrust Plaintiffs and not to the four
Right-of-Publicity Plaintiffs, whose claims are not at issue here.

1 Plaintiffs seek monetary damages to compensate them for the
2 financial losses they claim to have suffered as a result of the
3 NCAA's alleged plan to fix at zero the price of student-athletes'
4 group licensing rights in videogames and game broadcasts. In
5 addition, Plaintiffs seek to enjoin the NCAA from restraining
6 competition in the group licensing market for student-athletes'
7 name, image, and likeness rights in the future.

8 LEGAL STANDARD

9 Plaintiffs seeking to represent a class must satisfy the
10 threshold requirements of Rule 23(a) as well as the requirements
11 for certification under one of the subsections of Rule 23(b).
12 Rule 23(a) provides that a case is appropriate for certification
13 as a class action if

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

21 Fed. R. Civ. P. 23(a).

22 Plaintiffs must also establish that one of the subsections of
23 Rule 23(b) is met. In the instant case, Plaintiffs seek
24 certification under subsections (b) (2) and (b) (3).

25 Rule 23(b) (2) applies where "the party opposing the class has
26 acted or refused to act on grounds generally applicable to the
27 class, thereby making appropriate final injunctive relief or
28 corresponding declaratory relief with respect to the class as a
whole." Fed. R. Civ. Proc. 23(b) (2).

1 Rule 23(b)(3) permits certification where common questions of
2 law and fact "predominate over any questions affecting only
3 individual members" and class resolution is "superior to other
4 available methods for the fair and efficient adjudication of the
5 controversy." Fed. R. Civ. P. 23(b)(3). These requirements are
6 intended "to cover cases 'in which a class action would achieve
7 economies of time, effort, and expense . . . without sacrificing
8 procedural fairness or bringing about other undesirable results.'" Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (quoting
9 Fed. R. Civ. P. 23(b)(3) Adv. Comm. Notes to 1966 Amendment).

11 Regardless of what type of class the plaintiff seeks to
12 certify, it must demonstrate that each element of Rule 23 is
13 satisfied; a district court may certify a class only if it
14 determines that the plaintiff has borne this burden. Gen. Tel.
15 Co. of Sw. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v.
16 Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). In
17 general, the court must take the substantive allegations of the
18 complaint as true. Blackie v. Barrack, 524 F.2d 891, 901 (9th
19 Cir. 1975). However, the court must conduct a "'rigorous
20 analysis,'" which may require it "'to probe behind the pleadings
21 before coming to rest on the certification question.'" Wal-Mart
22 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting
23 Falcon, 457 U.S. at 160-61). "Frequently that 'rigorous analysis'
24 will entail some overlap with the merits of the plaintiff's
25 underlying claim. That cannot be helped." Dukes, 131 S. Ct. at
26 2551. To satisfy itself that class certification is proper, the
27 court may consider material beyond the pleadings and require
28 supplemental evidentiary submissions by the parties. Blackie, 524

1 F.2d at 901 n.17. "When resolving such factual disputes in the
2 context of a motion for class certification, district courts must
3 consider 'the persuasiveness of the evidence presented.'" Aburto
4 v. Verizon Cal., Inc., 2012 WL 10381, at *2 (C.D. Cal.) (quoting
5 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir.
6 2011)). Ultimately, it is in the district court's discretion
7 whether a class should be certified. Molski v. Gleich, 318 F.3d
8 937, 946 (9th Cir. 2003); Burkhalter Travel Agency v. MacFarms
9 Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991).

10 DISCUSSION

11 Plaintiffs seek to certify a class to pursue injunctive
12 relief under Rule 23(b)(2) and a subclass to pursue monetary
13 damages under Rule 23(b)(3). The proposed Injunctive Relief Class
14 is defined as follows:

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

Docket No. 651, Mot. Class Cert., at 2. This class shall not
include any officers, directors, or employees of the NCAA nor of
any Division I colleges, universities, or athletic conferences.

Id.

The proposed Damages Subclass is defined as follows:

All former student-athletes residing in the
United States who competed on an NCAA Division

1 I (formerly known as "University Division"
2 before 1973) college or university men's
3 basketball team or on an NCAA Football Bowl
4 Subdivision (formerly known as Division I-A
5 until 2006) men's football team whose images,
6 likenesses and/or names have been included in
7 game footage or in videogames licensed or sold
8 by Defendants, their co-conspirators, or their
9 licensees from July 21, 2005 and continuing
10 until a final judgment in this matter.

11 Id. at 1-2. Thus, the only difference between the proposed
12 Injunctive Relief Class and the proposed Damages Subclass is that
13 the subclass excludes current student-athletes and former student-
14 athletes whose names, likenesses, and images were featured in
15 videogames or game broadcasts before July 21, 2005.

16 For reasons explained more fully below, the Court certifies
17 the Injunctive Relief Class but declines to certify the Damages
18 Subclass for failure to satisfy the requirements of Rule 23(b)(3).

19 I. Rule 23(a) Requirements

20 A. Numerosity

21 Plaintiffs assert that the Injunctive Relief Class and the
22 Damages Subclass each contain several thousand potential class
23 members. The NCAA does not dispute that these classes are
24 sufficiently large to satisfy the numerosity prerequisite.
25 Accordingly, Plaintiffs have met this requirement. See In re
26 Citric Acid Antitrust Litig., 1996 WL 655791, at *3 (N.D. Cal.)
27 (finding that plaintiffs in a nationwide antitrust class action
28 satisfied the numerosity requirement by asserting that "the total
number of class members will be in the thousands").

B. Commonality

Rule 23 contains two related commonality provisions. Rule
23(a)(2) requires that there be "questions of law or fact common
to the class." Rule 23(b)(3), in turn, requires that these common

1 questions predominate over individual ones. This section
2 addresses only whether Plaintiffs have satisfied Rule 23(a)(2)'s
3 requirements, which are "less rigorous than the companion
4 requirements of Rule 23(b)(3)." Hanlon v. Chrysler Corp., 150
5 F.3d 1011, 1019 (9th Cir. 1998) ("Rule 23(a)(2) has been construed
6 permissively.").³

7 The Ninth Circuit has made clear that Rule 23(a)(2) may be
8 satisfied even if fewer than all legal and factual questions are
9 common to the class. Meyer v. Portfolio Recovery Associates, LLC,
10 707 F.3d 1036, 1041 (9th Cir. 2012) ("All questions of fact and
11 law need not be common to satisfy the [commonality requirement]."
12 (citations omitted; alterations in original)), cert. denied, 133
13 S. Ct. 2361 (2013). "The existence of shared legal issues with
14 divergent factual predicates is sufficient, as is a common core of
15 salient facts coupled with disparate legal remedies within the
16 class.'" Id. (citing Hanlon, 150 F.3d at 1019).

17 Plaintiffs have satisfied this requirement with respect to
18 both the Injunctive Relief Class and Damages Subclass. They have
19 identified several common questions of law and fact that must be
20 resolved to determine whether the NCAA violated federal antitrust
21 law. These questions include: the size of the "education" and
22 "group licensing" markets identified in the complaint; whether
23 NCAA rules have harmed competition in those markets; and whether
24 the NCAA's procompetitive justifications for its conduct are
25 legitimate. These types of questions, all of which may be

26
27 ³ Because Plaintiffs only need to satisfy the commonality
28 requirements of Rule 23(b)(3) with respect to the proposed Damages
Subclass, those requirements are addressed in a separate section of this
order.

1 resolved by class-wide proof and argument, are typically
2 sufficient to satisfy commonality in antitrust class actions.
3 See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D.
4 583, 593 (N.D. Cal. 2010) (finding questions of market size and
5 anticompetitive effects, among others, sufficient to satisfy
6 commonality), amended in part by 2011 WL 3268649 (N.D. Cal. 2011).
7 Indeed, commonality is "usually met in the antitrust [] context
8 when all class members' claims present common issues including
9 (1) whether the defendant's conduct was actionably anticompetitive
10 under antitrust standards; and (2) whether that conduct produced
11 anticompetitive effects within the relevant product and geographic
12 markets." Sullivan v. DB Investments, Inc., 667 F.3d 273, 336 (3d
13 Cir. 2011) (Scirica, J., concurring), cert. denied, 132 S. Ct.
14 1876 (2012).

15 Although the NCAA notes that some of the "common" questions
16 that Plaintiffs identify in their brief -- such as certain damage-
17 related questions -- are not actually amenable to class-wide
18 proof, this is not sufficient to defeat commonality. As noted
19 above, "all that Rule 23(a)(2) requires is 'a single significant
20 question of law or fact.'" Abdullah v. U.S. Sec. Associates,
21 Inc., 2013 WL 5383225, at *3 (9th Cir. 2013) (emphasis in
22 original; citing Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588
23 (9th Cir. 2012)). Plaintiffs have met that burden here. See In
24 re NCAA I-A Walk-On Football Players Litig., 2006 WL 1207915, at
25 *5 (W.D. Wash.) ("[T]he Court notes that common issues here
26 include: whether Bylaw 15.5.5 is a horizontal restraint of trade
27 in violation of the Sherman Act; whether there is a relevant
28 market for antitrust purposes; whether the NCAA and its members

1 have improperly monopolized Division I-A college football; [and]
2 whether there has been injury to competition.”).

3 C. Typicality

4 Rule 23(a)(3) requires that the “claims or defenses of the
5 representative parties [be] typical of the claims or defenses of
6 the class.” Thus, every “class representative must be part of the
7 class and possess the same interest and suffer the same injury as
8 the class members.” Falcon, 457 U.S. at 156 (quoting E. Tex.
9 Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977))
10 (internal quotation marks omitted). This requirement is usually
11 satisfied if the named plaintiffs have suffered the same or
12 similar injuries as the unnamed class members, the action is based
13 on conduct which is not unique to the named plaintiffs, and other
14 class members were injured by the same course of conduct. Hanon
15 v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).
16 Typicality is not met, however, “where a putative class
17 representative is subject to unique defenses which threaten to
18 become the focus of the litigation.” Id. (quoting Gary Plastic
19 Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
20 903 F.2d 176, 180 (2d Cir. 1990).

21 In this case, the named Plaintiffs’ interests are closely
22 aligned with those of absent class members. All of the named
23 Plaintiffs play or played for a Division I men’s football or
24 basketball team; all were depicted, without their consent and
25 without payment, in videogames or game broadcasts; and all
26 complied with NCAA rules that allegedly barred them from selling
27 or licensing the rights to their names, images, and likenesses.
28 These characteristics are common to every putative class member

1 and form the basis for the antitrust injuries that Plaintiffs
2 assert in this case. In antitrust cases, this uniformity of class
3 members' injuries, claims, and legal theory is typically
4 sufficient to satisfy Rule 23(a)(3). See NCAA I-A Walk-On
5 Football Players, 2006 WL 1207915, at *6 (finding Rule 23(a)(3)
6 typicality satisfied where "the legal theory to be advanced by all
7 class members -- that the NCAA and its members violated the
8 Sherman Act -- is identical"); White v. NCAA, Case No. 06-999,
9 Docket No. 95, slip op. at 3 (C.D. Cal. Dec. 19, 2006) (finding
10 Rule 23(a)(3) typicality satisfied where former college athletes
11 "allege[d] a horizontal agreement by the NCAA in violation of the
12 Sherman Act" and asserted that "they were all affected by the
13 [challenged NCAA rule] in the same way").

14 The NCAA has not identified any defense that applies uniquely
15 to the named Plaintiffs nor any other barrier to Rule 23(a)(3)
16 typicality. In fact, it fails to cite, let alone discuss, Rule
17 23(a)(3) in either of its briefs.⁴ Thus, because Plaintiffs'
18 claims and interests are common to the class, they have satisfied
19 the typicality requirement here.

20 D. Adequacy

21 Rule 23(a)(4) establishes as a prerequisite for class
22 certification that "the representative parties will fairly and
23 adequately protect the interests of the class." Fed. R. Civ. P.
24 23(a)(4). Rule 23(g)(2) imposes a similar adequacy requirement on
25

26 ⁴ Although the NCAA contends that "[i]ndividual defenses will
27 predominate," Docket No. 789, NCAA Sur-Reply, at 22, it raises this
28 argument under Rule 23(b)(3), not Rule 23(a)(3). Accordingly, these
"individual defenses" are addressed separately below, in the section
discussing the requirements of Rule 23(b)(3).

1 class counsel. "Resolution of two questions determines legal
2 adequacy: (1) do the named plaintiffs and their counsel have any
3 conflicts of interest with other class members and (2) will the
4 named plaintiffs and their counsel prosecute the action vigorously
5 on behalf of the class?" Hanlon, 150 F.3d at 1020.

6 The NCAA contends that there are conflicts of interest among
7 class members that preclude class certification here. It points
8 specifically to the fact that, in an unrestrained market for
9 publicity rights, some putative class members -- such as star
10 athletes -- would command a higher price for their name, image,
11 and likeness rights than others. According to the NCAA, if
12 Plaintiffs were to prevail in this case, those high-value class
13 members would be entitled to a larger share of damages than others
14 because they would have suffered greater economic losses from the
15 NCAA's ban on student-athlete compensation. Yet, Plaintiffs'
16 proposed model for allocating damages fails to account for these
17 differences between class members. Instead, Plaintiffs' model
18 proposes that damages be allocated equally among the members of
19 every football and basketball team. Plaintiffs' expert, Dr. Roger
20 Noll, describes the process as follows:

21 First, all revenues [from videogame and
22 broadcast licenses] are allocated to either
23 basketball or football at a college. These
24 revenues are then multiplied by the
25 appropriate sharing formula between colleges
26 and student-athletes. For each college, each
27 revenue stream is further divided between
28 current and former teams. Reflecting the
common practice in group licenses, the revenue
that is assigned to current players is divided
equally among all members of the current team.

1 Docket No. 651-3, Expert Report of Roger Noll, at 107. The NCAA
2 contends that this proposal for allocating damages benefits
3 lesser-known athletes at the expense of more popular athletes.
4 This argument is not persuasive for several reasons.

5 First, the supposed intra-class conflict that the NCAA has
6 identified here is illusory. Although it is true that class
7 members' publicity rights vary widely in value, it does not
8 necessarily follow that a model of equal sharing among team
9 members would inevitably create a conflict of interest. As noted
10 above, Plaintiffs allege harm to competition within a group
11 licensing market, not an individual licensing market. This
12 distinction is important because it renders irrelevant any
13 differences in the value of each class member's individual
14 publicity rights. After all, even if some class members suffered
15 greater economic losses than others because the NCAA prevented
16 them from licensing their individual publicity rights, those
17 losses would have no bearing on this case, where Plaintiffs seek
18 compensation only for losses suffered in the group licensing
19 market.

20 Courts have highlighted this distinction in other cases where
21 plaintiffs sought class certification to pursue claims based on
22 group licensing rights. In Parrish v. NFL, for instance, another
23 court in this district certified a class of retired professional
24 football players who charged the NFL with breaching a series of
25 group licensing agreements that the players had previously signed.
26 2008 WL 1925208, at *9 (N.D. Cal.). The court expressly rejected
27 the NFL's argument that class certification was inappropriate
28 because the players' publicity rights varied in value. Id. at *3

1 ("Despite the varying celebrity of retired players, the proposed
2 class as a whole has a common interest in determining what, if
3 any, rights they have under the [group licensing agreements].").
4 The court reasoned that, because the players' claims were not
5 based on individual licensing rights, the "star athletes of the
6 class would [] still be able to license their celebrity on an
7 individual basis for whatever amount they choose. Such licensing
8 would have no effect on the class. What is at stake here is the
9 group license." Id. at *6 (emphasis in original); accord Brown v.
10 NFL Players Ass'n, 281 F.R.D. 437, 442-43 (C.D. Cal. 2012).⁵ The
11 same principle applies here and illustrates that Plaintiffs'
12 proposed model for allocating damages does not create a real
13 conflict of interest among class members.

14 Even if Plaintiffs' method of allocating damages did create
15 such a conflict, this would not be sufficient to prevent class
16 certification. The Ninth Circuit has made clear that "damage
17 calculations alone cannot defeat certification" and the "potential
18

19 ⁵ Like Parrish, Brown involved claims by a group of retired
20 football players seeking to assert their group licensing rights under a
21 series of agreements with the NFL. In considering the plaintiffs' class
22 certification motion, the Brown court explained,

23 Contrary to Defendants' assertions, [the named
24 plaintiff]'s relative lack of celebrity does not
25 cause his damages claim to conflict with the
26 claims of absent class members. In their
27 Complaint, Plaintiffs do not allege that
28 Defendants failed to honor individual licensing
29 agreements, where the players' relative celebrity
30 would likely affect how much Defendants owed each
31 retired NFLPA member. Instead, Plaintiffs allege
32 that Defendants failed to license the group of
33 retired NFLPA members in the proposed class and to
34 distribute group licensing revenue to them.

281 F.R.D. at 442-43.

1 existence of individualized damage assessments . . . does not
2 detract from the action's suitability for class certification."
3 Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1089, 1094
4 (9th Cir. 2010). This is especially true here, where the
5 potential for intra-class conflicts would arise only at the final
6 stage of damage allocation, when damages would be divided among
7 the members of each team. No matter how damages were divided at
8 that stage, the entire class would still share an interest in
9 establishing that the NCAA restrained competition in the relevant
10 markets and that it lacked a procompetitive justification for
11 doing so. Because Plaintiffs' underlying theory of liability is
12 not tied to their expert's proposed method for dividing damages
13 among team members,⁶ their expert's proposed method will not
14 prevent them from adequately representing the class's most
15 important interest: to wit, establishing the NCAA's liability.

16 Finally, to the extent that Plaintiffs' damages model did
17 create the potential for any conflicts of interest, those
18 conflicts would only affect class members seeking monetary
19 relief -- that is, members of the Damages Subclass. The interests
20 of the broader Injunctive Relief Class would not be affected by
21 any conflicts that could arise at the damages stage of the

22 ⁶ Indeed, Plaintiffs' expert could propose a different model for
23 allocating damages among team members without altering his substantive
24 analysis of the NCAA's impact on the relevant markets. This is one
25 reason why Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), which the
26 NCAA cites for support, is inapposite here. In Comcast, the Supreme
27 Court decertified a class of antitrust plaintiffs because their expert's
28 damages model was based, in part, on a theory of antitrust liability
that the trial court had rejected. Id. at 1433. Here, in contrast, not
only is Plaintiffs' damages model based on a permissible theory of
antitrust liability but, what's more, the NCAA has attacked an aspect of
Plaintiffs' damages model that could be altered without changing their
underlying theory of antitrust liability.

1 litigation. Thus, Plaintiffs' proposed damages model does not
2 defeat certification here under Rule 23(a)(4).

3 Plaintiffs have therefore satisfied all of the Rule 23(a)
4 requirements with respect to both the Injunctive Relief Class and
5 the Damages Subclass.

6 II. Rule 23(b) Requirements

7 A. Rule 23(b)(2): Injunctive Relief Class

8 A court may grant certification under Rule 23(b)(2) "if class
9 members complain of a pattern or practice that is generally
10 applicable to the class as a whole. Even if some class members
11 have not been injured by the challenged practice, a class may
12 nevertheless be appropriate." Walters v. Reno, 145 F.3d 1032,
13 1047 (9th Cir. 1998); see also 7A Wright, Miller & Kane, Federal
14 Practice & Procedure § 1775 (2d ed. 1986) ("All the class members
15 need not be aggrieved by or desire to challenge the defendant's
16 conduct in order for some of them to seek relief under Rule
17 23(b)(2)."). Rule 23(b)(2) does not require a court "to examine
18 the viability or bases of class members' claims for declaratory
19 and injunctive relief, but only to look at whether class members
20 seek uniform relief from a practice applicable to all of them."
21 Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010).

22 Here, the NCAA contends that certification under Rule
23 23(b)(2) is inappropriate because Plaintiffs' "demand for damages
24 predominates over any request for injunctive relief" and
25 "'individualized monetary claims belong in Rule 23(b)(3)'" rather
26 than Rule 23(b)(2). Docket No. 677, NCAA Opp. Class Cert., at 21-
27 22 (citing Dukes, 131 S. Ct. at 2558). This argument misstates
28 the nature of the relief that Plaintiffs seek. As previously

1 explained, Plaintiffs seek to certify one class under Rule
2 23(b) (2) to pursue declaratory and injunctive relief and another
3 class under Rule 23(b) (3) to pursue monetary relief. Nothing in
4 the federal rules or existing case law prevents them from seeking
5 certification under both of these provisions. See In re Apple,
6 AT&T iPad Unlimited Data Plan Litig., 2012 WL 2428248 (N.D. Cal.)
7 (explaining that "a court may certify a Rule 23(b) (2) class for
8 injunctive relief and a separate class for individual damages or,
9 if the damage claims do not meet Rule 23(b) (3) standards, certify
10 the Rule 23(b) (2) class alone" (citing Schwarzer, Tashima &
11 Wagstaffe, Cal. Practice Guide: Federal Civil Procedure Before
12 Trial § 10:404 (2011))).

13 With respect to the Rule 23(b) (2) class, Plaintiffs seek
14 certification to pursue an injunction barring the NCAA from
15 prohibiting current and former student-athletes from entering into
16 group licensing deals for the use of their names, images, and
17 likenesses in videogames and game broadcasts. Their request for
18 this injunction is not merely ancillary to their demand for
19 damages. Rather, it is deemed necessary to eliminate the
20 restraints that the NCAA has allegedly imposed on competition in
21 the relevant markets. Without the requested injunctive relief,
22 all class members -- including both current and former student-
23 athletes -- would potentially be subject to ongoing antitrust
24 harms resulting from the continued unauthorized use of their
25 names, images, and likenesses. Because an injunction would offer
26 all class members "uniform relief" from this harm, Rodriguez, 591
27 F.3d at 1125, class certification is appropriate under Rule
28 23(b) (2).

1 B. Rule 23(b)(3): Damages Subclass

2 To qualify for certification under Rule 23(b)(3), "a class
3 must satisfy two conditions in addition to the Rule 23(a)
4 prerequisites: common questions must 'predominate over any
5 questions affecting only individual members,' and class resolution
6 must be 'superior to other available methods for the fair and
7 efficient adjudication of the controversy.'" Hanlon, 150 F.3d at
8 1022 (quoting Fed. R. Civ. P. 23(b)(3)). The rule also requires
9 the court to take into account the "likely difficulties in
10 managing a class action." Fed. R. Civ. P. 23(b)(3)(D). Taken
11 together, these requirements impose "an obligation on the court to
12 make findings that will demonstrate the utility and propriety of
13 employing the class-action device in the case before it." 7AA
14 Wright, Miller & Kane, Federal Practice & Procedure § 1777 (3d ed.
15 2013).

16 Plaintiffs have not presented sufficient evidence here to
17 establish that certification is appropriate under Rule 23(b)(3).
18 In particular, they have failed to satisfy the manageability
19 requirement because they have not identified a feasible way to
20 determine which members of the Damages Subclass were actually
21 harmed by the NCAA's allegedly anticompetitive conduct. Courts
22 have recognized that, in price-fixing cases such as this one,
23 where the "fact of injury" cannot be determined by a "virtually
24 mechanical task," class manageability problems frequently arise.
25 See, e.g., Windham v. Am. Brands, Inc., 565 F.2d 59, 67-68 (4th
26 Cir. 1977) (recognizing "respectable authorities in which
27 certification of an anti-trust action was denied because of the
28 complexity of, and the difficulties connected with, the proof of

1 individual injury"); In re Graphics Processing Units Antitrust
2 Litig., 253 F.R.D. 478, 489 (N.D. Cal. 2008) ("Direct-purchaser
3 plaintiffs have failed to supply a class-wide method for proving
4 'impact' on a class-wide basis.").

5 The first barrier to manageability here is the so-called
6 "substitution effect," which stems from Dr. Noll's opening expert
7 report on the economic impact of the NCAA's rules. As is
8 customary in antitrust cases, Dr. Noll's report described how the
9 relevant markets would be expected to function in the absence of
10 the challenged restraints on competition -- in this case, without
11 the ban on student-athlete compensation. See generally ZF
12 Meritor, LLC v. Eaton Corp., 696 F.3d 254, 292 (3d Cir. 2012)
13 (noting that, in antitrust cases, "an expert may construct a
14 reasonable offense-free world as a yardstick for measuring what,
15 hypothetically, would have happened 'but for' the defendant's
16 unlawful activities" (citations omitted)). Dr. Noll explained
17 that, because student-athletes are often motivated by financial
18 concerns when choosing whether and where to attend college, "the
19 expected effect [of the ban on student-athlete pay] is to change
20 the identities of the students who accept an athletic
21 scholarship." Docket No. 651-3, Noll Expert Report, at 58-59. To
22 illustrate this point, Dr. Noll examined the experiences of more
23 than one hundred Division I basketball players who left college
24 early between 2008 and 2010 to seek out opportunities to play
25 professionally. Id. at 61-63, Ex. 9B. He concluded that many of
26 these players "plausibly would have stayed in college" if they had
27 been permitted to participate in a competitive group licensing
28

1 market, because the financial costs of staying in school would
2 have been lower. Id. at 62.

3 Critically, however, Dr. Noll also notes that if these
4 athletes had stayed in college -- as they might have done if not
5 for the alleged restraints on competition in the group licensing
6 market -- they would have displaced other student-athletes on
7 their respective teams. Docket No. 683, Wierenga Decl., Ex. 4,
8 Feb. 2013 R. Noll Depo., at 364:13-:24. Those displaced student-
9 athletes would have either been forced to play for other Division
10 I teams or simply lost the opportunity to play Division I
11 basketball altogether. In either case, they would not have
12 suffered injuries as members of the teams for which they actually
13 played because, as Dr. Noll suggests, they would never have been
14 able to play for those teams in the absence of the challenged
15 restraints. See Docket No. 651-3, Noll Expert Report, at 59
16 ("[T]he NCAA rules simultaneously caused dead-weight loss for
17 students who decided not to accept a scholarship for Division IA
18 football or Division I basketball because of the price increase
19 [in the cost of attendance] and an inefficient substitution
20 because students of lesser athletic ability substituted for
21 students of greater athletic ability."). Indeed, many of these
22 individuals -- all of whom are putative members of the Damages
23 Subclass -- may have even benefitted from the challenged
24 restraints by earning roster spots that would have otherwise gone
25 to more talented student-athletes.

26 Plaintiffs have not proposed any method for addressing this
27 substitution effect among individual student-athletes. Nor have
28 they proposed any method for addressing the related substitution

1 effect among Division I schools. One of Plaintiffs' central
2 contentions in this case is that, without the ban on student-
3 athlete pay, competition among Division I schools for student-
4 athletes would increase substantially. That increased competition
5 for student-athletes, combined with the potentially higher costs
6 of recruiting and retaining those student-athletes, would have
7 likely driven some schools into less competitive divisions,
8 thereby insulating entire teams from the specific harms that
9 Plaintiffs allege in this suit. Wierenga Decl., Ex. 2, Expert
10 Report of Daniel L. Rubinfeld, at ¶¶ 185-86. Plaintiffs have not
11 provided a feasible method for determining which members of the
12 Damages Subclass would still have played for Division I teams --
13 and, thus, suffered the injuries alleged here -- in the absence of
14 the challenged restraints. This shortcoming likewise contributes
15 to the impossibility of determining which class members were
16 actually injured by the NCAA's alleged restraints on competition
17 and, as such, precludes certification under Rule 23(b)(3). See
18 NCAA I-A Walk-On Football Players, 2006 WL 1207915, at *8-*9
19 (denying class certification to a group of student-athletes who
20 challenged the NCAA's cap on team scholarships because raising the
21 scholarship cap would increase the level of competition for those
22 scholarships and thus require every putative class member to prove
23 individually that he would have obtained a scholarship and others
24 would not).

25 Another barrier to manageability here is determining which
26 student-athletes were actually depicted in videogames during the
27 relevant class period and, thus, members of the Damages Subclass.
28 See Rowden v. Pac. Parking Sys., Inc., 282 F.R.D. 581, 585 (C.D.

1 Cal. 2012) (“A class action is not manageable if membership of the
2 class cannot be sufficiently well-defined at the outset.”); Chavez
3 v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 376 (N.D. Cal.
4 2010) (stating that class certification is not appropriate unless
5 it is “administratively feasible to determine whether a particular
6 person is a class member”). Every team in the NCAA’s Football
7 Bowl Subdivision (formerly known as Division I-A) is allowed up to
8 105 players -- eighty-five scholarship players and twenty non-
9 scholarship players. Wierenga Decl., Ex. 4, Feb. 2013 R. Noll
10 Depo., at 102:18-103:2. In contrast, the football teams depicted
11 in NCAA-licensed videogames have only sixty-eight players each.
12 Docket No. 703, Slaughter Decl., Ex. 69, R. Harvey Depo. 24:15-
13 :21. As a result, the number of student-athletes depicted in
14 NCAA-licensed videogames is considerably smaller than the number
15 of student-athletes who actually played for a Division I football
16 team during the class period. Plaintiffs have not offered a
17 feasible method for determining on a class-wide basis which
18 student-athletes are depicted in these videogames and which are
19 not.⁷ This makes it impossible to determine who is a member of
20 the Damages Subclass without conducting thousands of
21 individualized comparisons between real-life college football
22 players and their potential videogame counterparts.

23 Plaintiffs have also failed to present a feasible method for
24 determining on a class-wide basis which student-athletes appeared
25 in game footage during the relevant period. Under Plaintiffs’
26 proposed class definition, the only student-athletes who belong in

27
28 ⁷ Using players’ jersey numbers is not an option because NCAA teams frequently allow multiple players to wear the same jersey number.

1 the Damages Subclass are those who appeared in game footage
2 licensed after July 21, 2005. Plaintiffs have not proposed a
3 straightforward method for identifying this subset of student-
4 athletes. Although they point to various third-party resources
5 containing information such as team rosters, game summaries,
6 televised game schedules, and broadcast licenses, they have not
7 provided any formula for extracting the relevant information from
8 each of these resources and using that information to identify
9 putative subclass members. In particular, Plaintiffs have not
10 explained how they would determine which of the student-athletes
11 listed on team rosters actually appeared in televised games. Nor
12 have they explained how they would determine which games were
13 broadcast pursuant to licenses issued after July 21, 2005.
14 Without a means of accomplishing these tasks on a class-wide
15 basis, Plaintiffs would have to cross-check thousands of team
16 rosters against thousands of game summaries and compare dozens of
17 game schedules to dozens of broadcast licenses simply to determine
18 who belongs in the Damages Subclass. This is not a workable
19 system for identifying class members.

20 In light of these obstacles to manageability, class
21 resolution does not provide a superior method for adjudicating
22 this controversy. Accordingly, certification of the Damages
23 Subclass under Rule 23(b) (3) is denied.

24 III. Evidentiary Objections

25 The NCAA's objections to the testimony of Plaintiffs'
26 experts, Dr. Noll and Larry Gerbrandt, are overruled. Each of
27 these witnesses offered relevant testimony regarding whether the
28 question of antitrust liability can be resolved through class-wide

1 proof and analysis and each witness based his opinions on a
2 sufficiently reliable methodology. This is enough to satisfy
3 Federal Rule of Evidence 702. Primiano v. Cook, 598 F.3d 558, 564
4 (9th Cir. 2010) (requiring the trial court to "assure that the
5 expert testimony 'both rests on a reliable foundation and is
6 relevant to the task at hand'" (citations omitted)). While the
7 NCAA may question the strength of their analyses, the Ninth
8 Circuit has made clear that, under Rule 702, "Shaky but admissible
9 evidence is to be attacked by cross examination, contrary
10 evidence, and attention to the burden of proof, not exclusion."
11 Id.

12 CONCLUSION

13 For the reasons set forth above, Plaintiffs' motion for class
14 certification (Docket No. 651) is GRANTED in part and DENIED in
15 part. The Court certifies the following class under Rule
16 23(b) (2) :

17 All current and former student-athletes
18 residing in the United States who compete on,
19 or competed on, an NCAA Division I (formerly
20 known as "University Division" before 1973)
21 college or university men's basketball team or
22 on an NCAA Football Bowl Subdivision (formerly
23 known as Division I-A until 2006) men's
24 football team and whose images, likenesses
and/or names may be, or have been, included in
game footage or in videogames licensed or sold
by Defendants, their co-conspirators, or their
licensees after the conclusion of the
athlete's participation in intercollegiate
athletics.

25 Further, Antitrust Plaintiffs' attorneys are certified as class
26 counsel.

27 The NCAA's motion for leave to file a supplemental memorandum
28 regarding new evidence (Docket No. 881) is DENIED. The NCAA has

1 not explained why it was unable to obtain and present this
2 evidence during the extensive briefing on class certification. In
3 addition, the NCAA's request to present this evidence is moot
4 because the evidence pertains to the calculation and allocation of
5 damages, which is no longer relevant in light of the Court's
6 denial of class certification under Rule 23(b) (3).

7 Plaintiffs shall submit any dispositive motions, including
8 any Daubert motions, in a single twenty-five page brief within one
9 week of this order. The NCAA shall file its opposition and any
10 cross-motions in a single twenty-five page brief, including any
11 evidentiary objections it intends to raise, on or before December
12 5, 2013. Plaintiffs shall file their reply and opposition in a
13 single fifteen-page brief on or before January 6, 2014. The NCAA
14 shall file its reply in a single fifteen-page brief on or before
15 February 3, 2014. The Court shall hear all dispositive motions,
16 including all evidentiary objections, and hold a case management
17 conference at 2:00 p.m. on February 20, 2014.

18 IT IS SO ORDERED.

19
20 Dated: 11/8/2013



CLAUDIA WILKEN
United States District Judge