

Nos. 14-16601 & 14-17068

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

v.

EDWARD O'BANNON, OSCAR ROBERTSON, WILLIAM RUSSELL,
HARRY FLOURNEY, THAD HARACZ, DAVID LATTIN, BOB TALLANT,
ALEX GILBERT, ERIC RILEY, PATRICK MAYNOR, TYRONE PROTHRO,
SAM JACABSON, DAMIEN THODES, DANNY WIMPRINE, RAY ELLIS,
JAKE FISCHER, JAKE SMITH, DARIUS ROBINSON, MOSES ALIPATE,
and CHASE GARNHAM,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees

From Orders Denying Summary Judgment and Granting a Permanent Injunction
Entered By The United States District Court for the Northern District of California

The Honorable Claudia Wilkin, Chief Judge
Case Nos. 09-cv-1967 CW& 09-cv-3329 CW

**BRIEF OF *AMICI CURIAE* ECONOMISTS AND PROFESSORS OF
SPORTS MANAGEMENT IN SUPPORT OF PLAINTIFFS-APPELLEES
AND IN SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *Amici* state that they are all natural persons, and thus that no further disclosure is necessary.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

Counsel for the parties did not author this brief. The parties have not contributed money intended to fund preparing or submitting the brief. No person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

CONSENT OF THE PARTIES

Counsel for the parties have consented to the filing of this brief.

TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. INTERESTS OF AMICI | 1 |
| II. THE DEFINITION OF “AMATEUR” HAS CHANGED DRAMATICALLY OVER TIME | 3 |
| III. RESTRICTIONS ON SHARING REVENUE WITH ATHLETES ARE NOT RELATED TO COMPETITIVE BALANCE IN SPORTS..... | 6 |
| IV. RESTRICTIONS ON PLAYER PAY ARE NOT RELATED TO DEMAND FOR THE PRODUCT | 12 |
| V. “NET INCOME” NUMBERS FROM THE NCAA ARE MISLEADING | 14 |
| VI. NCAA IS A CARTEL | 21 |
| VII. NCAA IS PRIMARILY FOCUSED ON SPORTS | 22 |
| VIII. CONCLUSION..... | 24 |
| CERTIFICATE OF COMPLIANCE..... | 25 |
| CERTIFICATE OF SERVICE | 26 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Other Authorities | |
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| Baird, Katie (2004) “Dominance in College Football and the Role of Scholarship Restrictions,” <i>Journal of Sport Management</i> Vol. 18 | 10 |
| Berri, David J. (2004) “Is There a Short Supply of Tall People in the College Game?” in Fizel, John and Rodney Fort, “Economics of College Sports” | 10 |
| Bowen, H. R. (1980) <i>The costs of higher education</i> . San Francisco: Jossey-Bass..... | 15 |
| Brown, Robert (1994) “Measuring the Cartel Rents in the College Basketball Player Recruitment Market,” <i>Applied Economics</i> Vol. 26..... | 21 |
| Carroll, Kathleen and Brad Humphreys (2014) “Opportunistic Behavior in a Cartel Setting: Effects of the 1984 Supreme Court Decision on College Football Television Broadcasts,” <i>Journal of Sports Economics</i> | 10 |
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| Eckard, Woodrow E. (1998) “The NCAA Cartel and Competitive Balance in College Football,” <i>Review of Industrial Organization</i> 13 | 11 |
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Martin, R. E. (2009)
Revenue to cost spiral in higher education. The John W. Pope Center for Higher Education Policy15

McEvoy, Chad, Alan Morse, and Stephen Shapiro (2013)
 “Factors Influencing Collegiate Athletic Department Revenues.” *Journal of Issues in Intercollegiate Athletics*.....14

Muenzen, Kristen (2013)
 “Weakening Its Own Defense? The NCAA’s Version of Amateurism.” *Marquette Sports Law Review*.....3

Peach, J. T. (2007)
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Schwarz, Andy (September 2011)
 “Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes,” *Selected Proceedings of the Santa Clara University Sports Law Symposium*11

Sutter, Daniel and Stephen Winkler (February 2003)
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 “NCAA Division I Men’s Basketball Coaching Contracts: A Comparative Analysis of Incentives for Athletic and Academic Team Performance Between 2009 and 2012.” *Journal of Issues in Intercollegiate Athletics*23

<http://admissions.duke.edu/application/aid>.....18

http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins.....5

<http://ope.ed.gov/athletics/Index.aspx>16

<http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach>.....19

http://www.basketball-reference.com/awards/recruit_rankings_2013.html.....8

<http://www.businessweek.com/news/2013-08-30/college-football-powers-seek-leeway-to-flex-muscle-through-rules>11

<http://www.forbes.com/nba-valuations/list/>.....20

<http://www.ncaa.org/about/resources/media-center/news/grants-waiver-college-football-playoff-national-championship>.....5

http://www.nccu.edu/formsdocs/proxy.cfm?file_id=894.....19

<http://www.sfgate.com/bayarea/article/UC-rejects-its-own-policy-of-tying-coach-pay-to-6033918.php>.....23

<http://www.sports-reference.com/cbb/schools/>21

<http://www.sports-reference.com/cbb/schools/?redir>6

<https://weaksidawareness.wordpress.com/2011/06/09/salary-and-contracts-of-nba-coaches/>20

I. INTERESTS OF AMICI

We are a group of economists and professors of sport management who focus specifically on the economics of sports – a subject that includes college athletics. Together, we have been published on sports topics in more than 200 peer-reviewed journal articles, in addition to dozens of other books and publications.

We write this *amici brief* to help inform the Court on the economic facts underpinning the O’Bannon vs. NCAA case. We will especially focus on how the word “amateur” has been defined over time, the impact of pay restrictions on competitive balance and consumer demand, and the compensation of college athletes.

The NCAA consistently argues that it is important that student-athletes be “amateurs.” We will note that the definition of this term has changed over time. In fact, what this means has changed within the past few weeks. The fact that this term cannot be clearly defined undermines the NCAA’s defense of the rules it establishes to restrict student-athlete compensation.

It is often argued that permitting student-athletes to earn more than the current NCAA restrictions allow would disrupt competitive balance. We explain the broad consensus within sports economics that establishes that competitive balance is not related to restrictions on player pay.

Restrictions on pay also have no influence on consumer demand.

Restrictions on pay have been removed in professional baseball and professional football without any impact on consumer demand. In addition, the compensation of student-athletes has changed over time without any corresponding decline in consumer demand.

The net revenue figures offered by the NCAA are misleading, since non-profits have an incentive to spend all revenues. When we look at the entry and exit of teams in Division-I, it appears that NCAA men's basketball is a very healthy business.

NCAA athletes are paid a wage that is well below what we should expect. Typically professional sports teams pay their athletes at least 50% of league revenues. If the NCAA followed this example, the average student-athlete in both FBS football and Division-I men's basketball would be paid more than \$100,000 per season.

It is claimed that the NCAA is primarily focused on the education of student-athletes. The evidence, though, suggests that the focus is on increasing revenues. Furthermore, coaches are often evaluated more in terms of wins and losses and less in terms of the education of their athletes.

We present mainstream economics, based on a long-agreed-upon consensus. If it appears counter-intuitive, that is because it has been in the interest of the

NCAA, member conferences, and schools to perpetuate a narrative that “feels” correct despite little or no theoretical or empirical support.

Much of the material included in this *amici brief* comes from past writings of one or more of the signers, including from academic publications, consulting projects, and litigation.

II. THE DEFINITION OF “AMATEUR” HAS CHANGED DRAMATICALLY OVER TIME

The term “amateur” is used in both the *Amicus Briefs* of the “Anti-Trust Scholars” and the “American Council on Education.” But these briefs do not define what this term means. And when we review the history of the term, we see that this definition is not fixed.

The definition of “amateur” has changed over time. Muenzen (2013)¹ makes the following observation: “*Early NCAA statements on amateurism comported favorably with the amateurism ideal of intrinsic, rather than extrinsic, rewards. In 1906 the NCAA’s stance was that [‘financial inducements from any source, including faculty or university financial aid committees, were not allowed. Singling out prominent athletic students from preparatory schools was a violation of the amateur code, as was paying those who were not bona fide students’].*”² In addition, the 1916 NCAA bylaws defined the “amateur” as “one who participates

¹Muenzen, Kristen (2013). “Weakening Its Own Defense? The NCAA’s Version of Amateurism.” *Marquette Sports Law Review*, v.13, n2: 257-288

²Muenzen, Kristen (2013), p: 260.

in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived there from.”³ While this definition does not differ dramatically from the current “Principle of Amateurism” in words,⁴ the notion of receiving any remuneration for athletic skill in the early years of the NCAA – as opposed to today’s athletic scholarships – was forbidden.

The ruling from Judge Wilken notes that after 1916 the rules regarding amateurism were changed again in 1956, 1975, and in 2013. The change in 2013 – as Judge Wilken observes – allows “*different levels of compensation for recruits in different sports. The new rules permit Division I tennis recruits to earn up to ten thousand dollars per year in prize money from athletic events before they enroll in college (Ex. 2340 at 75). Other Division I recruits, in contrast, remain barred from receiving any prize money in excess of their actual and necessary costs of competing in an event.*”

In January of 2015, the definition of amateur was changed twice. First, the NCAA announced that if a player’s team appeared in the NCAA football playoffs,

³*Id.*

⁴“The “Principle of Amateurism” states that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” *Id.*

the NCAA will assist the player's family with travel expenses to the game.⁵ Such a change in rules is consistent with the observation that benefits to players and their families are not fixed by NCAA principles, but change depending on shifting NCAA definitions of amateurism. In addition, because only the teams that appear in the playoffs receive travel funds, it suggests the NCAA is willing to allow pay for performance. Or, at least, their objection to this practice is not entirely fixed.

Another change from January of 2015 focused on the cost of attendance.⁶ Members of the ACC, Big 12, Big Ten, SEC, and Pac-12 are now allowed to give stipends to cover the "full cost of attendance." These awards don't just include scholarships, but also stipends to cover the cost of living. This measure passed on a vote of 79-1 and once again alters what it means to be an amateur, allowing cash payments that the NCAA previously argued would significantly harm college sports.

Given the above definition of "amateur" adopted in early-NCAA history, all of the practices employed today violate the basic principle. Athletes today are given scholarships. In addition the players are given room and board and families of players that win can be reimbursed for travel expenses. Finally, the athletes in

⁵ <http://www.ncaa.org/about/resources/media-center/news/grants-waiver-college-football-playoff-national-championship>

⁶ http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins

the top conferences are given stipends to cover the cost-of-living. In sum, athletes today are compensated, to a degree, for playing sports.

And this means that the word “amateur” today simply means that an athlete should not be compensated beyond the current restriction imposed by the NCAA. Obviously this is an arbitrary definition. Furthermore, as we will demonstrate, altering these restrictions will not impact competitive balance or consumer demand for the NCAA’s product.

III. RESTRICTIONS ON SHARING REVENUE WITH ATHLETES ARE NOT RELATED TO COMPETITIVE BALANCE IN SPORTS

The *Amicus Brief* from the “American Council on Education” made the following statement: “*The district court ruling would also impede achievement of procompetitive effects of NCAA’s amateurism rules*” (p.4).

This statement clearly contradicts the academic research on competitive balance in college sports. In fact, under the current rules it is clear that NCAA men’s basketball is not competitively balanced. This is easy to demonstrate. The following table reports the schools that have five or more Final Four appearances since the NCAA Final Four was first played in 1939.⁷ There are currently 351 schools participating in Division I men’s basketball. The following list, though, consists of only 19 schools (or 5.4% of schools currently in Division I). These 19 schools have combined to make 57.7% of all Final Four Appearances. And these

⁷ This data can be found at <http://www.sports-reference.com/cbb/schools/?redir>

19 schools have won 74.7% of all NCAA championships. Such a pattern is not unique to men's college basketball, but found in many other NCAA sports.⁸

Table One: Distribution of Final Four Appearances in Men's College Basketball: 1939-2014

| School | Final Four Appearances | National Championships |
|--|-------------------------------|-------------------------------|
| UCLA Bruins | 18 | 11 |
| North Carolina Tar Heels | 18 | 5 |
| Kentucky Wildcats | 16 | 8 |
| Duke Blue Devils | 15 | 4 |
| Kansas Jayhawks | 14 | 3 |
| Ohio State Buckeyes | 11 | 1 |
| Louisville Cardinals | 10 | 3 |
| Indiana Hoosiers | 8 | 5 |
| Michigan State Spartans | 8 | 2 |
| Michigan Wolverines | 7 | 1 |
| Arkansas Razorbacks | 6 | 1 |
| Cincinnati Bearcats | 6 | 2 |
| Oklahoma State Cowboys | 6 | 2 |
| Syracuse Orange | 5 | 1 |
| Connecticut Huskies | 5 | 4 |
| Illinois Fighting Illini | 5 | 0 |
| Georgetown Hoyas | 5 | 1 |
| Florida Gators | 5 | 2 |
| Houston Cougars | 5 | 0 |
| Total of these 19 Division I schools | 173 | 56 |
| Total all Division I schools competing in 2014-15 | 300 | 75 |
| Percentage | 57.7% | 74.7% |

⁸ Jim Peach (2007) found a similar pattern when examining football, women's college basketball, men's baseball, women's softball, and men's and women's volleyball. In each of these sports, championships are dominated by a small number of schools. Peach, J. T. (2007). "College Athletics, Universities and the NCAA: Western Social Science Association Presidential Address" *Social Science Journal*, 44(1), 11-22.

When we look at recruiting in men's basketball we can see why this outcome is achieved. The following table reports the top 10 schools with respect to recruiting high school players ranked in the top 30 in the Recruiting Service Consensus Index (RSCI).⁹ These ten schools represent only 3.3% of all Division-I schools. These schools, though, were the destination of 43.6% of top 30 talents. In addition, eight of the schools on the above list also appeared in our table listing the top Final Four schools.

Table Two: Top 10 Destinations of Top 30 RSCI Recruits: 1998 to 2013

| School | Number of Top 30 Recruits |
|--|------------------------------|
| Duke | 31 |
| Kentucky | 29 |
| North Carolina | 27 |
| Kansas | 18 |
| Arizona | 18 |
| UCLA | 16 |
| Texas | 14 |
| Florida | 13 |
| Syracuse | 12 |
| Michigan State | 11 |
| Total | 189 |
| Total Recruits | 433 |
| Percent of Top Recruits to Top 10 Schools | 43.6% |
| Percent of Schools in Top 10 | 3.3% |

⁹This data can be found at: http://www.basketball-reference.com/awards/recruit_rankings_2013.html. Basketball-reference reports the RSCI from 1998 to 2013. The RSCI combines the rankings of six different recruiting services.

The argument is made that the NCAA current pay restriction is necessary to maintain competitive balance. But this evidence actually makes the opposite argument. The current pay restrictions actually result in competitive imbalance. The simple economics of price ceilings illustrates why this is the case. The current rules restricting payment to players prevent any school from offering a higher wage to attract talent. This forces players to consider something else in deciding which school to attend. The above list makes it clear that one factor players consider is the historical success of the school. And that indicates that the pay restrictions that the NCAA trumpets as promoting balance actually lead to less balance.

The Kentucky Wildcats under coach John Calipari highlight the advantage top schools have in recruiting student-athletes. Calipari was hired by the University of Kentucky in 2009. Since his arrival, 23 athletes ranked in the RSCI top-30 have come to Kentucky. Although 11 of these athletes stayed at Kentucky for only one season (before moving on to the National Basketball Association), Calipari's ability to recruit top athletes means that he often has more than five top recruits on his roster at any one time. For example, his 2014-15 squad has nine top-30 recruits. With nine top players, at any given time Kentucky has four top-30 recruits on its bench. Meanwhile, its opponents frequently do not have any top recruits. Such a disparity in talent results in the competitive imbalance we observe.

Table Three: Top 30 RSCI Recruits at the University of Kentucky: 2009 to 2014

| Player | Year | RSCI | Player | Year | RSCI |
|-----------------|-------------|-------------|------------------------|-------------|-------------|
| Karl Towns | 2014 | 5 | Anthony Davis | 2011 | 1 |
| Trey Lyles | 2014 | 12 | Michael Kidd-Gilchrist | 2011 | 3 |
| Tyler Ulis | 2014 | 18 | Marquis Teague | 2011 | 7 |
| Devin Booker | 2014 | 23 | Kyle Wiltjer | 2011 | 18 |
| Julius Randle | 2013 | 2 | Brandon Knight | 2010 | 5 |
| Andrew Harrison | 2013 | 4 | Terrence Jones | 2010 | 10 |
| Aaron Harrison | 2013 | 6 | Doron Lamb | 2010 | 25 |
| Dakari Johnson | 2013 | 9 | John Wall | 2009 | 2 |
| James Young | 2013 | 11 | DeMarcus Cousins | 2009 | 3 |
| Marcus Lee | 2013 | 16 | Daniel Orton | 2009 | 16 |
| Nerlens Noel | 2012 | 1 | | | |
| Alex Poythress | 2012 | 8 | | | |
| Archie Goodwin | 2012 | 12 | | | |

If Kentucky had to pay its players in a free market, it is unlikely it would choose to pay top wages to players who are just sitting on the bench. The implication is that the pay restrictions the NCAA trumpets actually enable prominent schools to hoard top talent. Thus, relaxing the pay restrictions would not cause balance to get worse. If anything, it would allow balance to get better. Multiple economic publications¹⁰ have reached a similar conclusion that, rather

¹⁰A sample of this literature would include:
 Baird, Katie (2004) "Dominance in College Football and the Role of Scholarship Restrictions," *Journal of Sport Management* Vol. 18, No. 3.
 Berri, David J. (2004). "Is There a Short Supply of Tall People in the College Game?" in Fizel, John and Rodney Fort, "Economics of College Sports"
 Carroll, Kathleen and Brad Humphreys (2014). "Opportunistic Behavior in a Cartel Setting: Effects of the 1984 Supreme Court Decision on College Football Television Broadcasts," *Journal of Sports Economics*.

than improving competitive balance, the NCAA's price-fixing scheme – whereby schools collude to set the value of all payments to their athletes, including payments for NIL usage, at below-market rates – either has no effect on balance, or makes it worse.

These findings are robust across many studies¹¹; fixing prices for athletes does not help balance college sports. Some college administrators understand this; consider the conclusions of Big 12 Commissioner Bob Bowlsby: “The concept of competitive equity through rules management is largely a mirage. It hasn't worked at any level.”¹²

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Depken, Craig A. and Dennis P. Wilson (2004). “The impact of Cartel Enforcement in Division I-A Football,” in Fizel, John and Rodney Fort, “Economics of College Sports.”

Eckard, Woodrow E. (1998). “The NCAA Cartel and Competitive Balance in College Football,” *Review of Industrial Organization* 13.

Fort, Rodney “Sports Economics” (2005)

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Schwarz, Andy (September 2011). “Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes,” *Selected Proceedings of the Santa Clara University Sports Law Symposium*, pp. 46-74.

Sutter, Daniel and Stephen Winkler (February 2003). “NCAA Scholarship Limits and Competitive Balance in College Football,” *Journal of Sports Economics* Vol. 4, No. 1, pp. 3-18

¹¹ *See supra*, n. 10.

¹² <http://www.businessweek.com/news/2013-08-30/college-football-powers-seek-leeway-to-flex-muscle-through-rules>.

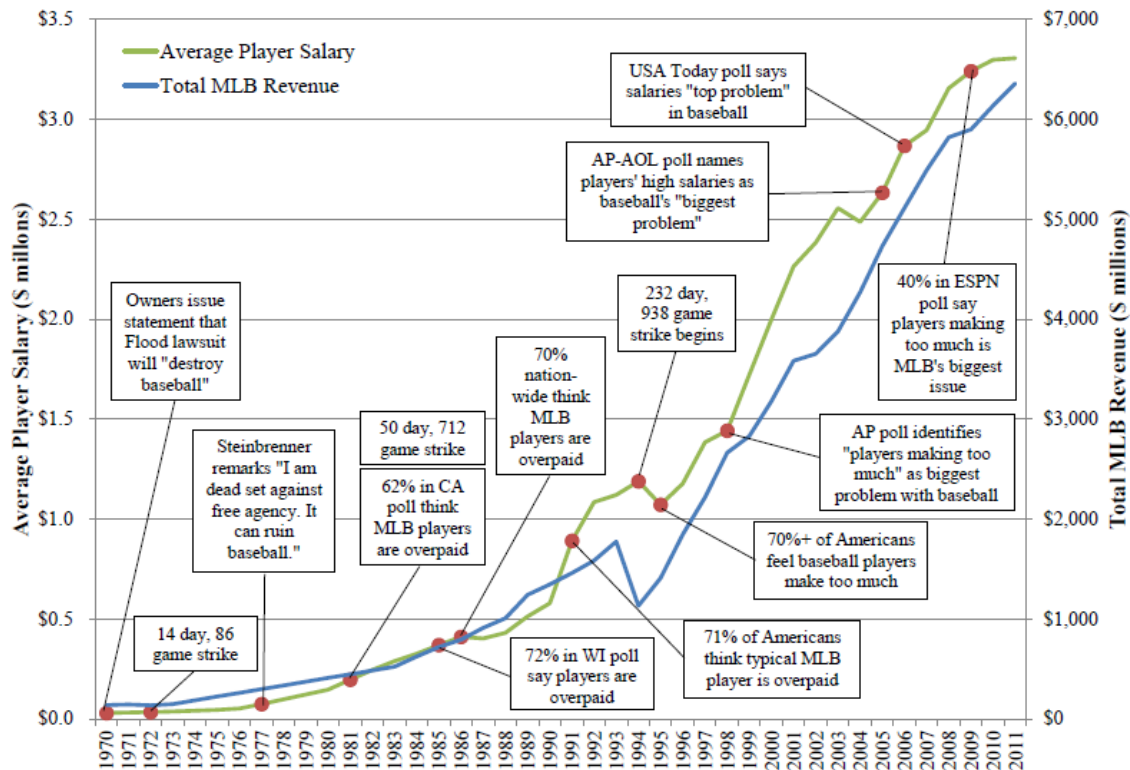
IV. RESTRICTIONS ON PLAYER PAY ARE NOT RELATED TO DEMAND FOR THE PRODUCT

The *Amicus Brief* from the “Anti-Trust Scholars” made the following statement: “*Amici take as their point of departure the district court’s findings that restrictions on payments to players bear a reasonable relationship to ... increasing consumer demand for amateur sports...*”

We concur with the following two observations from Judge Wilken: “*Thus, the Court finds that the NCAA’s restrictions on student-athlete compensation are not the driving force behind consumer demand for FBS football and Division I basketball-related products*” (p. 33) and “*Ultimately, the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography*” (p. 83).

Beyond these observations from Judge Wilken, we also note the following from baseball history. As economist Dan Rascher noted in his testimony – and as illustrated in the following figure – removing player pay restrictions in baseball in the 1970s has not impacted consumer demand. Free agency was established in Major League Baseball in the 1970s (this allowed veteran players to sell their services in a free labor market). This led to a dramatic increase in player salaries. Although owners and fans often claim that these high salaries are not good for

baseball, the data on revenues in baseball indicate that higher player salaries have not effected consumer demand.¹³



See Dkt. No. 957-10, pg. 19 (“Dr. Rascher Expert Report”).

For a more recent example, consider Olympic sports. Prior to the 1992 games, Olympic athletes were supposed to be amateurs. Professionals were prohibited from playing. Since 1992, though, this restriction has been removed. In 1988 – when only “amateurs” were supposed to be participating – the broadcasting rights for the Summer Olympics (in 2013 dollars which thus controls for inflation)

¹³ Similar arguments were made when the NFL moved from its restricted player market to the free agent market we observe today. As we saw in baseball, a more liberated labor market in the NFL did not impact consumer demand.

were \$915.6 million. In contrast, the broadcasting rights for the 2008 Summer Olympics (in 2013 dollars which thus control for inflation) was \$1,737 million.¹⁴ Such a dramatic increase across 20 years suggests that fans do not respond to the “amateur” status of the athletes.

We re-iterate that the NCAA has changed the definition of amateur over time and there is no evidence these shifting definitions have impacted demand for the product.

V. “NET INCOME” NUMBERS FROM THE NCAA ARE MISLEADING

The *Amicus Brief* from the “American Council on Education” made the following statement: “*Contrary to a canard, at nearly all colleges and universities the athletics program does not generate net income. Only a tiny fraction of athletics programs at a tiny fraction of colleges and universities do*” (p. 11).

McEvoy, Morse, and Shapiro (2013) note that there is a relationship between revenues and costs for a college athletic program.¹⁵ As these authors note, “*college athletic programs have witnessed tremendous growth in both their*

¹⁴ Broadcasting revenue can be found at Feizabadi, Mahdi Shariati, Marzie Bakhtiari, Hamed Rashidzade, and Fereshte NikKhakian (2013). “The Evolution of Television Broadcasting Rights during the Summer Olympic Games.” *International Research Journal of Applied and Basic Sciences*. Vol. 4 (3): 613-616. The Consumer Price Index data from St. Louis Federal Reserve was used to convert these numbers into 2013 dollars.

¹⁵McEvoy, Chad, Alan Morse, and Stephen Shapiro (2013). “Factors Influencing Collegiate Athletic Department Revenues.” *Journal of Issues in Intercollegiate Athletics*, 6: 249-267.

revenues and expenses in recent years. The trend of expenditures increasing at a similar rate to revenues is not uncommon in a non-profit setting. Non-profit organizations are tax-exempt; therefore, they must spend all resources on organizational operations (Martin, 2009).¹⁶ This phenomenon is the foundation of Bowen's (1980)¹⁷ Revenue Theory of Cost. The Revenue Theory of Cost states that in a non-profit setting expenditure increases are a direct result of increased revenue that must be spent by the organization in order to avoid a significant surplus. Bowen's work focused specifically on institutions of higher education. Colleges and universities generate increased revenue primarily through, tuition increases (either through increasing enrollment, raising tuition price, or both), government funding, private grants and contracts, and fundraising ("At Postsecondary Institutions," 2010). Institutions, due to their non-profit status, spend this additional revenue, which results in increased expenditures. Martin (2009) refers to this spending environment as the revenue-to-cost spiral. Educational administrators are incentivized to spend whatever revenue they generate."

The above quote argues that it is not surprising that estimates of net income indicate that large profits do not exist in college sports. There is an incentive for

¹⁶ Martin, R. E. (2009). *Revenue to cost spiral in higher education*. The John W. Pope Center for Higher Education Policy. Retrieved from <http://www.popecenter.org/acrobat/revenue-to-cost-spiral.pdf>

¹⁷ Bowen, H. R. (1980). *The costs of higher education*. San Francisco: Jossey-Bass.

these non-profits to spend the revenues earned. Hence, expenses tend to rise when revenues rise.

The evidence that men's college basketball and college football is financially successful begins with revenue growth in the sport. The Department of Education¹⁸ reports the following revenue numbers for men's college basketball from 2004-05 to 2012-13. As Table Four notes, average real revenue (i.e. revenue adjusted for the impact of inflation) per team in Men's College Basketball has increased from \$2.8 million to more than \$4 million. This represents a 42% increase in just nine years. Table Five reports a similar pattern in college football. From 2004-05 to 2012-13, average real revenue (i.e. revenue adjusted for inflation) has increased from nearly \$17 million to more than \$26 million. This represents a 54% increase.¹⁹

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¹⁸ Revenue data is reported by schools to the Department of Education. The data can be found at : <http://ope.ed.gov/athletics/Index.aspx>

¹⁹ With the institution of the college football playoff in the FBS division, these revenue are likely to increase further.

Table Four: Real Revenue in Men's College Basketball: 2004-05 to 2012-13

| Season | Teams Reporting | Total Real Revenue | Average Real Revenue |
|---------------|------------------------|-------------------------------|---------------------------------|
| 2012-13 | 343 | \$1,381,881,659 | \$4,028,810 |
| 2011-12 | 340 | \$1,329,549,826 | \$3,910,441 |
| 2010-11 | 342 | \$1,268,892,429 | \$3,710,212 |
| 2009-10 | 343 | \$1,268,583,614 | \$3,698,495 |
| 2008-09 | 343 | \$1,171,065,015 | \$3,414,184 |
| 2007-08 | 337 | \$1,100,877,671 | \$3,266,699 |
| 2006-07 | 332 | \$1,023,808,210 | \$3,083,760 |
| 2005-06 | 330 | \$974,375,331 | \$2,952,653 |
| 2004-05 | 325 | \$920,100,849 | \$2,831,080 |

Source: EADA; Bureau of Labor Statistics Database

Notes: Inflation adjustments made using 2013 as base year. Later of the academic term used for adjustment year. For example, adjustment for 2012 is applied to 2011-12 season.

** - average per player assumes a roster of 14 players – the typical average roster size in Division-I basketball – and that players are given 50% of the team's revenue*

Table Five: Real Revenue in FBS College Football: 2004-05 to 2012-13

| Season | Teams Reporting | Total Real Revenue | Average Real Revenue |
|---------------|------------------------|-------------------------------|---------------------------------|
| 2012-13 | 121 | \$3,172,981,938 | \$26,222,991 |
| 2011-12 | 117 | \$2,978,572,707 | \$25,457,886 |
| 2010-11 | 117 | \$2,801,848,785 | \$23,947,426 |
| 2009-10 | 117 | \$2,748,290,636 | \$23,489,664 |
| 2008-09 | 117 | \$2,619,714,985 | \$22,390,726 |
| 2007-08 | 117 | \$2,477,993,314 | \$21,179,430 |
| 2006-07 | 116 | \$2,283,411,085 | \$19,684,578 |
| 2005-06 | 116 | \$2,094,099,028 | \$18,052,578 |
| 2004-05 | 113 | \$1,918,339,659 | \$16,976,457 |

Source: EADA; Bureau of Labor Statistics Database

Notes: Inflation adjustments made using 2013 as base year. Later of the academic term used for adjustment year. For example, adjustment for 2012 is applied to 2011-12 season.

The above calculations are for the average school in each sport. It is also helpful to think of the richest and poorest schools. For example, consider Duke University in Men's College Basketball. In 2012-13, Duke University reported \$27,000,243 in men's basketball revenue. If Duke followed the practice of paying 50% of their revenue to their players, then their players would be paid \$13.5 million. And that means each of the 11 players who logged minutes would be paid \$1.227 million. The cost of attending Duke is less than \$70,000 per year.²⁰ These numbers suggest, therefore, that Duke University is paying its players less than 10% of what they would have to pay if it were openly a for-profit institution that was competing in a free market for its labor.

A similar story can be told about North Carolina Central (NCC), a school located just a few miles from Duke University. NCC joined the ranks of Division-I basketball in 2011. But in 2012-13, the school reported \$1.22 million in men's basketball revenue. This mark is below average for a Division-I program. If the school gave 50% of its revenue to its players, the 14 players who logged minutes on this team would each be paid \$43,659. Since the cost of attending NCC is less

²⁰ The cost of attending Duke University can be found here: <http://admissions.duke.edu/application/aid>

than \$15,000²¹, even a small program like NCC finds the employment of men's college basketball players to be profitable.

The cited player costs tend to be an exaggeration. As Goff and Wilson (2013)²² observe: *"...self-reported 'costs' of athletic programs... bear little relationship to marginal costs of producing the athletic program. In particular, tuition grants-in-aid for athletes are typically included at the maximum price charged to students. Even an average price overstates the marginal cost of tuition grants-in-aid because universities have large fixed costs. The marginal cost of instruction for 100 additional football and basketball students at large public universities with flexible enrollments is, at most, the price of hiring a few additional adjuncts or graduate assistants."*

There is an obvious beneficiary from the restriction on player pay. Mike Krzyzewski – the head coach of the men's basketball team at Duke University – was paid a reported \$9.68 million for the 2013-14 season.²³ For the 2012-13 season, Duke University reported revenues from this team of \$25.8 million. Even

²¹ The cost of attending North Carolina Central can be found here: http://www.nccu.edu/formsdocs/proxy.cfm?file_id=894

²² Goff, Brian and Dennis Wilson (2013). "Estimating the MRP of Collegiate Athletes From Professional Factor Shares." Presented at the Southern Economic Association meeting.

²³ Salaries for men's college basketball coaches can be found at <http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach>

if revenues grew by 10% from 2012-13 to 2013-14, Duke University was still paying about a third of its revenue to its coach.²⁴

To put that in perspective, a sample of salary data from NBA coaches in 2013-14 did not have a single coach paid as much as Mike Krzyzewski. In fact, in our sample, the average coach was only paid \$3.39 million.²⁵ With average NBA team revenues at more than \$160 million²⁶, the average coach in our sample was paid only about 2% of NBA team revenue.²⁷

Men's basketball coaches are not the only non-players to benefit from the current NCAA rules. The revenues generated by college basketball – and the corresponding costs – are likely a significant factor in the decision schools have made with respect to participating in Division-I men's college basketball. Since 1990, 52 different schools have joined the ranks of Division-I basketball while

²⁴ The salary data for men's basketball coaches from USA Today only includes coaches who led teams to the NCAA men's basketball tournament. If we look at the 30 teams in the sample with the highest revenue, we see that on average these teams paid 17.8% of their revenue to their head basketball coaches.

²⁵ Salary data for NBA coaches can be found at <https://weaksidawareness.wordpress.com/2011/06/09/salary-and-contracts-of-nba-coaches/>. For the 2013-14 season, this site only reports data for 21 of the 30 NBA coaches.

²⁶ Revenue data for NBA teams can be found at <http://www.forbes.com/nba-valuations/list/>

²⁷ A similar observation can be made about the pay of head football coaches in college relative to the pay of NFL head coaches.

only seven schools have left the Division-I ranks.²⁸ Such a record of entry and exit suggests that schools generally find playing Division-I basketball to be a good financial decision.

VI. NCAA IS A CARTEL

In a competitive marketplace, firms that earn the revenues we observe in men's college basketball and college football would not be able to pay their workers so little. NCAA schools, though, are able to restrict the pay to athletes because the NCAA is an anti-competitive cartel; a point well-established in the academic literature.²⁹

The microeconomic textbook by Robert Pindyck & Daniel Rubinfeld³⁰ provides clear discussion of the NCAA as a cartel: *“Like any industry, intercollegiate athletics has firms and consumers. The ‘firms’ are the universities that support and finance teams. The inputs to production are the coaches, student*

²⁸ Data on the entry and exit of college teams can be found at: <http://www.sports-reference.com/cbb/schools/>

²⁹ A review of this literature would include the following:

Humphreys, Brad and Jane E. Ruseski (2009). “Monitoring Cartel Behavior and Stability: Evidence from NCAA Football,” *Southern Economic Journal*, Vol. 75: 720-35.

Kahn, Lawrence M. (2007). “Markets: Cartel Behavior and Amateurism in College Sports,” *Journal of Economic Perspectives* Vol. 21: 209-26.

Brown, Robert (1994). “Measuring the Cartel Rents in the College Basketball Player Recruitment Market,” *Applied Economics* Vol. 26: 27-34

Arthur A. Fleischer III, Brian L. Goff, and Robert D. Tollison (1992) *The NCAA: A Study in Cartel Behavior*, University of Chicago, p. 38.

³⁰ Professor Rubinfeld served as the NCAA's primary economic expert witness in this matter.

athletes, and capital in the form of stadiums and playing fields. The consumers, many of whom are current or former college students, are the fans who buy tickets to games and the TV and radio networks that pay to broadcast them. There are many firms and consumers, which suggests that the industry is competitive. But the persistently high level of profits in this industry is inconsistent with competition ... This profitability is the result of monopoly power, obtained via cartelization. The cartel organization is the National Collegiate Athletic Association (NCAA)....”

If a school attempted to pay their athletes more than NCAA restrictions allow, that school would face significant sanctions. Persistent violations would result in expulsion from the NCAA and inability to compete. Consequently, the pay restrictions imposed by the NCAA have persisted over time.

VII. NCAA IS PRIMARILY FOCUSED ON SPORTS

The *Amicus Brief* from the “American Council on Education” made the following two statements:

“The mission of a higher education institution is to provide education, not to profit by pleasing sports fans.”

“Higher education’s commitment to maintaining education as the foundation of intercollegiate athletics is long-rooted.”

These statements re-iterate the idea that education is the primary mission of college athletic programs. However, when we look at coaches’ salaries we see a

different story. Wilson and Burke (2013) report the size of the contract incentives of men's college basketball coaches.³¹ These authors examined a sample of 45 coaching contracts. Of these, 42 had an athletic incentive.³² In contrast, only 28 contracts in this sample had an academic incentive. Not only did more contracts have athletic incentives, these incentives were much larger than those based on academic performance. The numbers these authors report indicate that the athletic incentives averaged \$245,042 per coach. In contrast, the average academic incentive was only \$43,940.³³

These numbers clearly indicate the priority in NCAA athletics. Although the athletes are often referred to as "student-athletes", the contracts paid to coaches make it clear that performance on the field of play is the primary focus of the schools.

³¹ Wilson, Matthew and Kevin Burke (2013). "NCAA Division I Men's Basketball Coaching Contracts: A Comparative Analysis of Incentives for Athletic and Academic Team Performance Between 2009 and 2012." *Journal of Issues in Intercollegiate Athletics*. v6: 81-95.

³² As Wilson and Burke (2013) noted: "The seven most common athletic incentive categories were: Conference Coach of the Year; National Coach of the Year; Postseason Appearance; Regular Season Conference Champion; Elite Eight Appearance; Final Four Appearance; and National Champion."

³³ Consistent with this observation, recently the Regents of the University of California rejected a proposal to tie the pay of athletic coaches to the academic success of the student athletes. <http://www.sfgate.com/bayarea/article/UC-rejects-its-own-policy-of-tying-coach-pay-to-6033918.php>

VIII. CONCLUSION

None of what we have outlined above is particularly controversial in the academic literature on the economics and management of collegiate sports. The word “amateur” appears to mean “the NCAA sets the pay of its student-athletes”. It does not mean that an athlete is not entitled to any compensation for his or her efforts. This is clear when we look at how the level of compensation has been consistently re-defined over time. In addition, it is clear that changing the compensation of student-athletes is not expected to impact competitive balance or demand for the product. It is also clear that student-athletes are paid far less than what we would see in a free market. This is possible because the NCAA is an anti-competitive cartel. In addition, the evidence suggests that this cartel is more focused on athletics than on education. As a consequence, concerns the Court might harbor that increased payments to student-athletes might be fatal to college sports are, as a matter of economics, truly misplaced.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 31-1, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6), because it is written in 14 pt Times New Roman font, and with the type volume limitations of Fed. R. App. P. 29(d) and Ninth Circuit Rule 29-2(c), because it contains 5,214 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii). This count is based on the word-count feature of Microsoft Word 2010.

Dated: January 27, 2015

By: /s/ Steven N. Williams

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 27, 2015.

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