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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

8 ORDER RESOLVING  
9 CROSS-MOTIONS FOR  
10 SUMMARY JUDGMENT;  
11 GRANTING MOTION TO  
12 AMEND CLASS  
13 DEFINITION;  
14 DENYING MOTION FOR  
15 LEAVE TO FILE  
16 MOTION FOR  
17 RECONSIDERATION  
18 (Docket Nos. 898,  
19 911, 933, 998)

20  
21 Plaintiffs, a group of current and former college athletes,  
22 bring this antitrust class action against Defendant National  
23 Collegiate Athletic Association (NCAA). They initially brought  
24 claims against Collegiate Licensing Company (CLC) and Electronic  
25 Arts Inc. (EA), as well, but agreed in September 2013 to settle  
26 those claims. Plaintiffs now move for summary judgment on all  
27 antitrust class claims against the NCAA. The NCAA opposes the  
28 motion and cross-moves for summary judgment on those claims.  
Amici curiae, Fox Broadcasting Company and Big Ten Network, LLC  
(collectively, Networks), filed a brief supporting the NCAA's  
summary judgment motion. After considering the parties'  
submissions and oral argument, the Court grants in part  
Plaintiff's motion for summary judgment and denies it in part and  
denies the NCAA's cross-motion for summary judgment. In addition,  
the Court grants Plaintiffs' motion to amend the class definition  
and denies their motion for leave to seek reconsideration of the  
Court's class certification order.

## BACKGROUND

1  
2 Plaintiffs are twenty-four current and former student-  
3 athletes who played for NCAA men's football or basketball teams  
4 between 1953 and the present. All played at the Division I level,  
5 the highest level of collegiate athletic competition,<sup>1</sup> and many  
6 went on to play professionally, as well. In the present case,  
7 four of the Plaintiffs (Right-of-Publicity Plaintiffs) allege that  
8 the NCAA misappropriated their names, images, and likenesses in  
9 violation of their statutory and common law rights of publicity.  
10 The other twenty Plaintiffs (Antitrust Plaintiffs) allege that the  
11 NCAA violated federal antitrust law by conspiring with EA and CLC  
12 to restrain competition in the market for the commercial use of  
13 their names, images, and likenesses. The instant motions address  
14 only the latter set of claims, which arise under the Sherman  
15 Antitrust Act, 15 U.S.C. §§ 1 et seq.

16 Antitrust Plaintiffs<sup>2</sup> initiated the first of these  
17 consolidated actions in 2009 and filed the operative Third Amended  
18 Consolidated Class Action Complaint (3CAC) in July 2013. Docket  
19 No. 832. They allege that the NCAA engaged in anti-competitive  
20 conduct by conspiring to sell or license the names, images, and  
21 likenesses of Division I men's football and basketball players,  
22 without their consent, for use in live television broadcasts,  
23 archival game footage, and NCAA-branded videogames featuring

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24  
25 <sup>1</sup> As noted in prior orders, Division I was known as the "University  
26 Division" prior to 1973. In college football, the division now consists  
27 of two subdivisions known as the "Division I Football Bowl Subdivision"  
28 (FBS) and the "Division I Football Championship Subdivision" (FCS). For  
the sake of simplicity, this order refers generally to all of these  
divisions as "Division I."

<sup>2</sup> Unless otherwise noted, all subsequent references to "Plaintiffs"  
in this order are meant to denote the twenty Antitrust Plaintiffs.

1 player-avatars modeled after real student-athletes. They accuse  
2 the NCAA, EA, and CLC of engaging "in an overarching conspiracy  
3 to: (a) fix the amount current and former student-athletes are  
4 paid for the licensing, use, and sale of their names, images, and  
5 likenesses at zero; and (b) foreclose current and former student-  
6 athletes from the market for the licensing, use, and sale of their  
7 names, images, and likenesses." 3CAC ¶ 14.

8 In 2012, Plaintiffs moved to certify a class of current and  
9 former Division I football and basketball players to pursue  
10 declaratory and injunctive relief. In particular, they sought an  
11 injunction barring the NCAA from enforcing any rules, bylaws, or  
12 organizational policies that prohibit current and former student-  
13 athletes from seeking compensation for the commercial use of their  
14 names, images, or likenesses. According to Plaintiffs, these  
15 rules, bylaws, and policies form an integral part of the NCAA's  
16 price-fixing conspiracy and operate to restrain competition in two  
17 distinct but related markets: (1) the "college education" market,  
18 in which Division I colleges and universities compete to recruit  
19 the best student-athletes to play football or basketball; and  
20 (2) the "group licensing" market, in which broadcasters and  
21 videogame developers compete for group licenses to use the names,  
22 images and likenesses of all student-athletes on particular  
23 Division I football and basketball teams in live game broadcasts,  
24 archival footage, and videogames. Id. ¶ 391.

25 Plaintiffs also moved to certify a subclass of current and  
26 former student-athletes to pursue monetary damages. Specifically,  
27 they sought compensation for the unauthorized use of student-  
28 athletes' names, images, and likenesses in broadcast footage and

1 videogames after July 2005, which is the earliest date on which  
2 Plaintiffs could recover damages under the Sherman Act's four-year  
3 statute of limitations. See 15 U.S.C. § 15b.

4 In September 2013, while their class certification motion was  
5 pending, Plaintiffs reached a settlement in principle with EA and  
6 CLC. The parties represented that this settlement would resolve  
7 all of Plaintiffs' pending antitrust and right-of-publicity claims  
8 against EA and CLC. Based on this representation, the Court  
9 vacated EA and CLC's remaining discovery and dispositive motion  
10 deadlines in October 2013 so that they could finalize the terms of  
11 their agreement and Plaintiffs could move for preliminary  
12 settlement approval. Docket No. 870. As of this date, the  
13 parties have yet to finalize their agreement and move for  
14 preliminary approval.

15 In November 2013, this Court issued its class certification  
16 order. Docket No. 893, Nov. 8, 2013 Order, at 23-24. The Court  
17 granted Plaintiffs' request to certify the injunctive relief class  
18 but denied their request to certify a damages subclass, citing  
19 various barriers to class manageability.

20 On November 15, 2013, one week after the class certification  
21 order issued, Plaintiffs filed the instant motion for summary  
22 judgment. The NCAA cross-moved for summary judgment one month  
23 later. While these motions were pending, Plaintiffs moved for  
24 leave to seek partial reconsideration of the class certification  
25 order and moved to amend the class definition in the class  
26 certification order.

## LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods:

The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential

1 element of its claim or defense to carry its  
2 ultimate burden of persuasion at trial.

3 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d  
4 1099, 1106 (9th Cir. 2000).

5 If the moving party discharges its burden by showing an  
6 absence of evidence to support an essential element of a claim or  
7 defense, it is not required to produce evidence showing the  
8 absence of a material fact on such issues, or to support its  
9 motion with evidence negating the non-moving party's claim. Id.;  
10 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);  
11 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If  
12 the moving party shows an absence of evidence to support the non-  
13 moving party's case, the burden then shifts to the non-moving  
14 party to produce "specific evidence, through affidavits or  
15 admissible discovery material, to show that the dispute exists."  
16 Bhan, 929 F.2d at 1409.

17 If the moving party discharges its burden by negating an  
18 essential element of the non-moving party's claim or defense, it  
19 must produce affirmative evidence of such negation. Nissan, 210  
20 F.3d at 1105. If the moving party produces such evidence, the  
21 burden then shifts to the non-moving party to produce specific  
22 evidence to show that a dispute of material fact exists. Id.

23 If the moving party does not meet its initial burden of  
24 production by either method, the non-moving party is under no  
25 obligation to offer any evidence in support of its opposition.  
26 Id. This is true even though the non-moving party bears the  
27 ultimate burden of persuasion at trial. Id. at 1107.  
28

## DISCUSSION

## I. Cross-Motions for Summary Judgment

## A. Legal Standard under the Section 1 of the Sherman Act

Section 1 of the Sherman Act makes it illegal to form any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To prevail on a claim under this section, a plaintiff must show "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (citing Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996)). For reasons explained in prior orders, Plaintiffs' claims in this case must be analyzed under the rule of reason rather than a per se rule of illegality. See Docket No. 151, Feb. 8, 2010 Order, at 9-10.

"A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." Tanaka, 252 F.3d at 1063. Courts typically rely on a burden-shifting framework to conduct this balancing. Under that framework, the "plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'" Id. (citing Hairston, 101 F.3d at 1319). If the plaintiff satisfies this initial burden, "the defendant must come forward with evidence of the restraint's procompetitive effects." Id. Finally, if the defendant produces this evidence, the plaintiff must "show that 'any legitimate

1 objectives can be achieved in a substantially less restrictive  
2 manner.'" Id. (citing Hairston, 101 F.3d at 1319).

3 Plaintiffs urge the Court to engage in a "quick look" rule of  
4 reason analysis rather than applying the more comprehensive  
5 burden-shifting framework described above. A "quick look"  
6 analysis is an abbreviated form of the rule of reason analysis  
7 which presumes that the challenged restraint is unlawful and "in  
8 effect shifts to a defendant the burden to show empirical evidence  
9 of procompetitive effects." FTC v. Actavis, Inc., 133 S. Ct.  
10 2223, 2237 (2013) (internal citations and quotation marks  
11 omitted). The Ninth Circuit has explained that a "truncated rule  
12 of reason or 'quick look' antitrust analysis may be appropriately  
13 used where 'an observer with even a rudimentary understanding of  
14 economics could conclude that the arrangements in question would  
15 have an anticompetitive effect on customers and markets.'" California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1134  
16 (9th Cir. 2011) (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756,  
17 770 (1999)). However, "if an arrangement 'might plausibly be  
18 thought to have a net procompetitive effect, or possibly no effect  
19 at all on competition,' then a 'quick look' form of analysis is  
20 inappropriate." Harris, 651 F.3d at 1134 (citing Cal. Dental, 526  
21 U.S. at 771).  
22

23 Here, the challenged restraint is the set of NCAA rules and  
24 practices which prevent student-athletes from selling group  
25 licenses for the use of their names, images, and likenesses.  
26 Because courts have found that the NCAA's general restrictions on  
27 student-athlete compensation could conceivably enhance  
28



1 competition,<sup>3</sup> a "quick look" analysis is not appropriate here.  
2 Indeed, the parties have submitted such a large and diverse volume  
3 of competing economic analyses that any starting presumption --  
4 whether of legality<sup>4</sup> or illegality -- would do little to help  
5 resolve the ultimate question in this case: that is, what impact  
6 the challenged restraint has on competition in the relevant  
7 markets. See Board of Regents, 468 U.S. at 104 ("[W]hether the  
8 ultimate finding is the product of a presumption or actual market  
9 analysis, the essential inquiry remains the same -- whether or not  
10 the challenged restraint enhances competition."). The rule of  
11 reason analysis here will therefore follow the traditional burden-  
12 shifting framework rather than the "quick look" approach proposed  
13 by Plaintiffs.

14 B. Anti-Competitive Effects of Challenged Restraint

15 As noted above, the plaintiff bears the initial burden of  
16 showing that the challenged restraint "produces 'significant  
17 anticompetitive effects' within a 'relevant market.'" Tanaka, 252  
18 F.3d at 1063 (citing Hairston, 101 F.3d at 1319). To meet this  
19 burden, Plaintiffs in the present case must produce evidence to  
20 show that the NCAA's prohibition on student-athlete compensation

21 <sup>3</sup> See, e.g., NCAA v. Board of Regents of Univ. of Oklahoma, 468  
22 U.S. 85, 101-02 (1984) (noting in dicta that the NCAA's ban on student-  
23 athlete pay helps "preserve the character and quality" of its product).  
24 This Court has previously explained why Board of Regents -- which does  
25 not examine the NCAA's ban on student-athlete compensation under the  
26 rule of reason -- does not control the outcome of this case. See Docket  
27 No. 876, Oct. 25, 2013 Order, at 8-16.

28 <sup>4</sup> Although the NCAA contends that a "quick look" analysis is  
inappropriate, it argues that the eligibility rules challenged by  
Plaintiffs should nevertheless "be presumed to be procompetitive because  
they are essential for the NCAA to produce a unique product." Docket  
No. 926, NCAA Cross-Mot. Summ. J., at 8. Such a presumption is not  
useful here for the same reasons that Plaintiffs' requested presumption  
is not useful.

1 for the use of their names, images, and likenesses harms  
2 competition in the two markets they have identified -- namely, the  
3 "college education" market and the "group licensing" market.

4 With respect to the "college education" market, Plaintiffs  
5 rely on various expert reports to show that the NCAA undermines  
6 Division I schools' efforts to compete freely for the best  
7 football and basketball recruits. See, e.g., Docket No. 898, 1st  
8 Scherrer Decl., Ex. 12, Sept 2013 Noll Report, at 36-59  
9 (describing competition among Division I schools for top Division  
10 I football and basketball recruits). Other courts in this circuit  
11 have recognized that NCAA rules which impede Division I schools'  
12 ability to compete for student-athletes may give rise to a Sherman  
13 Act violation. See, e.g., White v. NCAA, Civil Case No. 06-999,  
14 Docket No. 72, slip op. at 3 (C.D. Cal. Sept. 20, 2006) (holding  
15 that former college football and basketball players stated a valid  
16 antitrust claim against the NCAA by alleging that its limits on  
17 financial aid for student-athletes restrained competition in  
18 markets where "colleges and universities compete to attract  
19 student-athletes"); In re NCAA I-A Walk-On Football Players  
20 Litig., 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (holding that  
21 former college football players stated a valid antitrust claim by  
22 alleging that NCAA restrictions on the number of full scholarships  
23 that Division I schools may offer restrain competition in the  
24 "market in which NCAA member schools compete for skilled amateur  
25 football players").

26 According to Plaintiffs' experts, the NCAA restrains  
27 competition in this market by preventing Division I schools from  
28 offering their recruits a portion of the revenue they receive from

1 football- and basketball-related broadcasting and videogame  
2 licenses. These schools are thus deprived of a tool that they  
3 could otherwise use to recruit the top student-athletes.  
4 Plaintiffs allege that student-athletes are harmed by this  
5 restraint because it prevents them from receiving compensation --  
6 specifically, for the use of their names, images, and  
7 likenesses -- that they would receive in an unrestrained market.  
8 1st Scherrer Decl., Ex. 12, Sept. 2013 Noll Report, at 113. Thus,  
9 because Plaintiffs' evidence supports an inference that this  
10 restraint has an anticompetitive effect on the "college education"  
11 market, it is sufficient to satisfy their initial summary judgment  
12 burden.

13 With respect to the "group licensing" market, Plaintiffs rely  
14 on the same expert evidence to show that the NCAA prevents  
15 videogame developers and broadcasters from competing freely for  
16 group licenses to use student-athletes' names, images, and  
17 likenesses. Plaintiffs' experts examined how broadcasters and  
18 videogame developers compete to obtain group licenses for the use  
19 of professional athletes' names, images, and likenesses and  
20 concluded that the NCAA prevents similar competition from taking  
21 place in the market for the use of college athletes' names,  
22 images, and likenesses. See id., Sept. 2013 Noll Report, at 59-  
23 72, 84; Docket No. 651, Aug. 2012 Noll Report, at 37-45.<sup>5</sup> These  
24 experts' analyses offer sufficiently plausible evidence of  
25 anticompetitive effects in the "group licensing" market and, thus,  
26

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27 <sup>5</sup> While some of this expert evidence was only submitted with  
28 Plaintiffs' class certification motion, Plaintiffs' expert, Dr. Noll,  
has incorporated it by reference in his latest report.

1 satisfy Plaintiffs' initial summary judgment burden to show harm  
2 to competition in that market.

3 The NCAA contends that Plaintiffs have not shown harm to  
4 competition in the market for former student-athletes' group  
5 licensing rights. It highlights Plaintiffs' failure to identify  
6 any NCAA bylaws that specifically prohibit former student-athletes  
7 from licensing their names, images, and likenesses after they stop  
8 playing Division I sports. But Plaintiffs do not need to identify  
9 any such bylaws to meet their summary judgment burden here. It is  
10 enough that they have presented evidence suggesting that the NCAA  
11 continues to license the names, images, and likenesses of former  
12 student-athletes, without their consent, long after they stopped  
13 competing in college. The record contains evidence that certain  
14 NCAA-branded videogames depict entire teams of former Division I  
15 basketball players who stopped competing years earlier. The NCAA  
16 does not dispute that most of these players were never compensated  
17 for the use of their likenesses in those videogames nor does it  
18 dispute that, as a practical matter, former student-athletes are  
19 not likely to receive any money for their appearances in those  
20 videogames or in rebroadcasts of past games. See Docket No. 1007,  
21 Feb. 20, 2014 Hrg. Tr. 9:4-12:21. As discussed at the hearing,  
22 the NCAA sells the rights to record and broadcast Division I  
23 football and basketball games while the student-athletes who  
24 participate in those games are still bound by its eligibility  
25 rules, including the restrictions on compensation. As a result,  
26 student-athletes are prevented from selling or negotiating  
27 licenses for the use of their names, images, and likenesses at the  
28 exact moment when those licenses are most valuable. By the time

1 these student-athletes have stopped participating in college  
2 sports -- and are no longer bound by NCAA rules -- they have  
3 effectively lost whatever bargaining power they once had in the  
4 group licensing market because the NCAA has already sold the  
5 recording and broadcasting rights for the games in which they  
6 played. Thus, even if the NCAA bylaws do not prohibit former  
7 student-athletes from licensing their names, images, and  
8 likenesses, the NCAA can still preclude these student-athletes  
9 from participating fully in the group licensing market through a  
10 combination of its compensation rules and licensing practices.

11 The NCAA next contends that Plaintiffs' request for an  
12 injunction to prevent the unauthorized use of their names, images,  
13 and likenesses in videogames is moot because the NCAA has not  
14 renewed its licensing agreement with EA. Docket No. 925, C.  
15 Luedtke Decl., Ex. 24, J. Isch Decl. ¶ 19. Even without this  
16 specific licensing agreement, however, the NCAA could still enter  
17 into licensing agreements with other videogame developers. It  
18 could also facilitate such an agreement between a videogame  
19 developer and specific NCAA member schools and conferences.  
20 Accordingly, because the NCAA has not shown that it will never  
21 seek to enter into or facilitate another videogame licensing  
22 agreement, Plaintiffs' injunctive relief claim regarding  
23 videogames is not moot. See Nanoexa Corp. v. Univ. of Chicago,  
24 2010 WL 3398532, at \*3 (N.D. Cal.) (Koh, J.) (finding that the  
25 termination of a licensing agreement between parties in a patent-  
26 licensing dispute was not sufficient to render moot the  
27 plaintiff's claims for injunctive relief because the defendant was  
28 still able to "partner with other companies").

1 Finally, the NCAA contends that most of the named Plaintiffs'  
2 damages claims are time-barred because they are based on alleged  
3 violations that occurred more than four years before this action  
4 was filed. See 15 U.S.C. § 15b (establishing four-year statute of  
5 limitations). This Court previously recognized that the  
6 continuing violations doctrine applied to Plaintiffs' claims in  
7 this case because Plaintiffs alleged that the NCAA committed  
8 certain overt acts after July 2005 which revived Plaintiffs'  
9 antitrust claims. See Feb. 8, 2010 Order at 11-12 (citing Pace  
10 Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir.  
11 1987)). Although Plaintiffs have failed to identify any evidence  
12 of those overt acts here, they may nevertheless proceed to trial  
13 on their claims. Plaintiffs have yet to notify the Court which  
14 individuals will be asserting damages claims at trial and what the  
15 basis of those claims will be. The parties agreed that Plaintiffs  
16 could disclose this information after the summary judgment  
17 hearing. Accordingly, in light of this agreement and the fact  
18 that Plaintiffs have yet to identify the specific basis for their  
19 individual damage claims, Plaintiffs will not be required to  
20 present evidence of a continuing violation until trial. At trial,  
21 however, Plaintiffs will need to establish a continuing antitrust  
22 violation by showing that the NCAA committed some overt act after  
23 July 2005 to further its unlawful conduct. Pace Indus., 813 F.2d  
24 at 237 ("[E]ven when a plaintiff alleges a continuing violation,  
25 an overt act by the defendant is required to restart the statute  
26 of limitations and the statute runs from the last overt act.").

## 1 C. Existence of a Relevant Market

2 As explained in the October 25, 2013 order, Plaintiffs'  
3 evidence of a "group licensing" market rests on the assumption  
4 that student-athletes, absent the challenged restraint, would be  
5 able to assert cognizable right-of-publicity claims against  
6 broadcasters who depict them in live game broadcasts or archival  
7 game footage without a group license or consent. If student-  
8 athletes could not protect their publicity rights in this way,  
9 then broadcasters would have no reason to purchase group licenses  
10 from them (or otherwise obtain their consent) for the use of their  
11 names, images, or likenesses in game broadcasts. Thus, to  
12 establish the existence of a "group licensing" market, Plaintiffs  
13 must show that, absent the NCAA's restraint on student-athlete  
14 pay, student-athletes would have cognizable rights of publicity in  
15 the use of their names, images, and likenesses in live game  
16 broadcasts and archival game footage.<sup>6</sup>

17 The NCAA and the Networks, as amici, contend that Plaintiffs  
18 cannot make this showing. They argue that live broadcasts of  
19 college football and basketball games are a form of protected  
20 speech and that broadcasters' First Amendment right to televise  
21 these games trumps whatever rights of publicity the student-  
22 athletes might otherwise assert. The Networks further argue that  
23

24 \_\_\_\_\_  
25 <sup>6</sup> As previously noted, this order addresses only the Antitrust  
26 Plaintiffs' claims and not the Right-of-Publicity Plaintiffs' claims.  
27 Although the following sections discuss the scope of student-athletes'  
28 publicity rights, the discussion focuses on whether those rights could,  
absent the challenged restraint, give rise to a market for group  
licenses. The Court does not analyze the viability of Right-of-  
Publicity Plaintiffs' claims, which remain stayed pending EA's petition  
for certiorari.

1 archival game footage, including highlights and rebroadcasts of  
2 old games, is also protected.

3 The Supreme Court has never specifically considered whether  
4 or not the First Amendment prevents an athlete from asserting a  
5 right-of-publicity claim against a defendant who used footage of  
6 the athlete's entire performance without his or her consent.  
7 However, its decision in Zacchini v. Scripps-Howard Broadcasting  
8 Co., 433 U.S. 562 (1977), provides useful guidance in balancing a  
9 performer's right of publicity against First Amendment  
10 considerations. In Zacchini, the Court held that a television  
11 station was not entitled to First Amendment protection for  
12 broadcasting the entire fifteen-second "human cannonball" act of a  
13 performer at an Ohio county fair. Id. at 563-64. The Court  
14 explained that the First Amendment did not shield the station from  
15 right-of-publicity liability because it chose to broadcast the  
16 performer's entire act without his consent and, in so doing,  
17 undermined his economic interests by reducing demand for his live  
18 show. Id. at 574-76 ("Wherever the line in particular situations  
19 is to be drawn between media reports that are protected and those  
20 that are not, we are quite sure that the First and Fourteenth  
21 Amendments do not immunize the media when they broadcast a  
22 performer's entire act without his consent.").

23 The Court's reasoning in Zacchini strongly suggests that the  
24 First Amendment does not guarantee media organizations an  
25 unfettered right to broadcast entire sporting events without  
26 regard for the participating athletes' rights of publicity. In  
27 fact, the Court specifically analogized the performer's "human  
28 cannonball" act in Zacchini to the athletic performances at issue



1 in two earlier right-of-publicity cases decided by lower federal  
2 courts. In one of those cases, Ettore v. Philco Television Broad.  
3 Corp., 229 F.2d 481 (3d Cir. 1956), the Third Circuit held that a  
4 television network had violated a professional boxer's right of  
5 publicity by broadcasting one of his old fights without his  
6 consent. Similarly, in Pittsburgh Athletic Co. v. KQV Broad. Co.,  
7 24 F. Supp. 490 (W.D. Pa. 1938), a district court held that a  
8 radio station had violated a baseball team owner's rights to  
9 disseminate, sell, or license broadcasting rights for its games by  
10 broadcasting certain baseball games without the owner's consent.  
11 Although neither Ettore nor Pittsburgh Athletic specifically  
12 considered whether sports broadcasts constitute protected speech,  
13 the Supreme Court's reliance on these cases in Zacchini  
14 nevertheless implies that sports broadcasters are not entitled to  
15 any special First Amendment protections against right-of-publicity  
16 liability. See 433 U.S. at 575 ("The Constitution no more  
17 prevents a State from requiring respondent to compensate  
18 petitioner for broadcasting his act on television than it would  
19 privilege respondent . . . to film and broadcast a prize fight or  
20 a baseball game, where the promoters or the participants had other  
21 plans for publicizing the event.").

22 Zacchini's logic applies in this case even though sports  
23 broadcasters are not solely responsible for depriving Division I  
24 student-athletes of compensation for their athletic performances.  
25 The NCAA's challenged rules obviously play a key role in ensuring  
26 that student-athletes are not paid for their performances in  
27 televised games. But, absent those rules, student-athletes would  
28 have an economic interest in being able to sell group licenses for

1 the rights to broadcast their games. Under those circumstances,  
2 the First Amendment would not empower broadcasters to undermine  
3 the student-athletes' economic interests by televising their games  
4 without group licenses any more than it allowed the television  
5 station in Zacchini to broadcast the county fair performer's  
6 "human cannonball" act without his consent. The student-athletes'  
7 economic interests in this case are determined by the value their  
8 athletic performances would have in an unrestrained market -- not  
9 by their value in a market from which they have been allegedly  
10 excluded.

11 The Seventh Circuit recently relied on Zacchini in holding  
12 that a news organization did not have an absolute First Amendment  
13 right to stream entire high school sporting events on its website.  
14 In Wisconsin Interscholastic Athletic Association v. Gannett Co.,  
15 Inc., 658 F.3d 614, 615 (7th Cir. 2011), a high school athletic  
16 association sought declaratory judgment that it had a right to  
17 grant an exclusive license to a regional television network to  
18 broadcast certain sporting events that it helped organize. Id. at  
19 618. The association filed the suit against a local newspaper  
20 which had streamed four postseason football games on its website  
21 without the regional network's consent. Id. After the district  
22 court granted summary judgment to the association,<sup>7</sup> the newspaper  
23 appealed, arguing that the exclusive broadcasting license was  
24 invalid because it violated the newspaper's "First Amendment right  
25

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26 <sup>7</sup> Although the athletic association was technically a state actor,  
27 the Seventh Circuit made clear that this fact did not change its First  
28 Amendment analysis because the association was "functioning as the  
creator and disseminator of content," not as a regulator. 658 F.3d at  
622-24.

1 to broadcast entire [game] performances" and prevented it from  
2 covering high school sports. Id. at 616.

3 The Seventh Circuit rejected this argument. It held that the  
4 newspaper's "theory that coverage and broadcast are identical is  
5 both analytically flawed and foreclosed by Zacchini." Id.  
6 Addressing the analytical flaws in the newspaper's theory, the  
7 court explained,

8           Interpreting the First Amendment to provide  
9           the media with a right to transmit an entire  
10           performance or to prohibit performers from  
11           charging fees would take us back centuries, to  
12           a time when artists or performers were unable  
13           to capture the economic value of a  
14           performance. Over the long run, this would  
15           harm, not help, the interests of free speech.  
16           The First Amendment requires no such folly.

17 Id. at 624. The court then turned to Zacchini, noting that  
18 Zacchini established "two propositions" which undercut the  
19 newspaper's argument: "First, [Zacchini] distinguishes between the  
20 media's First Amendment right to 'report on' and 'cover' an event  
21 and its lack of a right to broadcast an 'entire act.' Second,  
22 Zacchini makes clear that the producer of entertainment is  
23 entitled to charge a fee in exchange for consent to broadcast."  
24 Id. Relying on these principles, the Wisconsin Interscholastic  
25 court concluded that the newspaper's First Amendment rights did  
26 not trump the athletic association's right to grant an exclusive  
27 license to broadcast high school sporting events.

28           These principles compel a similar conclusion here: the First  
Amendment does not guarantee media organizations an unlimited  
right to broadcast entire college football and basketball games.  
Indeed, if the First Amendment did guarantee such a right, then it

1 would cast doubt on the NCAA's ability to issue exclusive licenses  
2 to specific broadcasters. There is no principled reason why the  
3 First Amendment would allow the NCAA to restrict press access to  
4 college football and basketball games (via exclusive licensing  
5 agreements) but, at the same time, prohibit student-athletes from  
6 doing the same (via right-of-publicity actions). This is  
7 precisely why the court in Wisconsin Interscholastic equated the  
8 athletic association's right to issue exclusive broadcasting  
9 licenses with the "human cannonball" performer's right of  
10 publicity in Zacchini. Zacchini itself also appeared to equate  
11 the publicity rights of "promoters" and "participants" in sporting  
12 events. 433 U.S. at 575 (stating that the First Amendment did not  
13 immunize media from right-of-publicity liability for broadcasting  
14 a sporting event "where the promoters or the participants had  
15 other plans for publicizing the event"). As far as the First  
16 Amendment is concerned, these rights stand on equal footing.

17 Thus, taken together, Zacchini and Wisconsin Interscholastic  
18 make clear that the First Amendment does not create a right to  
19 broadcast an entire athletic performance without first obtaining a  
20 license or consent from all of the parties who hold valid  
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1 ownership rights in that performance.<sup>8</sup> Whether Division I  
2 student-athletes hold any ownership rights in their athletic  
3 performances does not depend on the scope of broadcasters' First  
4 Amendment rights but, rather, on whether the student-athletes  
5 themselves validly transferred their rights of publicity to  
6 another party. Because the current record does not demonstrate  
7 that all Division I student-athletes validly transferred all of  
8 these rights, the First Amendment does not preclude student-  
9 athletes from asserting rights of publicity in live broadcasts or  
10 re-broadcasts of entire games. Accordingly, the First Amendment  
11 does not preclude the existence of a market for group licenses to  
12 use student-athletes' names, images, and likenesses in those  
13 broadcasts.

14 The NCAA and the Networks contend that Zacchini and Wisconsin  
15 Interscholastic are not applicable here and urge the Court to rely  
16 instead on several other cases, which rejected athletes' rights-  
17 of-publicity claims on First Amendment grounds. All of the cases  
18 they cite, however, are inapposite because they do not address  
19 claims based on footage of the athletes' entire athletic  
20  
21

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22 <sup>8</sup> In its reply brief, the NCAA cites Washington v. Nat'l Football  
23 League, 880 F. Supp. 2d 1004, 1008 (D. Minn. 2012), to argue that any  
24 dispute between the NCAA and the student-athletes regarding profits from  
25 game rebroadcasts is a dispute over performance ownership rights and,  
26 thus, "is a royalties issue, not an antitrust issue." This statement,  
27 however, is only partially true. While some student-athletes may be  
28 entitled to recover royalties from the NCAA based on their appearances  
in certain game re-broadcasts, those royalty claims would not preclude  
student-athletes from challenging the alleged price-fixing plan that  
excluded them from the group licensing market in the first place.  
Whatever individual harms might be redressed through royalties claims,  
antitrust law remains a vehicle for challenging harms to competition  
more broadly.

1 performance, that is, entire games.<sup>9</sup> What's more, many of the  
2 cases they cite were decided based on First Amendment  
3 considerations that are not relevant to full-game broadcasts. For  
4 instance, in Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95  
5 F.3d 959, 972 (10th Cir. 1996), the Tenth Circuit rejected a group of  
6 professional baseball players' right-of-publicity claims based on  
7 "cartoons and caricatures" of their likenesses in "parody trading  
8 cards." Id. at 969. The court held that the card company's use of  
9 the players' likenesses was protected because its "interest in  
10 publishing its parody trading cards implicates some of the core  
11 concerns of the First Amendment." Id. at 969, 972 (explaining  
12 that "parody, both as social criticism and a means of self-  
13 expression, is a vital commodity in the marketplace of ideas").  
14 Game broadcasts are not a form of parody and, thus, do not raise  
15 the same concerns.

16 The Eighth Circuit's decision in C.B.C. Distribution &  
17 Marketing, Inc. v. Major League Baseball Advanced Media, L.P., 505  
18 F.3d 818, 823 (8th Cir. 2007), was also based on First Amendment  
19 concerns that do not apply to full-game broadcasts. In that case,  
20 a group of professional baseball players alleged that a website  
21 had misappropriated their publicity rights by using their names  
22

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23 <sup>9</sup> See, e.g., Gionfriddo v. Major League Baseball, 94 Cal. App. 4th  
24 400 (2001) (holding that professional baseball league's use of retired  
25 players' "names, voices, signatures, photographs and/or likenesses" in  
26 websites and video clips was protected under the First Amendment);  
27 Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790, 794 (1995)  
28 (holding that "full page newspaper accounts of Super Bowls XXIII and  
XXIV" featuring photographs of the 49ers' star quarterback, Joe Montana,  
were "entitled to First Amendment protection"); Dora v. Frontline Video,  
Inc., 15 Cal. App. 4th 536 (1993) (holding that a documentary featuring  
audio interview, photographs, and video clips of a retired surfer was  
constitutionally protected).

1 and playing statistics in a fantasy baseball game without their  
2 consent. The Eighth Circuit held that the website's use of the  
3 players' names and statistics was protected because, among other  
4 reasons, the information was "readily available in the public  
5 domain, and it would be strange law that a person would not have a  
6 first amendment right to use information that is available to  
7 everyone." Id. at 823. This rationale does not justify a First  
8 Amendment right to broadcast entire Division I football and  
9 basketball games, which are not available in the public domain.

10 Plaintiffs argue that, in addition to the reasons discussed  
11 above, full-game broadcasts are not protected by the First  
12 Amendment because they constitute commercial speech. As  
13 previously explained, Oct. 25, 2013 Order at 19-20, footage of  
14 athletic performances is not protected by the First Amendment if  
15 it is used for "strictly commercial" purposes. Pooley v. Nat'l  
16 Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1113-14 (D. Ariz. 2000)  
17 ("[W]hen the purpose of using a person's identity is strictly to  
18 advertise a product or a service, as it is here, the use is not  
19 protected by the First Amendment."); see also Dryer, 689 F. Supp.  
20 2d at 1116 ("The threshold inquiry is whether the films are, as  
21 the NFL argues, expressive works entitled to the highest  
22 protection under the First Amendment, or commercial speech  
23 entitled to less protection, as Plaintiffs contend."). The Ninth  
24 Circuit defines commercial speech as "'speech that does no more  
25 than propose a commercial transaction.'" Hunt v. City of Los  
26 Angeles, 638 F.3d 703, 715 (9th Cir. 2011) (citing United States  
27 v. United Foods, Inc., 533 U.S. 405, 409 (2001)).  
28

1 Applying this test to the present case, it is clear that  
2 broadcasts of entire Division I football and basketball games do  
3 not constitute commercial speech. To the extent that these  
4 broadcasts propose commercial transactions, they do so largely  
5 during commercial breaks or other stoppages in game play. This is  
6 analogous to a newspaper or magazine setting aside certain pages  
7 for advertisements and is not sufficient to render the entire  
8 broadcast commercial. See Ad World, Inc. v. Township of  
9 Doylestown, 672 F.2d 1136, 1139 (3d Cir. 1982) ("The fact that a  
10 publication carries advertisements . . . does not render its  
11 speech commercial for first amendment purposes."). Although many  
12 game broadcasts also feature corporate logos and slogans during  
13 the course of play, these elements of the broadcast are not  
14 sufficient to convert the entire broadcast into commercial speech.  
15 See Transp. Alternatives, Inc. v. City of New York, 340 F.3d 72,  
16 78 (2d Cir. 2003) ("Notwithstanding the presence of minor  
17 commercial elements, such as display of corporate logos, this  
18 speech [i.e., a city-sponsored biking tour] was a far distance  
19 from commercial speech undertaken to solicit a commercial  
20 transaction."). Furthermore, the fact that some of the game  
21 broadcasters' programming decisions are motivated by a desire for  
22 profit does not establish that the rest of the broadcast is  
23 commercial. See Dex Media W., Inc. v. City of Seattle, 696 F.3d  
24 952, 960 (9th Cir. 2012) ("[E]conomic motive in itself is  
25 insufficient to characterize a publication as commercial.").  
26 Plaintiffs' assertion that broadcasts of entire college football  
27 and basketball games are commercial must therefore be rejected.  
28



1 With respect to broadcasts or recordings that feature only  
2 clips or highlight footage of games -- that is, partial athletic  
3 performances -- neither Zacchini nor Wisconsin Interscholastic is  
4 directly on point. The handful of federal district courts to  
5 address whether the First Amendment precludes athletes from  
6 asserting rights of publicity in clips or highlights of their  
7 athletic performances have relied on the commercial speech test  
8 outlined above to decide the issue. See Dryer, 689 F. Supp. 2d at  
9 1116; Pooley, 89 F. Supp. 2d at 1113-14. Some state courts have  
10 taken a similar approach. See, e.g., Gionfriddo, 94 Cal. App. 4th  
11 at 412 (concluding that "minor historical references to plaintiffs  
12 within game programs and Web sites and in videos documenting  
13 baseball's past" were protected by the First Amendment because  
14 they did not constitute commercial speech).

15 Here, the NCAA has not presented evidence to show that there  
16 can be no market for clips and highlight footage of Division I  
17 football and basketball players because such clips are used  
18 exclusively to produce protected, non-commercial speech.  
19 Plaintiffs, likewise, have not presented evidence to define a  
20 clear market for clips and highlight footage of these student-  
21 athletes to produce unprotected, commercial speech. Thus, the  
22 Court can neither summarily adjudicate that the First Amendment  
23 precludes a market for clips and highlight footage nor can it  
24 conclude that, absent the challenged restraint, such a market  
25 would actually exist. Accordingly, neither party is entitled to  
26 summary judgment on the question of whether the group licensing  
27 market includes a market for clips and highlight footage.  
28

1 In sum, Zacchini and Wisconsin Interscholastic make clear  
2 that the First Amendment does not bar Division I student-athletes  
3 from selling group licenses to use their names, images, and  
4 likenesses in live or recorded broadcasts of entire college  
5 football and basketball games.<sup>10</sup> Plaintiffs' evidence is therefore  
6 sufficient to support an inference that, in the absence of the  
7 NCAA's restrictions on student-athlete pay, a market would exist  
8 for these group licenses. If Plaintiffs seek to prove that a  
9 similar market would exist for group licenses to use student-  
10 athletes' names, images, and likenesses in clips and highlight  
11 footage, they will have to prove that there would be a demand for  
12 these clips and highlight footage specifically for use in  
13 commercial speech that is not protected by the First Amendment.

14 D. Scope of Relevant Market

15 The NCAA contends that, even if a group licensing market  
16 would exist absent the challenged restraint, the named Plaintiffs  
17 could not participate in that market because their rights of  
18 publicity would not be cognizable in the states where they are  
19 currently domiciled. This argument is not persuasive for two  
20 reasons.

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22  
23 <sup>10</sup> This is not to suggest that any individual student-athlete would  
24 be able to prevent a broadcaster from televising his team's games merely  
25 by withholding his consent. To create a group licensing market such as  
26 the one that Plaintiffs have identified, individual student-athletes  
27 would have to transfer their rights of publicity to some representative  
28 entity -- such as their school or conference -- as a condition of their  
participation in Division I athletics so that the representative entity  
could license the right to televise their games. Thus, broadcasters  
would obtain group licenses to use every participating student-athlete's  
name, image, and likeness as part of the general licenses they would  
acquire from every school or conference whose games they wished to  
broadcast.

1 First, the NCAA has not shown that each of the named  
2 Plaintiffs is, in fact, domiciled in a state that refuses to  
3 recognize an athlete's right of publicity in live broadcasts of  
4 sporting events. Two of the named Plaintiffs, for instance, are  
5 domiciled in Minnesota, where the scope of the common law right of  
6 publicity remains unsettled. See generally Hillerich & Bradsby Co.  
7 v. Christian Bros., Inc., 943 F. Supp. 1136, 1141 (D. Minn. 1996)  
8 ("Although the Minnesota state courts have not explicitly  
9 recognized (or rejected) this cause of action, the federal courts  
10 in this circuit and district have concluded that it exists in  
11 Minnesota."). The NCAA has not cited any cases that preclude  
12 athletes from asserting right-of-publicity claims in Minnesota<sup>11</sup>  
13 and recent case law suggests that athletes may bring such claims  
14 under Minnesota law to recover for the unauthorized use of their  
15 names and images in at least certain kinds of broadcast footage.  
16 See Dryer, 689 F. Supp. 2d at 1123.

17 Second, even if the named Plaintiffs were precluded from  
18 bringing right-of-publicity claims in their states of domicile,  
19 the NCAA has not adequately explained why they could not bring  
20 these claims in other states. As the Court previously explained  
21 in its order denying the NCAA's motion to dismiss,

22 Plaintiffs allege harm to a national market  
23 for the licensing rights to their names,  
24 images, and likenesses in game broadcasts. To  
25 disprove the existence of this market at the  
26 pleading stage, the NCAA would have to  
27 identify a law or set of laws that precludes

28 <sup>11</sup> The NCAA cites only one Minnesota case, Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235-36 (Minn. 1998), which does not include any discussion of athletes' publicity rights. Moreover, the NCAA only cited this case in a footnote to an improperly filed appendix to its brief.

1 student-athletes from asserting publicity  
rights to game broadcasts in every state.

2  
3 Oct. 25, 2013 Order at 17-18 (emphasis in original). Although the  
4 NCAA argues that states "generally apply the law of the  
5 plaintiff's domicile for right of publicity claims, regardless of  
6 the location of the alleged infringement," NCAA Cross-Mot. Summ.  
7 J. at 7, it provides scant support for that assertion. Its only  
8 support comes from section 153 of the Restatement (Second) of  
9 Conflict of Laws, which describes how courts typically resolve  
10 choice-of-law disputes regarding invasion-of-privacy claims. Even  
11 assuming that most courts would apply section 153 to the named  
12 Plaintiffs' right-of-publicity claims -- and there is good reason  
13 to believe many would not<sup>12</sup> -- this Restatement provision still  
14 would not justify finding that the named Plaintiffs are excluded  
15 from the national group licensing market because the provision  
16 does not represent a universal rule. Rather, it represents the  
17 approach that courts "usually" take when resolving choice-of-law  
18 disputes. Id. Not every jurisdiction follows this approach.  
19 See, e.g., Donovan v. Bishop, 2010 WL 4062370, at \*5 (S.D. Ind.)  
20 ("The Indiana Rights of Publicity Statute . . . 'applies to an act  
21 or event that occurs within Indiana, regardless of a personality's  
22 domicile, residence, or citizenship.'" (citing Ind. Code § 32-36-  
23 1-1)); Bi-Rite Enterprises, Inc. v. Bruce Miner Poster Co., Inc.,  
24 616 F. Supp. 71, 74 (D. Mass. 1984) (finding that "the situs of  
25 the right of publicity is where the 'commercial value' of one's  
26 persona is exploited" and that, while "the plaintiff's domicile

27  
28 <sup>12</sup> See Zacchini, 433 U.S. at 571 (noting that the tort of invasion  
of privacy is an "entirely different tort from the 'right of publicity'"  
under Ohio state law).

1 may be a relevant factor," it is not determinative), aff'd, 757  
2 F.2d 440 (1st Cir. 1985). Thus, section 153 does not govern  
3 choice-of-law disputes in every jurisdiction where the named  
4 Plaintiffs could conceivably assert a right-of-publicity claim.  
5 As such, it does not preclude them from participating in the  
6 "group licensing" market that they have alleged.

7 E. Procompetitive Justifications for the Challenged  
8 Restraint

9 The NCAA has identified five potential procompetitive  
10 justifications for its rules prohibiting student-athletes from  
11 receiving compensation for the use of their names, images, and  
12 likenesses. These justifications include (1) the preservation  
13 of amateurism in college sports; (2) promoting competitive balance  
14 among Division I teams; (3) the integration of education and  
15 athletics; (4) increased support for women's sports and less  
16 prominent men's sports; and (5) greater output of Division I  
17 football and basketball. Each of these justifications is examined  
18 below.

19 1. Amateurism

20 The NCAA asserts that the challenged restraint increases the  
21 popularity of Division I sports by promoting amateurism. For  
22 support, it relies on the expert reports of Dr. Daniel Rubinfeld,  
23 an economist, and Dr. J. Michael Dennis, a public opinion  
24 researcher. Dr. Rubinfeld analyzed several consumer surveys  
25 conducted over the past twelve years and concluded that "consumers  
26 generally favor the amateur nature of college sports." Luedtke  
27 Decl., Ex. 29, Sept. 2013 Rubinfeld Report ¶ 79. Dr. Dennis  
28 conducted his own consumer survey and reached the same conclusion.

1 He observed that 68.9% of survey respondents were opposed to  
2 paying college football and basketball players.<sup>13</sup> Id., Ex. 37,  
3 Nov. 2013 Dennis Report ¶ 28. Among respondents who identified  
4 themselves as college football or basketball fans (i.e., those who  
5 watched, listened to, or attended more than thirty games over the  
6 previous twelve months), fifty-one percent were opposed to paying  
7 college athletes. Id. Dr. Dennis also noted that thirty-eight  
8 percent of all survey respondents stated that they would be less  
9 likely to watch, listen to, or attend college football and  
10 basketball games if student-athletes were paid \$20,000 per year;  
11 forty-seven percent stated that they would be less likely to  
12 watch, listen to, or attend games if student-athletes were paid  
13 \$50,000 per year; and fifty-three percent stated that they would  
14 be less likely to watch, listen to, or attend games if student-  
15 athletes were paid \$200,000 per year. Id. ¶ 31. In contrast,  
16 fewer than five percent stated that they would be more likely to  
17 watch, listen to, or attend games if student-athletes were paid  
18 these amounts. Id. ¶ 32.

19 Plaintiffs highlight several deficiencies in the NCAA's  
20 survey evidence. For instance, they note that Dr. Dennis's survey  
21 questions failed to distinguish between pay-for-play compensation  
22 and compensation for the use of student-athletes' names, images,  
23

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24 <sup>13</sup> Plaintiffs move to strike Dr. Dennis's report (and any portions  
25 of Dr. Rubinfeld's rebuttal report which rely on it) because the NCAA  
26 failed to make timely expert disclosures under Rule 26(a). Because this  
27 Rule 26 violation was ultimately harmless, Plaintiffs' motion is denied.  
28 See Fed. R. Civ. P. 37(c)(1) (providing that a Rule 26 violation should  
not result in the exclusion of evidence if the violation was harmless).  
Plaintiffs not only deposed Dr. Dennis but also submitted their own  
expert report criticizing his survey results. Accordingly, they will  
not be prejudiced by the admission of this evidence.

1 and likenesses. See Docket No. 898, 1st Scherrer Decl., Ex. 19,  
2 Nov. 2013 Poret Report ¶¶ 11-32 (criticizing survey evidence  
3 submitted by the NCAA). They also note that Dr. Dennis's results  
4 summary focused more heavily on the opinions of the general  
5 population rather than actual college sports fans. In this  
6 regard, Dr. Dennis's failure to specify how many college sports  
7 fans would be less likely to watch college sports if student-  
8 athletes were paid is especially noteworthy.

9 Still, despite these shortcomings in Dr. Dennis's report, a  
10 reasonable fact-finder could conclude from his survey results that  
11 the NCAA's ban on student-athlete compensation serves a  
12 procompetitive purpose. Accordingly, Plaintiffs are not entitled  
13 to summary judgment on this issue. See Clicks Billiards, Inc. v.  
14 Sixshooters, Inc., 251 F.3d 1252, 1263 (9th Cir. 2001) (noting  
15 that "considering conflicting evidence and deciding what weight to  
16 accord the survey [evidence]" is "the proper role for a trier of  
17 fact" and "not the role of a district court at the summary  
18 judgment stage").

19 Nor is the NCAA entitled to summary judgment on this issue.  
20 Plaintiffs have presented sufficient evidence to support an  
21 inference that the preservation of the NCAA's definition of  
22 amateurism serves no procompetitive purpose. They have submitted  
23 several expert reports attacking the NCAA's survey evidence and  
24 highlighting other evidence which suggests that the popularity of  
25 college sports is not tied to the NCAA's efforts to promote  
26 amateurism. One of Plaintiffs' experts, economist Dr. Roger Noll,  
27 notes in his report that the NCAA has changed its definition of  
28 amateurism several times over the years without significantly

1 affecting consumer demand for its product. 1st Scherrer Decl.,  
2 Ex. 12, Sept. 2013 Noll Report, Exs. 1A, 1B, 1C (documenting  
3 various changes between 1967 and 2005 to NCAA rules governing  
4 athletic scholarships, financial aid grants, athletic performance  
5 awards, travel expenses, non-athletic employment pay, and other  
6 forms of student-athlete compensation). Dr. Noll also observes  
7 that other popular sporting event sponsors which once restricted  
8 participation to unpaid amateurs, such as the Olympics, eliminated  
9 these restrictions without undermining their popularity or  
10 marketability. Id., Sept. 2013 Noll Report, at 129-33. Finally,  
11 Dr. Noll notes in his report that, in recent years, national  
12 television ratings for popular FBS football teams did not suffer  
13 when the NCAA sanctioned them for violating its amateurism rules.  
14 1st Scherrer Decl., Ex. 12, Sept. 2013 Noll Report at 127-29.  
15 Another one of Plaintiffs' experts, Dr. Daniel Rascher, a  
16 professor of sports management, reached the same conclusions as  
17 Dr. Noll after examining similar developments in other sports.  
18 Docket No. 957, 2d Scherrer Decl., Ex. 8, Nov. 2013 Rascher  
19 Report, at 66-70. Taken together, this evidence could lead a  
20 reasonable fact-finder to conclude that amateurism, as defined by  
21 the NCAA, does not contribute to the popularity of Division I  
22 football and basketball.

23 Thus, in light of the conflicting expert evidence regarding  
24 the alleged procompetitive benefits of the NCAA's definition of  
25 amateurism, neither party is entitled to summary judgment on this  
26 issue.



## 2. Competitive Balance

The NCAA's second asserted justification for the challenged restraint is that it promotes competitive balance among Division I football and basketball teams and, thus, makes these sports more marketable. Numerous courts, including the Supreme Court, have recognized that promoting competitive balance among sports teams serves a "legitimate" procompetitive purpose and may justify the imposition by sports leagues of certain restraints on competition. See Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010) ("We have recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" (citing Board of Regents, 468 U.S. at 117)).

Here, the NCAA contends that its rules restricting student-athlete pay enhance competitive balance by preventing teams with greater financial resources from using those resources to gain an advantage in recruiting. It has submitted declarations from various Division I conference commissioners and university administrators who assert that providing student-athletes with a share of schools' broadcast and other licensing revenue would jeopardize competitive balance between large schools and small schools. See Luedtke Decl., Exs. 1-21A. The NCAA also submitted a declaration from Dr. Rubinfeld asserting the same thing. Id., Ex. 27, D. Rubinfeld Decl. ¶¶ 33-38.

This evidence does not establish that the NCAA's restrictions on student-athlete compensation promote competitive balance among Division I football and basketball teams. As an initial matter, none of the declarations from conference commissioners and

1 university administrators is based on empirical evidence, factual  
2 data, or expertise in economic analysis. Furthermore, all of  
3 these declarations are self-serving because Division I conferences  
4 and universities stand to lose a significant portion of their  
5 current licensing revenue should Plaintiffs ultimately prevail in  
6 this suit. See FTC v. Publishing Clearing House, Inc., 104 F.3d  
7 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit,  
8 lacking detailed facts and any supporting evidence, is  
9 insufficient to create a genuine issue of material fact."). Most  
10 importantly, none of these witnesses has even attempted to  
11 identify what level of competitive balance is actually necessary  
12 to maintain existing consumer demand for Division I football and  
13 basketball. And, even if they had, they have not cited any  
14 evidence to suggest that the NCAA's restrictions on student-  
15 athlete compensation -- the specific restraint challenged in this  
16 case -- actually help the NCAA achieve that level of competitive  
17 balance.<sup>14</sup>

18 While Dr. Rubinfeld has asserted generally that allowing  
19 Division I schools to pay student-athletes would lead to

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20 <sup>14</sup> The Court notes that both parties have failed to submit any  
21 meaningful statistical analyses of competitive balance here.  
22 Statisticians and sports economists have developed numerous methods for  
23 measuring competitive balance among sports teams. See generally Rodney  
24 Fort, "Competitive Balance in North American Professional Sports," in  
25 Handbook of Sports Economics Research 190, 194 (John Fizel ed., 2006)  
26 (noting that there are "many measures [of competitive balance] to choose  
27 from"). Given the wealth of publicly available historical data  
28 regarding Division I teams' win-loss records, national rankings,  
recruiting class quality, box scores (which document game-by-game point  
differentials), and betting lines, the parties could have used any  
number of methods to examine competitive balance among Division I teams  
and to evaluate its impact on consumer demand. While no method for  
measuring competitive balance is perfect, almost any statistically based  
measure would have been superior to the collection of selectively culled  
facts, figures, and non-expert opinions that the parties rely on here.

1 recruiting disparities between high-revenue and low-revenue  
2 schools, he has not provided any statistical support for that  
3 claim. Moreover, he specifically admitted that such disparities  
4 already exist. 1st Scherrer Decl., Ex. 1, Sept. 2013 Rubinfeld  
5 Report ¶ 97 (acknowledging that "high-revenue schools may have  
6 recruiting advantages in the current world (better training  
7 facilities, coaches, etc)"). The NCAA's own staff has likewise  
8 acknowledged that the current "disparity in expense budgets" among  
9 Division I schools has likely contributed to "a significant  
10 disparity in competition" among Division I football and basketball  
11 teams. Id., Ex. 27, Aug. 2011 NCAA Presidential Retreat, Paper on  
12 "Division I Financial Sustainability," at 911-12. Although it is  
13 possible that the NCAA's restrictions on student-athlete  
14 compensation prevents these disparities from growing even larger,  
15 the NCAA has not provided any evidence to suggest that this is the  
16 case. It has not explained, for instance, why the restriction on  
17 student-athlete compensation would deter high-revenue schools from  
18 using their resources to gain a recruiting advantage in other  
19 ways, such as by building superior athletic facilities or hiring  
20 better coaches. Nor has the NCAA explained why it could not use  
21 less restrictive means of maintaining competitive balance, such as  
22 those used by professional sports leagues.

23       Nevertheless, because the NCAA has presented some evidence  
24 that the challenged restraint promotes competitive balance,  
25 Plaintiffs are not entitled to summary judgment on this issue. In  
26 order to prevail on this issue at trial, however, the NCAA will  
27 have to present evidence that the challenged restraint promotes a  
28 level of competitive balance that (1) contributes to consumer

1 demand for Division I football and basketball and (2) could not be  
2 achieved through less restrictive means. See Tanaka, 252 F.3d at  
3 1063.

### 4 3. Integration of Education and Athletics

5 The NCAA's third stated justification for the challenged  
6 restraint is that it promotes the integration of education and  
7 athletics. The NCAA contends that the integration of education  
8 and athletics not only improves the educational experiences of  
9 student-athletes but also advances the educational mission of  
10 colleges.

11 While these may be worthwhile goals, they are not  
12 procompetitive. The Supreme Court has made clear that antitrust  
13 defendants cannot rely on these types of social welfare benefits  
14 to justify anticompetitive conduct under the Sherman Act. FTC v.  
15 Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) ("The  
16 social justifications proffered for respondents' restraint of  
17 trade thus do not make it any less unlawful." (citing National  
18 Society of Professional Engineers v. United States, 435 U.S. 679,  
19 695 (1978))). Rather, to justify a challenged restraint under the  
20 rule of reason, an antitrust defendant must show that it actually  
21 promotes competition in a relevant market. Here, the NCAA has not  
22 provided evidence that improving the educational experiences of  
23 student-athletes or advancing the educational mission of colleges  
24 ultimately promotes its product: namely, college sports.

25 The NCAA argues that "improv[ing] the quality of education"  
26 and "promoting socio-economic diversity" at institutions of higher  
27 education are legitimate procompetitive justifications under  
28 United States v. Brown University, 5 F.3d 658, 669 (3d Cir. 1993).

1 In Brown University, the Third Circuit held that an agreement  
2 among several selective colleges to adopt a need-blind financial  
3 aid system and to match each other's financial aid grants did not  
4 violate the Sherman Act. The court rejected the plaintiff's  
5 argument that the agreement created a purely social good,  
6 reasoning that the agreement "not only serves a social benefit,  
7 but actually enhances consumer choice" by expanding educational  
8 opportunities for "qualified students who are financially 'needy'  
9 and would not otherwise be able to afford the high cost of  
10 education." Id. at 677 (emphasis added) ("Thus, rather than  
11 suppress competition, [the agreement] may in fact merely regulate  
12 competition in order to enhance it, while also deriving certain  
13 social benefits.").

14 Unlike the colleges in Brown University, the NCAA has not  
15 explained how the challenged restraint in this case -- which  
16 limits, rather than increases, the financial benefits provided to  
17 college students -- would enhance consumer choice in the markets  
18 Plaintiffs have identified. It has also failed to present any  
19 evidence showing that the integration of athletics and education  
20 actually benefits Division I college sports fans or student-  
21 athletes. Instead, it has submitted a collection of declarations  
22 from university administrators describing how the challenged  
23 restraint benefits other college students. See, e.g., Luedtke  
24 Decl., Ex. 19, K. Starr Decl. ¶ 7 (asserting that "paying student-  
25 athletes in men's basketball and football would have a corrosive  
26 effect on University culture at Baylor and elsewhere, would be  
27 demoralizing to numerous other students, and would create an  
28 elitist group of paid athletes whose separateness from other

1 students could interfere with their relationships with other  
2 students and faculty" (emphasis added)); id., Ex. 16, C. Plonsky  
3 Decl. ¶ 15 ("Paying any student athlete for the use of their name,  
4 image, and likeness would upset the balance within our education  
5 system by paying some but not all students for extracurricular  
6 activities."). These declarations do not support an inference  
7 that the NCAA's restriction on student-athlete compensation  
8 contributes to the integration of education and athletics or that  
9 such integration actually serves a procompetitive purpose.

10 Thus, if the NCAA seeks to argue at trial that the challenged  
11 restraint promotes the integration of education and athletics, it  
12 must present evidence to show that (1) the ban on student-athlete  
13 compensation actually contributes to the integration of education  
14 and athletics and (2) the integration of education and athletics  
15 enhances competition in the "college education" or "group  
16 licensing" market.

#### 17 4. Viability of Other Sports

18 The NCAA's fourth asserted justification for the challenged  
19 restraint is that it increases NCAA member schools' athletic  
20 budgets and, therefore, enables them to provide greater financial  
21 support to women's sports and less prominent men's sports.

22 This is not a legitimate procompetitive justification. The  
23 Supreme Court has explained that competition "cannot be foreclosed  
24 with respect to one sector of the economy because certain private  
25 citizens or groups believe that such foreclosure might promote  
26 greater competition in a more important sector of the economy."

27 United States v. Topco Associates, Inc., 405 U.S. 596, 610  
28

1 (1972).<sup>15</sup> It is "improper to validate a practice that is decidedly  
2 in restraint of trade simply because the practice produces some  
3 unrelated benefits to competition in another market." Sullivan v.  
4 Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994). Thus,  
5 the NCAA cannot restrain competition in the "college education"  
6 market for Division I football and basketball recruits or in the  
7 "group licensing" market for Division I football and basketball  
8 teams' publicity rights in order to promote competition in those  
9 markets for women's sports or less prominent men's sports. To the  
10 extent that the NCAA contends that supporting women's sports and  
11 less prominent men's sports serves a broader social purpose --  
12 beyond merely increasing output in those markets -- this  
13 justification is precluded for reasons outlined in the previous  
14 section of this order. See Trial Lawyers Ass'n, 493 U.S. at 424  
15 (holding that "social justifications" cannot support an otherwise  
16 unlawful restraint of trade).

17 This justification also fails because the NCAA could provide  
18 support for women's sports and less prominent men's sports through  
19 less restrictive means. See Tanaka, 252 F.3d at 1063 (stating  
20 that, if a defendant meets its burden to identify a procompetitive

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21 <sup>15</sup> The Ninth Circuit has questioned whether Topco would preclude an  
22 antitrust defendant from justifying a challenged restraint with evidence  
23 that the restraint enhances competition in a "closely related" market.  
24 Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1157 (9th  
25 Cir. 2003) ("[P]erhaps that language from Topco is not controlling  
26 because it is a dictum or incomplete or obsolete or because the case of  
27 such closely related markets as those for transport of natural gas and  
28 the natural gas itself might be distinguished. In any event, we need  
not and do not reach this issue on the permissible bounds of rule of  
reason inquiry."). Nevertheless, it has never expressly distinguished  
Topco on this ground and, even if it had, the NCAA has not presented any  
evidence here to suggest that the market for Division I football and  
basketball is "closely related" to the market for women's sports or less  
prominent men's sports.

1 justification for a restraint, the "plaintiff must then show that  
2 'any legitimate objectives can be achieved in a substantially less  
3 restrictive manner'"). For instance, the NCAA could mandate that  
4 Division I schools and conferences redirect a greater portion of  
5 the licensing revenue generated by football and basketball to  
6 these other sports. Dr. Rubinfeld acknowledges in his report that  
7 the NCAA already encourages, but does not require, its member  
8 conferences to redistribute the revenue generated from the NCAA  
9 Division I men's basketball tournament to sports other than  
10 football and basketball. Luedtke Decl., Ex. 29, Sept. 2013  
11 Rubinfeld Report ¶ 127. The NCAA has not explained why it could  
12 not adopt more stringent revenue-sharing rules.

13 Accordingly, the challenged restraint is not justified by the  
14 NCAA's claimed desire to support women's sports or less prominent  
15 men's sports. Plaintiffs are entitled to summary adjudication of  
16 this issue.

#### 17 5. Increased Output Benefits

18 The NCAA's fifth asserted justification for the challenged  
19 restraint is that it increases the total "output" of Division I  
20 football and basketball, as measured by the total number of teams,  
21 players, scholarships, and games. According to Dr. Rubinfeld, the  
22 NCAA's restraint on student-athlete compensation generates  
23 additional revenue for NCAA member schools to spend on more  
24 scholarships and other costs associated with competing at the  
25 Division I level. Dr. Rubinfeld asserts that this revenue-sharing  
26 plan provides support to low-revenue schools which might not  
27 otherwise be able to compete in Division I. Luedtke Decl., Ex.  
28 29, Sept. 2013 Rubinfeld Report ¶ 143 ("By increasing the number



1 of schools participating, the NCAA helps to increase the total  
2 number of student-athletes and the number of scholarships  
3 available for men's FBS football and Division I men's basketball  
4 student-athletes." ).

5 Unlike the financial support provided to women's sports or  
6 less prominent sports, the revenue provided to football and  
7 basketball teams at low-revenue schools is potentially  
8 procompetitive because it increases output in the relevant market.  
9 Thus, a reasonable fact-finder could conclude from Dr. Rubinfeld's  
10 report that the challenged restraint enhances consumer demand for  
11 Division I football and basketball.

12 Plaintiffs dispute that the challenged restraint actually  
13 increases the amount of revenue that is shared among Division I  
14 football and basketball teams. They cite Dr. Noll's opening  
15 expert report, in which he asserts that the NCAA's revenue-sharing  
16 system may hurt demand for its product by increasing the number of  
17 Division I teams and players and thereby decreasing the overall  
18 quality of play or reducing competitive balance. 1st Scherrer  
19 Decl., Ex. 12, Sept. 2013 Noll Report, at 44-45 ("Revenue sharing  
20 redistributes wealth from players to teams, at a cost in terms of  
21 lower quality of play and, perhaps, less competitive balance.").  
22 This evidence is sufficient to create a material factual dispute  
23 as to whether or not the increased output benefits the NCAA has  
24 identified are legitimately procompetitive. In light of this  
25 factual dispute, neither Plaintiffs nor the NCAA is entitled to  
26 summary adjudication of this issue.

## 1 II. Motion to Amend the Class Definition

2 After the summary judgment hearing, Plaintiffs moved to amend  
3 the current class definition to bring it into conformity with the  
4 class definition that they proposed in their 3CAC. They note that  
5 the current class definition is that which they requested in their  
6 class certification motion rather than the one that they requested  
7 in their 3CAC.

8 The discrepancy between the two class definitions stems from  
9 the unique procedural history of this case. As explained in prior  
10 orders, Plaintiffs were granted leave to amend their complaint in  
11 July 2013 -- after they moved for class certification -- because  
12 their class certification motion made clear that they intended to  
13 pursue a theory of antitrust liability which they had not clearly  
14 plead in their prior complaint. Rather than forcing Plaintiffs to  
15 withdraw their class certification motion, which had already been  
16 briefed and argued, the Court directed Plaintiffs to file an  
17 amended complaint articulating their new theory of antitrust  
18 liability. Defendants were then given an opportunity to challenge  
19 Plaintiffs' new theory with another round of motions to dismiss.<sup>16</sup>  
20 See Docket Nos. 856, 857, 858. After the Court denied Defendants'  
21 motions to dismiss in October 2013, it turned back to Plaintiffs'  
22 pending class certification motion. In November 2013, it granted  
23 that motion in part and denied it in part. The class  
24 certification order adopted the class definition set forth in  
25 Plaintiffs' motion.

26 \_\_\_\_\_  
27 <sup>16</sup> Defendants had previously sought to challenge Plaintiffs' new  
28 theory in a joint motion to strike the motion for class certification.  
See Docket No. 639. The Court denied the motion to strike in January  
2013. Docket No. 673.

1 The slight differences between that class definition and the  
2 class definition in the 3CAC are a product of the recent changes  
3 in Plaintiffs' theory of the case. The NCAA received ample notice  
4 of these changes and had an opportunity to challenge Plaintiffs'  
5 new theory after the 3CAC was filed. Thus, it will not be  
6 prejudiced by the adoption of the class definition proposed in the  
7 3CAC. Indeed, the NCAA itself noted at the summary judgment  
8 hearing that the class definition Plaintiffs seek was "stated in  
9 their complaint crystal clear." Feb. 20, 2014 Hrg. Tr. 97:16-:18.

10 Accordingly, the current class definition shall be amended to  
11 reflect the class definition set forth in the 3CAC, the text of  
12 which is reproduced in the conclusion of this order.

13 III. Plaintiffs' Motion for Leave to File Motion for  
14 Reconsideration

15 Plaintiffs seek leave to file a motion for reconsideration of  
16 part of the November 2013 class certification order.  
17 Specifically, they seek reconsideration of the Court's decision  
18 not to certify the damages subclass.

19 Under Civil Local Rule 7-9(b), a party seeking leave to file  
20 a motion for reconsideration must show (1) that "a material  
21 difference in fact or law exists from that which was presented to  
22 the Court before entry of the interlocutory order for which  
23 reconsideration is sought"; (2) the "emergence of new material  
24 facts or a change of law occurring after the time of such order";  
25 or (3) a "manifest failure by the Court to consider material facts  
26 or dispositive legal arguments which were presented to the Court  
27 before such interlocutory order." Here, Plaintiffs' motion is  
28 based on the emergence of new material facts and the Court's

1 purported failure to consider dispositive legal arguments and  
2 material facts presented with their class certification motion.  
3 None of these grounds provides justification for reconsidering the  
4 class certification order.

5 The new material facts which Plaintiffs cite come from Dr.  
6 Rubinfeld's November 2013 expert report, which was produced four  
7 months after the class certification hearing. Plaintiffs contend  
8 that this report shows that the "substitution effect" among  
9 Division I athletes -- which the Court identified as one of the  
10 barriers to class manageability -- is de minimis. This evidence,  
11 however, had already been presented to the Court before the class  
12 certification hearing. As Plaintiffs themselves concede in their  
13 brief, the analysis of substitution effects in Dr. Rubinfeld's  
14 November 2013 report is essentially the same as the analysis in  
15 his earlier report. See Docket No. 911, Mot. Leave File Mot.  
16 Reconsid., at 2 (noting that "Rubinfeld reached the same  
17 conclusion" in both of his expert reports regarding student-  
18 athletes who left college early for the NBA). It therefore does  
19 not justify reconsideration of the prior order.

20 Further, even if Dr. Rubinfeld's latest report did contain  
21 new information about the substitution effect among student-  
22 athletes, it would still be insufficient to justify  
23 reconsideration. The substitution effect among Division I  
24 student-athletes was only one of the barriers to class  
25 manageability that the Court identified in the class certification  
26 order. Another barrier was the "related substitution effect among  
27 Division I schools." Nov. 8, 2013 Order at 19-20 (emphasis  
28 added). The Court specifically noted that, in Plaintiffs' but-for

1 scenario, "increased competition for student-athletes, combined  
2 with the potentially higher costs of recruiting and retaining  
3 those student-athletes, would have likely driven some schools into  
4 less competitive divisions, thereby insulating entire teams from  
5 the specific harms that Plaintiffs allege in this suit." Id. at  
6 20. Plaintiffs have not cited any new evidence to justify  
7 reconsideration of this part of the Court's prior ruling.

8 With respect to Plaintiffs' second ground for seeking  
9 reconsideration -- a manifest failure to consider dispositive  
10 legal arguments previously presented to the Court -- Plaintiffs  
11 rely on two Seventh Circuit cases and one case decided by another  
12 court in this district: Butler v. Sears, Roebuck & Co., 727 F.3d  
13 796 (7th Cir. 2013); Messner v. Northshore Univ. HealthSystem, 669  
14 F.3d 802 (7th Cir. 2012); and In re Cathode Ray Tube (CRT)  
15 Antitrust Litig., MDL 1917, 2013 WL 5391159 (N.D. Cal.). None of  
16 these cases is binding on this Court. Furthermore, Plaintiffs  
17 only cited one of these cases, Messner, in their class  
18 certification briefs.<sup>17</sup> The Court considered Messner and concluded  
19 that it was not analogous to this case.

20 Plaintiffs' newly cited cases are, like Messner, inapposite.  
21 These cases stand for the general proposition that class  
22 certification should not be denied based on minor flaws in the  
23 plaintiff's proposed methodology for calculating damages. But  
24 this principle has no bearing on the present case because  
25

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26 <sup>17</sup> What's more, Plaintiffs cited Messner without discussion in a  
27 footnote listing other out-of-circuit precedents. The other two cases  
28 Plaintiffs cite here -- Butler and In re CRT Antitrust Litig. -- were  
decided after class certification briefing was completed but Plaintiffs  
did not submit a statement of recent decision concerning either of them.

1 Plaintiffs did not simply propose a flawed method for calculating  
2 damages; rather, they failed to propose any method whatsoever for  
3 dealing with problems -- namely, substitution effects -- which  
4 their own expert identified in his report. See Nov. 8, 2013 Order  
5 at 19-20 ("Plaintiffs have not proposed any method for addressing  
6 this substitution effect among individual student-athletes. Nor  
7 have they proposed any method for addressing the related  
8 substitution effect among Division I schools."). The cases  
9 Plaintiffs cite do not provide any compelling reasons to  
10 reconsider this aspect of the class certification order.

11 Finally, Plaintiffs argue that the Court failed to consider  
12 certain material facts in issuing its class certification order.  
13 In particular, they point to certain EA company documents which,  
14 they contend, provide a means for determining on a class-wide  
15 basis which student-athletes were actually depicted in EA's  
16 videogames. They assert that the Court overlooked this evidence  
17 when it found that the discrepancy between the size of football  
18 team rosters in EA's videogames and the size of actual Division I  
19 football rosters posed a significant barrier to class  
20 manageability. See Class Cert. Order 21 ("[T]he number of  
21 student-athletes depicted in NCAA-licensed videogames is  
22 considerably smaller than the number of student-athletes who  
23 actually played for a Division I football team during the class  
24 period. Plaintiffs have not offered a feasible method for  
25 determining on a class-wide basis which student-athletes are  
26 depicted in these videogames and which are not.").

27 The documents Plaintiffs have identified -- a collection of  
28 unlabeled and undated spreadsheets listing the physical attributes

1 of certain football players -- do not solve the problem the Court  
2 highlighted in its order. See Docket No. 749, S. Gosselin Supp.  
3 Decl., Ex. 4. The spreadsheets contain the names of fewer than  
4 forty student-athletes out of the many thousands who played  
5 Division I football during the proposed class period; as such,  
6 they cannot identify every class member depicted in the  
7 videogames. Furthermore, Plaintiffs have not presented any  
8 evidence to suggest that EA actually used the names, images, and  
9 likenesses of the student-athletes listed in the spreadsheets to  
10 create the player avatars in its videogames. Without this  
11 evidence, the spreadsheets are not probative of anything.

12 Thus, because Plaintiffs have failed to identify any evidence  
13 or case law that would justify reconsideration of the class  
14 certification order, their motion must be denied.

#### 15 CONCLUSION

16 For the reasons set forth above, Plaintiffs' motion for  
17 summary judgment (Docket No. 898) is GRANTED in part and DENIED in  
18 part and Defendant's cross-motion for summary judgment (Docket No.  
19 933) is DENIED. Plaintiffs are entitled to summary judgment that  
20 the NCAA's fourth asserted justification for the challenged  
21 restraint -- increased support for women's sports and less  
22 prominent men's sports -- is not legitimately procompetitive.  
23 Accordingly, the NCAA may not rely on this justification at trial.

24 Plaintiffs' motion to amend the class definition (Docket No.  
25 998) is GRANTED. The class definition is hereby amended to read  
26 as follows:

27 All current and former student-athletes  
28 residing in the United States who compete on,  
or competed on, an NCAA Division I (formerly

1 known as "University Division" before 1973)  
2 college or university men's basketball team or  
3 on an NCAA Football Bowl Subdivision (formerly  
4 known as Division I-A until 2006) men's  
5 football team and whose images, likenesses  
6 and/or names may be, or have been, included or  
7 could have been included (by virtue of their  
8 appearance in a team roster) in game footage  
9 or in videogames licensed or sold by  
10 Defendants, their co-conspirators, or their  
11 licensees.

12 Plaintiffs' motion for leave to file a motion for partial  
13 reconsideration (Docket No. 911) is DENIED.

14 A final pretrial conference will be held at 2:00 p.m. on May  
15 28, 2014 and a jury trial will commence at 8:30 a.m. on June 9,  
16 2014. In the joint pretrial statement, Plaintiffs must identify  
17 which Antitrust Plaintiffs intend to proceed to trial on their  
18 individual damages claims and which specific uses of their names,  
19 images, and likenesses will serve as the basis for their damages  
20 claims.

21 IT IS SO ORDERED.

22 Dated: 4/11/2014

23   
24 CLAUDIA WILKEN  
25 United States District Judge  
26  
27  
28