GLENN D. POMERANTZ (State Bar No. 112503)
glenn.pomerantz@mto.com
KELLY M. KLAUS (State Bar No. 161091)
kelly.klaus@mto.com
CAROLYN HOECKER LUEDTKE (State Bar No. 207976)
carolyn.luedtke@mto.com
ROHIT K. SINGLA (State Bar No. 213057)
rohit.singla@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

GREGORY L. CURTNER (*Pro Hac Vice*)
gcurtner@schiffhardin.com
ROBERT J. WIERENGA (State Bar No. 183687)
rwierenga@schiffhardin.com
KIMBERLY K. KEFALAS (*Pro Hac Vice)*
kkefalas@schiffhardin.com
SCHIFF HARDIN LLP
350 Main St., Suite 210
Ann Arbor, MI 48104
Telephone: (734) 222-1500
Facsimile: (734) 222-1501

Attorneys for Defendant
National Collegiate Athletic Association

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

IN RE NCAA STUDENT-ATHLETE NAME AND LIKENESS LICENSING LITIGATION

Case No. 09-CV-1967-CW

DEFENDANT NCAA'S OPPOSITIONS TO PLAINTIFFS' MOTIONS *IN LIMINE*

Judge: Hon. Claudia Wilken
Date: May 28, 2014, 2:00 p.m.
Courtroom: 2, 4th Floor

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

The National Collegiate Athletic Association ("NCAA") hereby opposes Plaintiffs' motions *in limine* filed with the Court on May 14, 2014, Dkt. 1063 ("APs' Motion").

MOTION #1: EXCLUDE NON-EXPERT LIVE WITNESSES FROM TESTIFYING IN THE NCAA'S CASE WHO WERE NOT MADE AVAILABLE FOR LIVE TESTIMONY IN PLAINTIFS' CASE-IN-CHIEF.

Plaintiffs filed this motion when they were seeking a jury trial, and their argument largely depends on the risk of jury confusion. In the context of a bench trial, this should not be a concern. Plaintiffs have identified three NCAA witnesses (Mark Emmert, David Berst, and Wallace Renfro) that they would like to call in their case-in-chief. The most efficient way to accomplish this is to permit Plaintiffs to leave their case-in-chief open for these three witnesses and conduct a full cross-examination of these three witnesses as part of Plaintiffs' case if the NCAA calls any of these witnesses during its case-in-chief. If the NCAA does not call one or more of these witnesses, Plaintiffs may submit the deposition testimony they designated for these witnesses just as they would have done in their case-in-chief.

The NCAA submits that this is the most efficient and fair procedure, and the least burdensome on witnesses and the Court. If, however, the Court would prefer to permit Plaintiffs to call these three witnesses live during their case-in-chief, the NCAA proposes the following:

First, the NCAA should be able to conduct a direct examination of any such witness before Plaintiffs examine the witness. This Court employed this procedure in the trial of the *Norvir* litigation, which Plaintiffs cite as the model for their proposal: "I think it really flows better if the plaintiff just lets the defendant take those witnesses on direct and then do all of its cross." *SmithKline Beecham Corp. v. Abbott Labs.*, No. 07-5702 (N.D. Cal.), Hr'g Tr. 7:9-14, Feb. 8, 2011. The NCAA proposed this approach in meet-and-confer, and Plaintiffs have offered no explanation for why the approach from *Norvir* would not make sense here.

Second, Plaintiffs must recognize that a given witness may have a good faith scheduling conflict that makes it impossible for them to testify in the Plaintiffs' case-in-chief. If that situation occurs, the NCAA submits that Plaintiffs may cross-examine that witness beyond the scope of the NCAA's direct examination when the witness is available to testify.

Third, Plaintiffs' motion suggests that they want to reserve the right to call additional

unnamed witnesses from the NCAA's witness list, including third parties, to testify in their case-in-chief. The NCAA objects to any effort by the Plaintiffs to leave their options open in this way. If Plaintiffs want any other NCAA witnesses for their case-in-chief, they should have identified them, or do so now. This will enable the NCAA to coordinate with the witnesses' schedules to see if earlier trial testimony dates are even possible. Plaintiffs are insisting, however, that they will not tell the NCAA which NCAA witnesses they want live in their case until the NCAA tells them which witnesses the NCAA will call live in its case. This is unreasonable. Plaintiffs' case proceeds first because they have the burden of proof. Plaintiffs should know at the outset of trial which witnesses they want to call during their case-in-chief. The NCAA, as the defendant, responds to Plaintiffs' proof. The NCAA has the right to decide *after* Plaintiffs' case-in-chief whether and when to call certain of its witnesses. Thus, the NCAA is not in a position to decide which witnesses it will call live until after the close of Plaintiffs' case.

MOTION #2: EXCLUDE TESTIMONY OF PREVIOUSLY UNDISCLOSED NCAA WITNESSES, OR REQUIRE THE NCAA TO PRODUCE THEM FOR DEPOSITION PRIOR TO TRIAL.

Plaintiffs' effort to exclude the testimony of nine third-party witnesses is meritless for many independent reasons.

First, the NCAA's Rule 26 disclosures were sufficient to inform Plaintiffs of the identity of each of these nine witnesses.[1] The NCAA disclosed that it would rely on the testimony of current and former members of the Division I Board of Directors and other Division I committees, like the Division I Amateurism Cabinet, and also that it would rely on the testimony of certain officers and employees of NCAA Division I member institutions. The specific membership and officers of the disclosed committees and institutions was both publicly available and contained in many of the documents that the NCAA produced in discovery. Each witness about which Plaintiffs now complain was disclosed in at least one of these categories, and Plaintiffs knew who they were. At most then, Plaintiffs are complaining that the NCAA should have individually

[1] The NCAA has withdrawn 3 of the witnesses that Plaintiffs seek to exclude, specifically Dustin Page, Kendell Spencer, and Wendy Walters. This leaves 9 at issue. *See* APs' MIL at 4, n.2.

named the publicly known members of each committee, rather than listing the committee itself. This is, at best, a harmless omission.

Second, the NCAA sought to re-open discovery after Plaintiffs added their broadcast claims and new plaintiffs six months after the close of discovery, which is what forced the NCAA to amend its Rule 26 disclosures with the new categories of witnesses. *Plaintiffs refused to reopen discovery*. Dkt. 851. They cannot now claim that they were unable to obtain discovery that they opposed, particularly when the newly added witnesses were a response to their new claims.

Third, Plaintiffs sat on these disclosures and never asked to depose any witnesses in any category. They cannot rely on their own silence as a ground to exclude relevant evidence from trial. The purpose of Rule 26 is to permit plaintiffs to obtain discovery, not to exclude evidence, as one of the cases cited by Plaintiffs explains in *rejecting* a challenge to a Rule 26 disclosure. *See Jang Sool Kwon v. Singapore Airlines*, No. C02-2590 BZ, 2003 WL 25686535, *2 (N.D. Cal. Nov. 7, 2003) (denying motion to exclude testimony of plaintiff's treating physician where initial disclosures had identified the clinic where the plaintiff was treated; noting that "Defendant's failure to obtain the records from the Hyun Sung Orthopedic Clinic or to depose Dr. Hong prior to the close of discovery suggests it is more interested in using the discovery rules to exclude evidence than to obtain discovery").

Fourth, the identity of each specific witness was already known to Plaintiffs through the course of the litigation. Where the identities of witnesses have "otherwise been made known" to Plaintiffs during the course of litigation, it "discharge[s] Defendants' duty to supplement their disclosures with respect to these [witnesses]." *Vieste, LLC v. Hill Redwood Dev.*, No. C 09-04204 JSW (DMR), 2011 WL 2181200, *3 (N.D. Cal. June 3, 2011) (quoting Fed. R. Civ. P. 26(e)). When a witness becomes known either through document discovery, deposition testimony, or otherwise, there is no further need to list that witness in a Rule 26 disclosure. *See* 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2049.4, at 313 (3d ed. 2010) ("[T]here is no need as a matter of form to submit a supplemental disclosure to include information already revealed by a witness in a deposition or otherwise through formal discovery").

As set forth below and summarized in Appendix A, there is no doubt that the nine

challenged witnesses were made known to Plaintiffs in the course of discovery and disclosed in categories contained within the NCAA's Rule 26 disclosures:

- Mary Sue Coleman: Dr. Coleman is the President of the University of Michigan, and she has served on the Division I Board of Directors. Former members of the NCAA Board of Directors and officers of the University of Michigan are both categories in the NCAA's Rule 26 disclosures. Further, she was identified by name repeatedly during the deposition of James Delany. Subsequently, in the Plaintiffs' brief on class certification, Plaintiffs themselves identified Coleman by name. Dkt. 799, at 7. Beyond this, Coleman is named in eight of Plaintiffs' own trial exhibits, including as a co-author of two of them, and also named in over 200 documents produced in discovery.
- Harris Pastides: Dr. Pastides is the President of the University of South Carolina, and he is a member of the Division I Board of Directors. The NCAA's Rule 26 disclosures listed both members of the Division I Board of Directors and officers of the University of South Carolina. He is named in over 1,000 documents produced in discovery; and even in an exhibit to Plaintiffs' motion for class certification, Dkt. 651. In addition, Pastides is quoted in the report of Plaintiffs' expert Dr. Ellen Staurowsky, and he appears in four of Plaintiffs' trial exhibits.
- Britton Banowsky: Mr. Banowsky is the Commissioner of Conference-USA, and he has served on the Division I Management Council and the Division I Committee on Academic Performance. Former members of these two NCAA committees and Personnel from Conference USA are both categories in the NCAA's Rule 26 disclosures. Moreover, he is named in over 4,000 documents produced in discovery; he is quoted by name in the report of Plaintiffs' expert Daniel Rascher; he was named in three documents filed by Plaintiffs as exhibits to their motion for class certification, Dkt. 651; and he is named in 13 of Plaintiffs' trial exhibits. Mr. Banowsky also submitted a declaration in support of Plaintiffs' motion to seal certain documents, Dkt. 918.

- David Brandon: Mr. Brandon is the Athletic Director of the University of Michigan. As such, he was disclosed as an officer or employee of the University of Michigan. In addition, he is named in over 400 documents produced in discovery; and he was quoted in the rebuttal report of the NCAA's expert Daniel Rubinfeld. He was named in two exhibits to Plaintiffs' motion for class certification, Dkt. 651 and Dkt. 820; and he is named in one of Plaintiffs' trial exhibits. Two additional documents on Plaintiffs' trial exhibit list refer to the "Athletic Director of the University of Michigan."
- Mark Hollis: Mr. Hollis is the Athletic Director of Michigan State University, and he has been the chair of the NCAA Amateurism Cabinet as well as a member of the Division I Men's Basketball Issues Committee. Members of these two NCAA committees and officers and employees of Michigan State were categories disclosed in the NCAA's Rule 26 disclosures. Further, Mr. Hollis is named in over 200 documents produced in discovery, many of which involve his role as the Chair of the NCAA Amateurism Cabinet; and he was identified as a source for the rebuttal report of the NCAA's expert Daniel Rubinfeld. He was named in two exhibits to Plaintiffs' motion for class certification, Dkt. 651 and Dkt. 820; and he is named in two of Plaintiffs' trial exhibits.
- Bernard Muir: Mr. Muir is the Athletic Director at Stanford University (the officers and employees of which were disclosed in the Rule 26 disclosures), and he has served on the Division I Championships Cabinet (the members of which were disclosed in the NCAA's Rule 26 disclosure). He is named in over 50 documents produced in discovery, and he is named in one of Plaintiffs' trial exhibits.
- Kevin Anderson: Mr. Anderson is the Athletic Director of the University of Maryland (the employees of which were included in the NCAA's Rule 26 disclosures). He has served on the Division I Men's Basketball Issues Committee (the members of which were disclosed in the NCAA's Rule 26 disclosure). He is

named in more than 200 documents produced in discovery, and he is named in two of Plaintiffs' trial exhibits.

- Michael Drake: Mr. Drake is the Chancellor of the University of California, Irvine. He is a member of the Division I Board of Directors. Both members of the Division I Board and officers of UC-Irvine are listed in the NCAA's Rule 26 disclosures. Mr. Drake is named in more than 500 documents produced in discovery, and he is named in two of Plaintiffs' own trial exhibits.
- Roderick McDavis: Mr. McDavis is the President of Ohio University. He is a member of the Division I Board of Directors and the Division I Committee on Academic Performance. He was thus disclosed in the NCAA's Rule 26 disclosures as a member of these committees and as an officer of Ohio. He appears in over 100 documents produced in discovery, and he is named in three of Plaintiffs' trial exhibits.

Fifth, six of the nine witnesses filed declarations in support of the NCAA's motion for summary judgment: Britton Banowsky, David Brandon, Mary Sue Coleman, Mark Hollis, Bernard Muir, and Harris Pastides. These declarations were filed over five months ago on December 12, 2013. After receiving these declarations, Plaintiffs were indisputably aware that these were potential trial witnesses, inasmuch as summary judgment is based on the evidence a party plans to introduce at trial. Yet, Plaintiffs made no attempt to seek depositions of any of these witnesses. Since December 2013, both Plaintiffs and the NCAA have sought and obtained targeted discovery on various issues, *e.g.*, the NCAA obtained three depositions of named Plaintiffs in March.[2]

Plaintiffs could have requested depositions of the NCAA's summary judgment declarants

[2] In January, more than a year after the close of discovery, Plaintiffs filed and won a motion to compel the NCAA to make a substantial additional document production regarding proposed changes to the Division I governance structure. The production was completed just a few weeks ago. Plaintiffs clearly intend to use some of these new documents at trial, and simple fairness demands that the NCAA be permitted to present witnesses to explain the governance changes and the surrounding decision-making process. For example, Plaintiffs' Proposed Trial Exhibit 2092 lists Michael Drake, Roderick McDavis, and Harris Pastides as members of the Division I Board of Directors who attended an August 2013 meeting where the governance proposal was discussed.

at any time, but they waited until their motions *in limine* a few weeks before trial when it was difficult to schedule depositions of these individuals given the academic calendar and their schedules. After receiving Plaintiffs' belated deposition demand, the NCAA nonetheless worked with these third-party witnesses to try to procure pre-trial deposition dates. The NCAA offered Bernard Muir, Harris Pastides, Kevin Anderson, Britton Banowsky, and Rod McDavis all for two-hour depositions starting May 23, 2014 and concluding June 5, 2014. The time limits were the result of the short notice and limited period of time prior to trial testimony. If Plaintiffs had requested depositions earlier, allowing for more notice, longer depositions could have been scheduled. The NCAA was working on trying to schedule the remainder of the requested depositions when Plaintiffs refused to proceed with *any* of these pre-trial depositions. Plaintiffs' refusal to proceed with these depositions (despite having numerous law firms across the country at their disposal) again demonstrates their interest in excluding evidence rather than taking discovery.

A party may not sit on its rights for months between summary judgment and trial, only to cry foul when summary judgment declarants are identified as trial witnesses. *See, e.g., Intel Corp. v. VIA Techs., Inc.*, 204 F.R.D. 450, 452 (N.D. Cal. 2001) (denying motion to strike summary judgment declarant and noting that the "pretrial process ordinarily heads off the present problem. If summary judgment is made before the end of the discovery period, the respondent may seek to depose a declarant, obtaining an adjournment for good cause. To the same end, if a summary-judgment motion is made after the end of the discovery period, the respondent . . . may request leave to re-open discovery upon a showing of good cause."); *Rodriguez-Garcia v. Municipality of Caguas*, 225 F.R.D. 67, 68 (D.P.R. 2004) (noting that party could have sought to depose other party's summary judgment declarant in the three months between summary judgment and pretrial motions, and that "[n]ot having done so, they cannot now claim that they were precluded from deposing [the declarant]").

MOTION #3: EXCLUDE TESTIMONY OF JOHN PAUL VACCARO.

John Paul "Sonny" Vaccaro is a former representative for Nike, Reebok, and Adidas who spent his career paying colleges and coaches to use his companies' equipment, and who was a

founding father of summer basketball camps for high school students to be recruited to play college basketball. He has boasted publicly of being a driving force behind this case. He was deposed. Mr. Vaccaro has regularly attended hearings in this case and posed for pictures outside the courthouse with Plaintiffs' counsel. He undoubtedly will attend the trial. There is no credible argument that testifying will be inconvenient for Mr. Vaccaro.

Plaintiffs' argument that his testimony is irrelevant is also specious:

First, Mr. Vaccaro's testimony is relevant for the fact-finder to assess what the NCAA expects will be the named Plaintiffs' testimony about their purpose and goals in this litigation. Plaintiffs will get up on the stand and say they are pursuing this litigation for altruistic purposes, having given up their damage claims. The NCAA is entitled to challenge the motivation for this case by questioning the man that Ed O'Bannon himself says is "behind" this case:

> I wouldn't be here today if it wasn't for him . . . . He's 100 percent engulfed in it. This is his baby. That's why I think this case will succeed. Because he's behind it.[3]

Plaintiffs' counsel have also said: "Every cause starts with and needs a catalyst . . . [Mr. Vaccaro] has performed that function most admirably and necessarily."[4] And numerous plaintiffs testified that Mr. Vaccaro was involved in their decision to join this litigation.

Plaintiffs will also complain about the commercialization of college sports, as if they seek to limit that commercialization. The fact-finder should hear that Mr. Vaccaro, the man "behind" this litigation, has spent his career trying to *increase* the commercialization of college sports:

> Q. You're the guy who supplied the money. You're the guy who knew the coaches, had the network of people, had the talent and contacts to get close to the kids. **You made it possible, this commercialization.**
>
> A. **Yes, I'm proud. I'm honored.** I did a good job for my employer, [Nike CEO] Phil Knight, at that time. Absolutely. **We**

[3] J. Brady McCollough, One-man rebellion: Sonny Vaccaro takes on the NCAA, *Pittsburgh Post-Gazette*, June 16, 2013, *available at* http://www.post-gazette.com/sports/Pitt/2013/06/16/One-man-rebellion-Sonny-Vaccaro-takes-on-the-NCAA/stories/201306160231.

[4] *Id.*

did nothing wrong.[5]

To place in context Plaintiffs' allegation that the NCAA has permitted the commercialization of college sports and provide a complete picture of what the world of college athletics will look like under Plaintiffs' proposed relief, the NCAA is entitled to question the man "behind" this litigation regarding the goals and plans for college sports should plaintiffs prevail. The trier of fact should see whether the goal of this litigation is to place control of college sports in the hands of people like Mr. Vaccaro, as opposed to colleges and athletes.

Plaintiffs say that the NCAA is bent on "creating the false appearance of an ethical violation." APs' Motion at 6. Not so. The NCAA should have the opportunity to develop a clear record about how this litigation came about and why Plaintiffs are involved in it. Plaintiffs claim that the NCAA seeks to harass Mr. Vaccaro, but he has not told the Court that he feels harassed. To the contrary, he has intentionally inserted himself into this case.

If Plaintiffs do not wish to offer any testimony on their objectives in bringing suit or claim that they seek to reduce the commercialization of college sports, the NCAA will withdraw its opposition to this part of Plaintiffs' motion.

Second, Mr. Vaccaro's experience running high school basketball camps is also relevant to showing there is no cognizable market for the licensing of student-athlete NILs, that amateur athletes are not paid for their "NILs" for these purposes. Mr. Vaccaro himself did not pay these athletes to use their images to promote his businesses over many decades. The programs and website for his camps contained the names and images of current and former high school student-athletes who participated in them—including NBA stars such as Kobe Bryant of the Los Angeles Lakers and LeBron James of the Miami Heat—and were sponsored by numerous corporations, including Electronic Arts, the NCAA's alleged co-conspirator. *See* Trial Exhibits 621-628. Plaintiffs have included several programs, *see*, *e.g.*, Trial Exhibits 10 (UCLA), 137 (Stanford), 1051 (Clemson), 2449-2451 (Final Four and BCS National Championship), and thus apparently

[5] Interview—Sonny Vaccaro, PBS *Frontline*, *available at* http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/sonny-vaccaro.html (emphases added).

intend to argue that these are media where their NIL has been improperly used without their consent. Yet, Mr. Vaccaro testified that he "never thought" about paying, and did not pay, any of the participants for using their NIL in the programs. Vaccaro Dep. at 45:19-46:13, 47:3-13, 52:24-56:6, 57:12-22, 58:14-59:19. That is evidence that there is no market for these NILs.

Plaintiffs' argument for excluding this evidence is that this case "does not involve any restraint relating to high school students." APs' Motion at 6. That is both incorrect and immaterial. Plaintiffs' theory is that without the NCAA's rules, amateur athletes will be paid for their NILs. Mr. Vaccaro himself demonstrates that is incorrect. Evidence that a sports organization does not obtain consent of current or former athletes to use their image in material promoting the organization itself is certainly relevant to industry practice regarding whether or not such uses are commercial and thus actionable under state law and the First Amendment. The Court's summary judgment order recognizes this as a key issue in this litigation. *See* Dkt. 1025 at 26.

MOTION #4: EXCLUDE PERCIPIENT WITNESSES, EXCEPT FOR ONE PARTY REPRESENTATIVE, FROM THE COURTROOM UNLESS THEY ARE TESTIFYING.

During the meet-and-confer process, the NCAA clarified that Plaintiffs do not dispute that the NCAA may have a corporate representative present at trial, who may testify. Rule 615 permits a party to have "an officer or employee" present. Fed. R. Evid. 615(b). The NCAA previously asked Plaintiffs to agree to allow the NCAA to bring an additional testifying corporate representative to be present during trial, but now withdraws that request. Pursuant to the parties' agreement, the NCAA may have one testifying corporate representative present during the trial.

MOTION #5: EXCLUDE EVIDENCE OF FAILURE TO MITIGATE.

Plaintiffs have withdrawn this motion.

MOTION # 6: PRECLUDE EVIDENCE AND ARGUMENT THAT THERE IS NO RESTRAINT ON FORMER COLLEGE ATHLETES.

Plaintiffs have withdrawn this motion.

MOTION # 7: PRECLUDE SPECULATIVE TESTIMONY FROM CONFERENCE COMMISSIONERS AND UNIVERSITY ADMINISTRATORS.

In a trial that will largely focus on the effects of NCAA rules, Plaintiffs seek to exclude the

testimony of the witnesses with the most firsthand experience of these rules—university administrators and NCAA conference commissioners.

Plaintiffs first suggest that this testimony is irrelevant. That is wrong. In evaluating the effects of the NCAA's rules, the percipient testimony of the people who observe the effects of these rules on a daily basis is indisputably relevant. *See Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905, 2008 WL 504098, *4 (N.D. Cal. Feb. 19, 2008) (noting that "the rules of evidence have long permitted a person to testify to opinions about their own businesses based on their personal knowledge of their business"); *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 81 (3d Cir. 2009) ("When a lay witness has particularized knowledge by virtue of her experience, she may testify—even if the subject matter is specialized or technical—because the testimony is based upon the layperson's personal knowledge rather than on specialized knowledge within the scope of Rule 702.").

Plaintiffs also claim the testimony will be "self-serving." Plaintiffs do not identify how any of the NCAA's university and conference witnesses have any personal interest in this case that would render their testimony self-serving, but that is beside the point. Whether testimony is self-serving goes to its weight, not its admissibility. If self-serving testimony were inadmissible, then none of the Plaintiffs should be permitted to testify.

Plaintiffs next argue that this testimony is impermissible lay opinion. In the first place, the witnesses will provide percipient factual testimony regarding their observations and experience administering various aspects of collegiate athletics, including their personal observations of how NCAA rules affect their colleges and conferences. Moreover, Plaintiffs are wrong on the law. A lay witness may offer opinions based on particular experience in a business or industry. *See*, *e.g.*, *United States v. Maher*, 454 F.3d 13, 24 (1st Cir. 2006) ("Rule 701, on the other hand, is meant to admit testimony based on the lay expertise a witness personally acquires through experience, often on the job."); *United States v. Valencia*, 600 F.3d 389, 416 (5th Cir. 2010) ("Because Labhart's knowledge and analysis were derived from duties he held at Dynegy, his opinions were admissible as testimony based upon personal knowledge and experience gained while employed by Dynegy. He engaged in precisely the kind of analysis he regularly performed as chief risk officer; the fact

that he drew particular opinions and projection for the purposes of this case does not make him an 'expert' within the meaning of Federal Rule of Evidence 702."); *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1223 (11th Cir. 2003) ("Tampa Bay's witnesses testified based upon their particularized knowledge garnered from years of experience within the field. Their testimony was helpful to the district judge and relevant to the issues presented in the case.").[6]

As especially relevant here, the Ninth Circuit has held that lay opinion testimony from witnesses with industry experience is admissible and probative of the likely effects on competition from the elimination of an existing restraint. *See California Dental Ass'n v. FTC*, 224 F.3d 942 (9th Cir. 2000). Applying the rule of reason, the court in that case upheld an agreement to limit advertisements by California dentists on the basis of the defendant's evidence of "plausibly procompetitive justifications for the restrictions." *Id.* at 949. The defendant's evidence largely consisted of testimony from people in the dental industry about what might happen absent the restraint. *See id.* at 949 n.5 (quoting a dentist's testimony that the restraint "protects the public more from advertising they might see that is misleading to them. And if you don't have that, then consumers, you know, will be misled by, you know, some unscrupulous people out there."); *id.* at 956 (quoting testimony of a dental marketing officer that allowing certain types of advertisements would "cause seniors to come in, even though they don't know specifically what the deal is").

California Dental establishes that an antitrust defendant may introduce testimony of lay witnesses who are familiar with the industry about the effects of removing a particular restraint. This is an application of the general rule that an experienced witness may testify about existing

---

[6] In a footnote, citing an unpublished Ninth Circuit memorandum, *Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev. Inc.*, 371 F. App'x 719, 721 (9th Cir. 2010), Plaintiffs argue that lay opinion is not admissible unless based on sensory perception. That is a misreading of the decision. In *Plush Lounge*, the district court struck the testimony of two lay witnesses who purported to "define the relevant market"—an highly technical issue requiring understanding of economics and law—without explaining their methodology or explaining what relevant training they had, and the Ninth Circuit held this exclusion was not an abuse of discretion. Here, the NCAA has separate expert testimony regarding market definition. Its witnesses will testify regarding their experiences and observations and about the practices they have experienced within the relevant market.

conditions regarding the witness's business and answer questions about how that business would change if those conditions were different. *See, e.g., United States v. Hill*, 643 F.3d 807, 841 (11th Cir. 2011) (district court properly permitted lay witnesses with experience in the financial industry to "testify about what their institutions would have done had they known that several representations in various loan applications were falsified"). The NCAA's witnesses will testify about their knowledge of the effect of the NCAA's rules within the industry about which they are indisputably knowledgeable and experienced, and about the effect on that same industry of removing those rules.

MOTION # 8: PRECLUDE EVIDENCE OF OFFSETS.

Plaintiffs have withdrawn this motion.

MOTION # 9: PRECLUDE EVIDENCE OF AGGREGATE COLLEGE GRADUATION RATES.

Plaintiffs seek to exclude the NCAA from referencing the graduation rates of all student-athletes (as opposed to the graduation rates of student-athletes within football and men's basketball). During meet-and-confer, the NCAA proposed that both parties agree not to introduce aggregate student-athlete graduation rate statistics. Plaintiffs refused. Apparently, the Plaintiffs want to reference this evidence but preclude the NCAA from doing so. This makes no sense and suggests that Plaintiffs believe that evidence of aggregate rates are relevant to some issue.

The fact-finder will have to decide how to weigh and interpret evidence of different graduation rates. Both parties can introduce the types of graduation rate data that they believe are relevant and accurate. Both parties can cross-examine each other's witnesses regarding this data. And both parties can make their arguments about the flaws they believe exist in the other side's data. Plaintiffs' effort to limit the evidence to the statistics they like, or to permit them to elect which statistics are presented, should be denied.

Alternatively, both sides should be precluded from relying on this evidence.

MOTION # 10: PERMIT PRESENTATION OF NLRB FACTUAL FINDINGS.

For the reasons set forth in the NCAA's Motion *in Limine* No. 3, the NLRB decision should be excluded as irrelevant hearsay.

Plaintiffs cite only two cases for the proposition that the NLRB Regional Director's factual findings are admissible under the hearsay exception for public records, *Option Resources Group v. Chambers Development Co.*, 967 F. Supp. 846 (W.D. Pa. 1996), and *Baldwin v. Rice*, 144 F.R.D. 102 (E.D. Cal. 1992). Both cases are distinguishable from the cases directly on point that the NCAA has cited.

First, in both *Option Resources* and *Baldwin*, the courts permitted plaintiffs to introduce agency decisions against defendants that had been party to the agency proceedings. *Second*, in both cases, the findings at issue had been finally adjudicated by the agency. The defendant in *Option Resources* settled with the SEC. 967 F. Supp. at 847-48. And in *Baldwin*, the agency had affirmed the findings of the administrative law judge on appeal. 144 F.R.D. at 104.

Neither circumstance is present here. The NCAA was not a party to the NLRB proceeding involving Northwestern, and the full NLRB in Washington will be considering the Regional Director's findings on appeal to determine "the correct result." In those circumstances, as set forth in the NCAA's motion, courts in this District and elsewhere have held that findings of administrative agencies are inadmissible hearsay and should, in any event, be excluded under Rule 403. This Court should do the same.

MOTION # 11: PRECLUDE EVIDENCE AND ARGUMENT REGARDING THE OTHER SPORTS JUSTIFICATION AND REQUIRE AN OFFER OF PROOF ON THE INTEGRATION JUSTIFICATION.

A. Excluding Evidence and Argument on the Other Sports Justification.

The NCAA disagrees with Plaintiffs that the Court's summary judgment order finding that support for women's sports or less prominent men's sports is not a legitimate pro-competitive justification means that the NCAA cannot even "*mention* benefits for women's sports or less prominent men's sports" at trial. APs' Motion at 15 (emphasis added). Regardless of whether it is itself a procompetitive justification, the evidence regarding these sports may be relevant and admissible on many other issues.

1. A Complete Picture of College Sports Finances Is Relevant

Plaintiffs will seek to prove at trial that there is excess money in the college sports system that should be reallocated to men's basketball and football student athletes. They will seek to

argue that colleges are "rolling" in money and characterize colleges as wasting money received from men's basketball and football programs. The NCAA must have the opportunity to respond by providing a complete record about the finances of college athletics.

For instance, in their "Statement of Disputed Factual Issues" in the Joint Pretrial Statement, Plaintiffs claim that the "NCAA and its co-conspirators have collectively reaped billions of dollars in revenue from the licensing" of their NIL. Dkt. 1071, at 8. To prove as much, Plaintiffs have listed as trial exhibits IRS financial forms for the NCAA as well as for the conferences that earn the most licensing revenues—the ACC, Big 12, Big East, Big Ten, Pac-12, and SEC conferences. *See* Trial Exhibits 2311-2339. For the Court to consider these arguments, it needs evidence and testimony about where the money that Plaintiffs seek is currently spent, and that story must necessarily include references to other sports.

Further, Plaintiffs have designated as trial witnesses experts that seek to offer numerous opinions based on the finances of college sports. Under the heading, "How Money is Generated," Plaintiffs' expert Dr. Ellen Staurowsky provides tables with the television licensing revenues for football and men's basketball, the value of college footwear and apparel agreements (which are not in this case), the supposed "valuation" of major football programs, the salaries of college and professional football and basketball coaches (again, not relevant to the case and the subject of the NCAA's Motion *in Limine* No. 8), and the cost of various athletics facilities on college campuses. Dkt. No. 898-20 at 7-25. Her conclusion? "A growing chorus of leading figures in college sports recognizes that it is untenable for universities, conferences and the NCAA to obtain ever-increasing revenues from college sports—now billions of dollars annually—while prohibiting the athletes whose efforts produce those revenues from receiving any share." *Id.* at 23. If this testimony is allowed (which it should not be, *see* Motion *in Limine* No. 6), then the NCAA must be allowed to tell the complete story about college athletics department finances.

These experts also opine that the "excess profit being created by the restraint on group NIL payments is already being spent by the university" on "coaches and lavish training facilities used to help recruit the best athletes," and on executives at the NCAA. Rascher Reply Report at ¶ 54; *see also id.* at ¶¶ 73-78; Rascher Merits Report at ¶¶ 107-118 ("Ironically, some of the money that

would go to compensate athletes for their NILs (and thus for damages) is instead spent on salaries of the people paid to prevent athletes from being compensated for their NILs."); Dkt. 896-11 (Noll Merits Report) at 105-113. Indeed, in meet-and-confer, Plaintiffs informed the NCAA that they would oppose the NCAA's Motion *in Limine* No. 8 to preclude evidence on university employee salaries because they believe the evidence is relevant to show how colleges spend the money they want Plaintiffs to receive.

Plaintiffs cannot present a one-sided picture of colleges and college athletics. If they are permitted to make any of the above arguments, the NCAA must be permitted to respond by showing exactly how colleges are really spending the money at issue.

2. Other Sports Are Relevant to Whether Plaintiffs Can Show That Paying Student-Athletes Would Not Significantly Increase Costs

Evidence regarding other sports is relevant because, to the extent that a less restrictive alternative is relevant, Plaintiffs have the burden to prove that paying student-athletes 50% of television licensing revenue would be "virtually as effective in serving the legitimate objective *without significantly increased cost*." *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (emphasis in original) (internal quotation marks omitted). According to Plaintiffs, their supposed alternative would result in millions of dollars in cash payments to football and men's basketball student-athletes.

In these circumstances, the NCAA's trial witnesses will testify based on decades of experience in university and athletics administration that providing these payments to male student-athletes without providing significant additional resources to female student-athletes would be inconsistent with their commitment to gender equity and Title IX. Dkt. 928-1 at 9-16 (Sweet Rebuttal Report) ("[I]n my experience as an athletics director and in working with universities on implementing Title IX, I believe universities would and should consider Title IX and gender equity if they were to pay football and men's basketball players any of the school's broadcast revenue."); Dkt. 921-6 (Brandon Decl.) at ¶ 17 ("[S]erious thought would have to be given to how such actions could affect U-M's ability to maintain its commitment to gender diversity in sports and our Title IX obligations."); Dkt. 922-2 (LeCrone Decl.) at ¶ 19 ("Based on

my experience in higher education and college athletics, I know that the conference and its member schools have obligations under Title IX to promote gender equality in collegiate athletics. Paying male athletes for their participation in sports would seriously undermine the objectives of Title IX and Horizon League member schools' ability to remain in Title IX compliance, and/or could result in Horizon League members reducing additional men's sports and participation opportunities."). In other words, the NCAA has compelling evidence that the true cost of Plaintiffs' "less restrictive alternative" is perhaps twice as much as they are suggesting.

Plaintiffs' experts do not rebut this testimony. The most they can say is that "it is an open question whether the sorts of payments in suit, which are not necessarily a form of financial assistance but rather a share of royalty payments, are even subject to Title IX's gender equity rules." Rascher Merits Report at ¶ 197. But this Court need not decide as a matter of law whether that is so to conclude that evidence regarding other sports is relevant. The NCAA's witnesses' testimony that their commitment to gender equity and desire to reduce the risk of Title IX liability is relevant to whether paying football and men's basketball student-athletes would impose a "significantly increased cost," *Cnty. of Tuolumne*, 236 F.3d at 1159, and, therefore, to whether plaintiffs have identified a less restrictive alternative (to the extent one is relevant).

3. Other Sports Improve the College Experience for All Students, Including Football and Men's Basketball Student-Athletes, Which is Procompetitive

Evidence regarding other sports also shows that when a school offers a broad base of sports (beyond just football and men's basketball), it improves the quality of the educational experience for all students, including football and men's basketball student-athletes, which is a classic procompetitive benefit. *See* Dkt. 1025 at 36-37 (citing *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993)). In other words, schools provide a better "product" to high school recruits looking to play men's basketball or football—and to those students who choose to matriculate—if that school can point to a well-rounded, high quality array of women's sports and other men's sports. The NCAA is entitled to present evidence that having robust programs and opportunities for student-athletes in numerous sports other than football and men's basketball creates a diverse student body and enhances the college experience for football and men's

basketball SAs and all students. Plaintiffs can hardly deny this when the Plaintiffs who are current student-athletes have Tweeted for the world to see that they enjoy supporting and interacting with fellow students in these sports: they attend women's softball games, watch women's soccer games in their locker rooms, and cheer on their friends on these and other teams.[7]

This simply confirms testimony from school and conference witnesses about student-athletes learning from and enjoying supporting each other. *See*, *e.g.*, Dkt. 921-8 (Coleman Decl.) at ¶ 16 (testifying that "reduced opportunities for young female and male student-athletes to experience and obtain a Michigan education" would mean "fewer sports for Michigan fans and alumni to enjoy"); Dkt. 921-9 (Delany Decl.) at ¶ 16 ("It would also mean a loss of the valuable diversity that we have built over the years in the Big Ten."); Dkt. 922-1 (Hollis Decl.) at ¶ 10 ("While our student-athletes have unique talents, their purpose on campus and our purpose in giving them the opportunity to join our university is the same as with any other student: to use the resources of our university, *including each other*, to learn and grow as much as possible.") (emphasis added); Dkt. 922-3 (Muir Decl.) at ¶ 10 ("In my opinion, support and camaraderie fostered in the Stanford culture greatly enhance the student-athlete experience and this culture will be dealt a serious blow if football and men's basketball student-athletes are paid. I believe it would be difficult, if not impossible, to maintain the type of cross-sport support and camaraderie with the type of caste system that would be created if some student athletes are paid.").

4. Other Sports Are Relevant to the NCAA's Output Justification

Evidence regarding other sports is relevant to the NCAA's output justification. Plaintiffs do not dispute, and are not challenging, that NCAA rules require Division I member institutions to field teams in 14-16 sports, not just football and men's basketball. These rules are designed to maximize the number of opportunities for young men and women to participate in, and obtain the

[7] *See*, *e.g.*, https://twitter.com/iKick_/status/440228532854067200; https://twitter.com/Moses_Alipate12/status/254706509055942656; https://twitter.com/Moses_Alipate12/status/447826403803688960; https://twitter.com/ArizonaWSoccer/status/400392697279574016; https://twitter.com/iKick_/status/398564797106515968/photo/1; https://twitter.com/iKick_/status/392080251775242240; https://twitter.com/iKick_/status/391342709702545408/photo/1.

educational benefits from, intercollegiate athletics. As the NCAA's witnesses have explained, NCAA member institutions use revenues from football and men's basketball to support programs in these other sports. *See*, *e.g.*, Dkt. No. 921-3 at ¶ 13 (Banowsky Decl.) ("Broadcast revenues from C-USA are used by member institutions for … other athletics programs costs and is not limited to football and men's basketball); Dkt. 921-6 (Brandon Decl.) at ¶ 14 ("[A]ll of the revenues that our sports generate are put into a pot and used to support all 29 NCAA teams and 900 student-athletes, regardless of whether a particular sport has an ability to sustain itself financially."); Dkt. 922-3 (Muir Decl.) at ¶ 14 (testifying that "revenue generated by football and men's basketball help to create opportunities for student-athletes in the other 34 sports that do not generate significant revenue or, as is the case with most sports, generate no revenue at all"). If these institutions can no longer afford to do so after paying 50% of these revenues to SAs in football and men's basketball, these institutions will no longer be able to provide the robust array of opportunities required to qualify for Division I. That will reduce the output of opportunities for football and men's basketball SAs in the class to participate in Division I football and men's basketball. *See*, *e.g.*, Dkt. No. 922-10 at ¶¶ 20-21 (Welty Decl.) ("It is a possibility that Fresno State … might cease playing Division I or Football Bowl Subdivision sports entirely. It may very well be the case that Fresno State would eliminate football rather than be forced to eliminate the balance of its athletic programs to keep football.").

That result would be anticompetitive, not procompetitive. Accordingly, evidence regarding other sports is relevant to the NCAA's output justification as well.

B. Requiring Offers of Proof on Other Procompetitive Benefits.

Plaintiffs' request to require the NCAA to make an offer or proof on each of its four remaining procompetitive justifications should be denied. It is an improper attempt to reargue summary judgment motions that the Court has already denied in the guise of motions in limine.

The Court has already analyzed some of[8] the NCAA's proof regarding amateurism and

[8] We note that since the Plaintiffs did not seek summary judgment on the procompetitive justifications, the NCAA was not required to and did not introduce all of its evidence on each point into the summary judgment record.

concluded that a "reasonable fact-finder could conclude" from the NCAA's survey evidence that its rules "serve[] a procompetitive purpose" and cited "conflicting expert evidence regarding the alleged procompetitive benefits of the NCAA's definition of amateurism." Dkt. 1025 at 31-32.

The Court has already analyzed the NCAA's proof regarding competitive balance and concluded that because "NCAA has presented some evidence that the challenged restraint promotes competitive balance, Plaintiffs are not entitled to summary judgment on this issue." *Id.* at 35.

The Court has already analyzed the NCAA's proof on output and found evidence "sufficient to create a factual dispute as to whether or not the increased output benefits the NCAA has identified are legitimately procompetitive." *Id.* at 41.

The Court has also analyzed the NCAA's evidence on the integration of athletics and academics—which benefits competition by, among other things, improving educational quality for the athletes themselves. Plaintiffs are incorrect that this Court's summary judgment order required an offer of proof before trial commences. The order suggests that the NCAA's evidence on the rules' impact on *other* students may not be relevant but recognizes it would be relevant to present evidence of how "(1) the ban on student-athlete compensation actually contributes to the integration of education and athletes and (2) the integration of education and athletics enhances competition in the 'college education' or 'group licensing' market." *Id.* at 38 There is no requirement in that order, nor should there be a requirement, that this evidence be submitted in advance of trial, particularly where it is a bench trial. Nor would any such requirement serve any purpose. The NCAA will present its evidence on this issue at trial, and the Court can then rule on whether it was sufficient.

Plaintiffs are themselves proceeding to trial despite a complete dearth of evidence on several key aspects of their claims. Plaintiffs still have not presented any evidence that any state statute or judicial decision recognizes a right to control the use of one's NIL in the live broadcast of a sporting event. Plaintiffs will be able to try claims regarding footage even though they "have not presented evidence to define a clear market for clips and highlight footage" of SAs "to produce unprotected, commercial speech." *Id.* at 25. And Plaintiffs will be able to present their theory of a

continuing violation even though they have "failed to identify any evidence" of overt acts during the limitations period. *Id.* at 14.

The point is not to reargue this Court's rulings. The point is that the parties have exchanged and are well aware of each other's theories and proof. They should prepare to present those at trial rather than repeat their evidentiary submissions on summary judgment.

MOTION # 12: PRECLUDE EVIDENCE AND ARGUMENT REGARDING SINGLE ENTERPRISE DEFENSE.

Plaintiffs' motion in *limine* conflates the law regarding single enterprises and the law regarding joint ventures, which are two distinct concepts in antitrust law. The NCAA will not introduce evidence at trial that it is a single enterprise, as that doctrine is understood separate from joint venture law. However, Plaintiffs further suggest that the NCAA should not be allowed to present evidence that it is a joint venture. This is an effort to obtain summary judgment in the guise of a two-page motion in *limine*. It is also wrong.

The Supreme Court in *Board of Regents* ("*BoR*") found that the NCAA was a legitimate joint venture. Indeed, the Court held that sports organizations are the "leading example" of "activities [that] can only be carried out jointly," because sports require "rules on which the competitors agreed to create and define the competition to be marketed." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (internal quotation marks omitted). Plaintiffs' own expert acknowledges that the NCAA is "appropriately described as a joint venture that has, like other joint ventures, certain aspects that must be agreed upon." Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: "Amateurism" in Big-Time College Sports,* Antitrust (Spring 2000).

The Supreme Court in *BoR* concluded, however, that the NCAA's limitations on the number of televised games under the Rule of Reason were not core to the venture's activities. *BoR*, 468 U.S. at 102-103; *id.* at 117 ("The specific restraints . . . that are challenged in this case do not, however, fit into the same mold as do" NCAA eligibility and competition rules). Because the restriction was not core to the venture's activity, the restriction on televised games were subject to a full Rule of Reason analysis (and ultimately condemned). Critically, the television

restrictions were not subject to *per se* condemnation—precisely because they might be ancillary to the NCAA's legitimate joint venture activities. *Id.* at 117 ("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 petitioner and its member institutions seek to market is to be preserved.").

The same applies to *Law v. NCAA*, 134 F.3d 1010, 1018-19 (10th Cir. 1998). It did not hold that the NCAA is "not a joint venture," as Plaintiffs suggest. Rather, it held that "the NCAA does not operate as a joint venture *for the purposes of hiring assistant basketball coaches.*" *Id*. at 1018 n.10 (emphasis added). It deemed the restrictions on coach salaries, like the restriction on television contracts at issue in *BoR*, not at the core of "enabling college [sports] to preserve its character." *BoR,* 468 U.S. at 102. The court thus proceeded to examine an NCAA rule restricting compensation to coaches under the Rule of Reason. But again, the court specifically did not apply a *per se* analysis because the NCAA was considered to be a legitimate joint venture to which the challenged restraint was ancillary.

There is thus no basis for finding that the NCAA is precluded from contending and introducing evidence that it is a legitimate joint venture—the equivalent of a summary judgment ruling. No court has ever so held.

Indeed, *BoR* and its progeny establish that if a joint venture's restraint "involves the core activity of the joint venture itself," then it is *presumptively procompetitive*. *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). In *BoR*, the Supreme Court found that the NCAA's core functions included "enabling college football to preserve its character, and as a result enabling a product to be marketed which might otherwise be unavailable." 468 U.S. at 102. So the NCAA's eligibility restraints related to that core function have been consistently deemed procompetitive by the courts, including *Law*. *See id.* at 117 ("[i]t is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics" including rules on "the eligibility of participants."); *Agnew v. NCAA*, 683 F.3d 328, 344-45 (7th Cir. 2012) 344-45 ("[t]he NCAA's limitation on athlete compensation *beyond* educational expenses . . . directly advances the goal of maintaining a clear line of demarcation between

intercollegiate athletics and professional sports" and is presumed to be procompetitive) (citation and internal quotation marks omitted); *Law*, 134 F.3d at 1018 ("The 'product' made available by the NCAA in this case is college basketball; the horizontal restraints necessary for the product to exist include rules *such as those forbidding payments to athletes* and those requiring that athletes attend class, etc.") (emphasis added).

Setting aside whether the restraints at issue here involve the core activity of the NCAA, there is no question that the NCAA's status as a joint venture is a critical part of this case.

MOTION # 13: PRECLUDE EVIDENCE AND ARGUMENT REGARDING AFFIRMATIVE DEFENSE OF CONSENT.

Once again, Plaintiffs seek to use a two-page motion *in limine* to obtain the equivalent of summary judgment on an important issue. The Court has already recognized the importance of consent, discussing the issue at length in ruling on summary judgment. *See, e.g.*, Dkt. 1025 at 21 (scope of Plaintiffs' supposed rights of publicity depends "on whether the student-athletes themselves validly transferred their rights of publicity to another party"). The Court's order makes clear that consent is an important issue for trial. Moreover, Plaintiffs' entire theory revolves around "group licensing" of student-athlete NILs. The question of consent, including what type of consent is needed and how licensing consent operates in the current market and would operate in a market absent the NCAA's challenged rules, is directly relevant to whether that alleged market even exists.

Plaintiffs cite a slew of cases concerning the possible unenforceability of waivers or releases of antitrust claims. But the issue of consent in this case has nothing to do with release or waiver of antitrust violations. The NCAA does not assert that its forms release or waive the right to seek antitrust damages—if there is an antitrust violation. Rather, the issue here is that the consent of student-athletes to, for example, play sports that they know will be shown on television eliminates any claim that their purported name, image, and likeness rights have been misappropriated and thus any claim that there has been an antitrust violation. Similarly, evidence regarding the degree to which college students freely consent to participate in collegiate athletics pursuant to the NCAA's rules is relevant to the existence of a relevant antitrust market. *See, e.g.*,

Person. v. Google, Inc., No. C06-7297 JS(RS), 2007 WL 1831111, *3 (N.D. Cal. June 25, 2007) ("The Supreme Court has explained that the relevant market for antitrust purposes is determined by *the choices available to consumers*.") (emphasis added), *aff'd,* 346 F. App'x 230 (9th Cir. 2009).

In other words, the issue of consent to the use of NILs is relevant to whether there is an antitrust violation to begin with. There is no claim of a release or waiver of an actual antitrust violation. None of the cases cited by Plaintiffs holds or even suggests that evidence regarding consent is inadmissible in an antitrust case. The evidence should be admitted, and the parties can argue to the Court about the legal implications of this evidence.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motions *in limine*.

Respectfully submitted,

DATED: May 23, 2014

MUNGER, TOLLES & OLSON LLP

By: */s/*
Rohit K. Singla

Attorneys for Defendant
National Collegiate Athletic Association

Appendix A to NCAA's Opposition to Plaintiffs' Motion in Limine No. 2

Witness	Title	On NCAA Committee Listed in Rule 26 Disclosure	School or Conference in Rule 26 Disclosure	Mentioned in Plaintiffs' Trial Exhibits	Submitted Declaration for Summary Judgment	Mentioned in 100+ Documents Produced in Discovery	Discussed in Plaintiffs' Briefs or Expert Reports
Mary Sue Coleman	President of Univ. of Michigan	✓	✓	✓	✓	✓	✓
Harris Pastides	President of Univ. of South Carolina	✓	✓	✓	✓	✓	✓
Britton Banowsky	Commis'r Conf-USA	✓	✓	✓	✓	✓	✓
Dave Brandon	Athletic Director of Univ. of Michigan		✓	✓	✓	✓	✓
Mark Hollis	Athletic Director of Michigan State	✓	✓	✓	✓	✓	
Bernard Muir	Athletic Director at Stanford	✓	✓	✓	✓		
Kevin Anderson	Athletic Director at Univ. of Maryland	✓	✓	✓		✓	
Michael Drake	Chancellor of UC-Irvine	✓	✓	✓		✓	
Rod McDavis	President of Ohio University	✓	✓	✓		✓	