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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE COLLEGIATE ATHLETE NIL LITIGATION

Case No. 4:20-cv-03919-CW

MENKE-WEIDENBACH OBJECTORS' OPPOSITION TO MOTIONS FOR FINAL APPROVAL AND REPLY TO RESPONSE TO OBJECTIONS

Hon. Claudia Wilken
Hearing Date: April 7, 2025
Hearing Time: 10:00 a.m.
Courtroom: 3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTRODUCTION

The arguments in the parties' 74 pages of briefing fail to overcome fundamental flaws rendering the Second Amended Settlement[1] incapable of being approved pursuant to Fed. R. Civ. P. 23(e)(2). The Settlement:

- Discriminates against women and violates Title IX;
- Creates gross unfairness through its roster limits;
- Violates the antitrust laws through its spending cap, NIL deal review system, and roster limits; and
- Undercompensates the unlitigated athletic services claims.

The Motions for Final Approval should be denied.

BACKGROUND

I. THE OBJECTORS

The Menke-Weidenbach Objectors are members of the "Additional Sports Class" and the "Injunctive Relief Settlement Class" as defined in the Settlement (the "Menke-Weidenbach Objectors"). *See* Dkt. 717-1 ("Berman Decl."), Ex. C ("2d Am. Settlement") § A.1(n)(3), (z). Ten are women athletes in the Additional Sports Class who competed on NCAA Division I teams during the class period. *See* Dkt. 628-1 ("Menke Objectors"). ***One hundred and fifty-five*** are current and aspiring student-athletes in a variety of sports who have been cut, or are at risk of being cut, from their teams due to roster limits in the Settlement. *See* Dkts. 628-1; 628-3 ("Weidenbach Objectors"); 628-5 ("Objectors Decls.").

As of the January 31, 2025 objection deadline, 18 Objectors had been cut from their teams. *See* Weidenbach Objectors at 8-9, 12-13; Objectors Decls. at 3, 59, 131, 141, 174, 216, 248, 270, 277, 310, 349, 367, 444, 458, 478, 510. Five more were informed that they will be cut if the Settlement is approved. *See* Objectors Decls. at 191, 431, 505, 526. At least 12 more have been cut since January 31. *See* Ex. B. Two more were informed they will be cut next year. *See* Ex. C.

[1] For simplicity, we refer to the Second Amended Settlement as "the Settlement," except where describing the recent revisions resulting in its current form.

Thirty-five additional class members in the Injunctive Relief Settlement Class who missed the objection deadline because they were afraid of retaliation or unaware of this litigation, the Settlement, the roster limits, their right to object, or the objection procedure, also object. *See* Exs. D, E. All are current or incoming Division I student-athletes. Most were cut by their respective schools in anticipation of final approval of the Settlement, and all oppose the roster limits.

II. THE SECOND AMENDED SETTLEMENT

The parties amended their agreement a second time in their March 3, 2025 Motions for Final Approval. *See* Dkts. 717 ("Pl. Mot"); 721 ("Def. Mot."). The Second Amended Settlement "corrects" "a drafting error," Berman Decl. ¶10, and replaces the definition of "Boosters" with a definition of "Associated Entity or Individual" (comprising five alternative definitions). 2d Am. Settlement § A.1(e); *see also* Dkt. 717-1, Ex. D at 4-5 (redline).

The Second Amended Settlement remains otherwise unchanged from Objectors' summary in their January 31, 2025 Objection. *See* Dkt. 628 ("Obj.") at 3-9. Objectors incorporate that summary, including all defined terms, by reference (except as noted in footnote 1). *See id.*

ARGUMENT

When deciding whether to approve a proposed class action settlement, the Court is a "fiduciary" tasked with "protecting the interests of absent class members." *Kim v. Allison*, 8 F.4th 1170, 1178 (9th Cir. 2021). A proposed settlement is "fair, reasonable, and adequate" only if "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate;" and – critically – "(D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). The Court must also weigh eight additional factors, including "the reaction of the class." *Kim*, 8 F.4th at 1178.[2]

[2] The full set of factors are: "(1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement." *Kim*, 8 F.4th at 1178 (internal quotation marks and citation omitted).

I. THE SETTLEMENT DISCRIMINATES AGAINST AND IS UNFAIR TO WOMEN

A. The Parties Fail To Justify The Gross Undercompensation Of Women's Antitrust Injuries

The Settlement blatantly discriminates against women athletes and deprives them of anything close to fair compensation for their antitrust injuries. Women athletes make up almost half of the class but will receive ***less than 10%*** of the funds. The parties concede that this skewed allocation is overwhelmingly biased in favor of men. Their justification for this is that "Defendants' real-world conduct" drove higher broadcast revenues for football and men's basketball than for women's sports. Pl. Mot. at 50.[3] But women's damages were heightened because Defendants' monopsony ***enabled and advanced*** the NCAA's artificial depression of the value of women athletes' NILs relative to men. If Defendants' anticompetitive conduct ***caused*** this gaping difference, they must compensate women for it.

The NCAA's historic discrimination depressed women's sports revenues. In 2021, the NCAA commissioned a report that concluded the NCAA "create[d]" and "perpetuate[d]" gender inequities that resulted in undervalued broadcasting rights for women's basketball. Kaplan Hecker & Fink LLP, *NCAA External Gender Equity Review Phase I: Basketball Championships* at 2-3 (Aug. 2, 2021), https://bit.ly/3Cx3whB ("Kaplan Hecker Phase I Report"). It found that the NCAA's failure to promote the sport drove down broadcasting revenues for women's basketball by ***hundreds of millions of dollars***. *Id.* at 8-9, 37-40, 75-78.

The parties are, therefore, wrong to rely on historic broadcasting revenues. The report relied on the conclusions of Ed Desser, the Plaintiffs' ***own media expert in this case***. *See* Kaplan Hecker Phase I Report at 8-9, 75-78. There, Desser assessed that the NCAA severely undervalued women's basketball media revenues for decades. *Id*. That lost revenue is not accounted for in

[3] Even without Title IX, non-revenue-generating sports – including women's sports – are necessary for schools to maintain Division I status, because schools must sponsor at least 14 sports to maintain NCAA eligibility. *See* NCAA Bylaw 20.9.6; NCAA, *Our Division One Members*, https://bit.ly/4iV7Ias (last accessed Mar. 17, 2025).

the damages model. If it was, revenues attributable to women's sports – and the value of female players' NILs – would be dramatically higher.

Plaintiffs suggest (at 49-50) that antitrust damages cannot compensate for discriminatory conduct. However, conduct can be both discriminatory and anticompetitive. The NCAA's discriminatory conduct is inextricably intertwined with its with its decades-long price-fixing conspiracy. ***The Plaintiffs themselves alleged this***. *See* Dkt. 533-1 ("TCAC"), ¶¶244-248. The NCAA failed to promote women's sports, and thus depressed women's sports revenues.

As Objectors explained, the recent explosion in popularity of women's sports proves significant revenues would have flowed to women athletes but for the NCAA's conduct. *See* Obj. at 11-12. In 2021, the NCAA finally extended March Madness branding to the women's college basketball tournament and suspended enforcement of its unlawful prohibition on third-party NIL compensation. *Id.* The result – skyrocketing television ratings for women's college basketball (outstripping men's ratings) and rapid expansion of women's NIL opportunities on par with men's – demonstrates how the NCAA's unlawful conduct devalued women's NILs relative to men. *Id.*

The Settlement ignores that fact and denies women adequate compensation for their antitrust damages. Instead, it releases the NCAA, conferences, and all Division I schools from ***ever*** paying for those losses. *See* 2d Am. Settlement § A.1(vv)(3). This discriminatory treatment flagrantly violates Rule 23's requirement that a settlement treat class members "equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D).

B. The Parties Fail To Explain Away The Settlement's Title IX Violation

Plaintiffs claim "There Are ***No*** Title IX Issues Raised by The Settlement." Pl. Mot. at 48 (emphasis added). That's false. The release of Title IX claims confirms it.

The Settlement explicitly raises Title IX issues by releasing ***all*** Title IX claims "arising out of or relating to the distribution of the Gross Settlement Fund." 2d Am. Settlement § A.1(vv)(3). The release applies to all Division I schools in addition to Defendants. *Id.* § A.1(rr). The parties fail to explain why the release exists, or what women receive in return. Plaintiffs instead downplay the release by emphasizing that it only applies to the distribution of the damages

fund. That is the ***exact part*** of the Settlement that blatantly violates Title IX by providing women – who comprise nearly 50% of the class – 10% of the fund. *See* Pl. Mot. at 49.[4]

If Title IX is inapplicable, the release of those claims would not be necessary. Its express inclusion refutes the parties' claim that Title IX does not apply.

1. The Title IX Violation

For more than 50 years, Title IX has provided that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, ***be denied the benefits of***, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). Title IX regulations further require substantially proportional distribution of athletic financial assistance between male and female athletics programs. 34 C.F.R. § 106.37(c). Though "financial assistance" is undefined, the Office for Civil Rights ("OCR") has long confirmed that it may be "provided in forms other than grants," including "work-related aid or loans." 1979 Policy Interpretation, 44 Fed. Reg. 71415.[5] NIL and athletic services compensation paid directly to student-athletes by schools is no different.

There are no exclusions under Title IX for revenue-generating sports, and the law applies to funds distributed to school athletic programs by outside entities (like the NCAA and conferences). Thus, Title IX governs the Settlement proceeds and is violated by the gross disparity in the distribution. In 1974, Congress rejected "efforts to limit the effect of the statute on athletics programs," *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004), by affirmatively declining to amend the statute to "exempt[] revenue-producing intercollegiate sports from Title IX's coverage." *Equity in Athletics, Inc. v. DOE*, 504 F. Supp. 2d 88, 95 (W.D. Va. 2007), *aff'd sub nom. Equity in Athletics, Inc. v. U.S. DOE*, 291 F. App'x 517 (4th Cir. 2008). And Title IX applies to funding for athletic "benefits and services" from

[4] Plaintiffs assert that, because they did not raise Title IX claims, "the settlement does not and cannot address them," so "Title IX does not govern how past damages should be allocated." Pl. Mot. at 49-50. But the Settlement ***does*** address Title IX claims: it releases them. Objectors are not claiming historic Title IX violations must be addressed in this case, except to the extent they are intertwined with Defendants' antitrust violations.

[5] *See* Valerie Bonnette, *The End of Equity in College Athletics* (Mar. 12, 2025), https://bit.ly/41RFFCb.

outside groups. OCR, Title IX Athletics Investigator's Manual 5 (1990), https://bit.ly/41UdVfT ("1990 Title IX Investigator's Manual").

Indeed, Title IX has always required that, when outside organizations "provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex," schools must "ensure that benefits and services are equivalent for both sexes." 1990 Title IX Investigator's Manual at 5; *see Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042, 1048 (8th Cir. 2002). Among those benefits are resources for "publicity" of men's and women's athletics. 34 C.F.R. § 106.41(c)(10); 1979 Policy Interpretation, 44 Fed. Reg. 71417. Because NIL revenues compensate student-athletes for athletic ability and publicity rights, Title IX applies.

Relying on *NCAA v. Smith*, 525 U.S. 459 (1999), Plaintiffs urge the Court to ignore Title IX because "no court" has found Title IX applies to the NCAA or conferences. Pl. Mot. at 49. However, Plaintiffs ignore that the NIL compensation would have been distributed by ***schools***, which are unquestionably subject to Title IX.[6]

The Settlement's skewed allocation of past NIL damages "follow[s] Dr. Rascher's damages methodology from class certification." Pl. Mot. at 50.[7] At class certification, Rascher did not account for Title IX because he assumed that ***conferences, not schools,*** would have paid NIL compensation directly to student-athletes. *See In re College Athlete NIL Litig.* ("*NIL I*"), No. 20-cv-03919-CW, 2023 WL 8372787, at *14 (N.D. Cal. Nov. 3, 2023). But the parties now agree that NIL compensation will be directly distributed by ***schools*** (which also get the benefit of the release), ***not conferences***. *See* 2d Am. Settlement, App'x A ("Injunctive Relief Settlement"), art. 3, § 2. Title IX therefore indisputably applies in the "but for" world. A damages model for

[6] Plaintiffs do not dispute that *Smith*'s holding is limited and that courts ***have*** applied Title IX to interscholastic athletic associations when schools delegate controlling authority over their athletic programs to those entities. *See* Obj. at 15-16. Nor do they dispute that interscholastic athletic associations are analogous to the NCAA and conferences, or that Division I schools have delegated controlling authority over their athletics programs to the NCAA and conferences. *See id.*

[7] Plaintiffs note (at 50) that the Court found Rascher's methodology "reliable" at the class certification stage, but do not dispute that the ***weight*** of his analysis was properly left to the jury. *See NIL I*, 2023 WL 8372787, at *12-16, 17.

the Settlement that properly accounted for Title IX would have ensured a proportional allocation of Settlement funds between male and female class members according to gender enrollment.[8]

That analysis did not occur. Instead, the fund allocation relies on Rascher's unsupportable conference-distribution assumption, which was the ***sole reason*** his damages model circumvented Title IX.[9] The grossly discriminatory result – more than 90% of the proceeds to men, and less than 10% to women – blatantly violates the law and deprives women athletes of adequate compensation. It also shines a harsh light on Plaintiffs' inadequate representation of female athletes. These deficiencies are fatal to the fairness and adequacy of the Settlement.

2. The Release – for Which There Is No Compensation – Is an Unfair Attempt To Avoid Title IX Liability

Apparently recognizing that Title IX prohibits their preferred distribution of funds, the parties included a broad Title IX release in the Settlement. While they characterize it as "narrow," Pl. Mot. at 49, it explicitly releases Title IX claims against the NCAA, conferences, and "***all*** Division I Member Institutions." 2d Am. Settlement § A.1(rr) (emphasis added).

The parties' attempted sleight of hand reinforces that women athletes were inadequately represented. No party has meaningfully addressed Title IX since class certification. Despite alleging that women disparately suffered under Defendants' price-fixing scheme, TCAC ¶¶244-248, Plaintiffs instructed their experts to disregard Title IX. *See* Dkt. 249 at 15-16 (quoting deposition transcripts of Desser and Rascher). At the time, Defendants argued that "even if [Plaintiffs' damages model] complied with Title IX, . . . for gender equity reasons, institutions

[8] At class certification, the Court excluded the report of Defendants' Title IX expert, Barbara Osborne, because it offered "impermissible legal conclusions" and "unreliabl[y]" opined that it was infeasible to "modify[ ] Dr. Rascher's [broadcast NIL] payments to comply with Title IX." *In re College Athlete NIL Litig.* ("*NIL II*"), No. 20-cv-03919-CW, 2023 WL 8372773, at *5 (N.D. Cal. Nov. 3, 2023). The Court also explained that even if Osborne's opinions were not impermissible legal conclusions, it would still exclude them because Osborne did not account for Title IX's application to payments "made by the conferences rather than schools." *Id.* at *8. Unlike Osborne, Objectors demonstrated the legal basis for Title IX's application to the NCAA and conferences. *See* Obj. at 15-16. In any event, the Settlement debunks Rascher's absurd assumption that conferences would pay student-athletes directly.

[9] As Objectors explained, even if Rascher's assumption was correct (it wasn't), Title IX still applies to the NCAA and conferences. *See* Obj. at 15-16; p. 6 n.6, *supra.*

and conferences would not adopt it." Dkt. 249 at 29. That concern has disappeared in light of the Title IX release, leaving no party on the side of women athletes.

3. DOE's Rescinding of the OCR Fact Sheet Is Irrelevant

The parties disregard Objectors' substantive arguments and assert (wrongly) that Title IX does not apply to NIL compensation. *See* Pl. Mot. at 48-50; Dkts. 613, 618, 628, 631, 638, 647, 665, 670, 674. Plaintiffs rely on the Department of Education's ("DOE") rescinding of the January 16, 2025 OCR Fact Sheet.[10] The rescinding of the OCR Fact Sheet does not change Title IX, its requirements, federal law, or the Court's obligation to ensure that the Settlement is fair, reasonable, and adequate. Notably, DOE did not replace the OCR Fact Sheet with any new guidance or interpretation of Title IX.[11] Plaintiffs' recitation of DOE's statement that no there is "clear legal authority" to apply Title IX to student-athlete revenue-sharing, Pl. Mot. at 49, is belied by the text and history of Title IX. *See* pp. 5-6, *supra.*

II. THE ROSTER LIMITS RENDER THE SETTLEMENT UNFAIR

The arbitrary roster limits are wreaking havoc across Division I sports. *See* Obj. at 17-20. Plaintiffs concede that class members cut from their teams because of the roster limits have been harmed, but insist the benefits of raised scholarship caps outweigh those harms. *See* Pl. Br. at 43-44. Yet the parties never explain why lifting scholarship caps requires ***any*** roster limits, much less the arbitrary limits of the Settlement. Their effort to downplay the harms to class members also falls flat.

The parties could adopt modest amendments that would at least ***mitigate*** the chaotic situation unleashed by the roster limits. Their inexplicable refusal to do so is telling and confirms that the substantial segment of the class impacted by roster limits lacked adequate representation. That, and the bitter intra-class conflict they have created, renders the Settlement beyond approval or repair.

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[10] OCR, *Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities* at 1-2 (Jan. 16, 2025) (rescinded).

[11] *See* DOE, Press Release, *U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation* (Feb. 12, 2025), https://bit.ly/3DLuYc3.

A. The Roster Limits Are Already Causing Severe Harm

The NCAA currently imposes scholarship limits for each sport, but does not restrict team sizes. Schools can have as many athletes on their Division I teams as they want. The Settlement changes that. It replaces scholarship caps with roster limits for schools that "opt-in" to the Settlement by sharing revenues or providing additional scholarships above the existing cap. *See* Injunctive Relief Settlement, art. 2, § 6; art. 3, § 3(b); art. 4, § 1; *see* Injunctive Relief Settlement at 144-49 (Appendix B). The limits appear to bear no relationship to current average roster sizes. *See* Dkt. 717-2 ("Rascher Final Approval Decl.") ¶71 (Exhibit 2). For some sports, the roster limits are severe. *See* Obj. at 7-8. For example, the Settlement imposes a new football roster limit of 105 players – a ***19.7% reduction*** from the current average roster size of 130.8. *See* Rascher Final Approval Decl. ¶71 (Exhibit 2).[12]

The roster limits take effect immediately following final approval of the Settlement – potentially mere months from now – even if this case is appealed. *See* 2d Am. Settlement §§ A(1)(v), D(18). There is no phase-in period or grandfathering-in of current or recruited student-athletes. Schools that opt in for the 2025-2026 academic year must comply by December 1, 2025 (winter and spring sports) or before the first championship-selecting competition in the relevant sport (fall sports), whichever is earlier.[13]

The result is chaos. Students-athletes who worked their entire lives to compete in their chosen sport have found their dreams shattered overnight as schools, anticipating final approval, abruptly slash rosters and rescind recruiting offers. *See* Obj. at 17. Objectors competing in sports as varied as golf and swimming have testified extensively to the immense personal losses, severe mental toll, and financial costs they and their families have suffered since they were cut from their teams. *See, e.g.*, Objector Decls. at 3-4, 28, 59, 131, 147, 345, 357, 362, 380, 422. Even student-

[12] The average roster size of 130.8 football players reflects the 2023-2024 roster sizes in both the Football Bowl Subdivision (FBS) and Football Championship Subdivision (FCS). *See* NCAA, *NCAA Sports Sponsorship and Participation Rates Report (1956-57 through 2023-24)* 91, 126 (Sept. 19, 2024), https://bit.ly/3WE9jIW.

[13] NCAA, *Updated Question and Answer: Impact of the Proposed Settlement on Division I Institutions* 4 (Dec. 9, 2024), https://bit.ly/42802Mp (Question 15).

athletes who have not been cut describe intense stress and anxiety from fear of being cut and separated from their friends, harming their performance on the field and in the classroom. *See, e.g.*, *id.* at 62, 67-68, 77, 102, 117, 134, 151, 159-60, 217, 260, 280-81, 372, 376, 382, 389, 472-73, 558.

Coach Eddie Reese – the legendary head coach of the number-one-ranked University of Texas at Austin ("UT") Men's Swimming and Diving team for 46 years, and three-time head coach of the U.S. Olympic men's swim team (collecting 68 medals) – starkly describes the dilemma faced by impacted student-athletes. Ex. A ("Reese Decl."). Coach Reese reports that 13 swimmers cut from UT's team because of the roster limits face an extremely difficult choice: They must upend their entire lives to roll the dice in the transfer portal, or "take the academic route" to complete their education at their chosen school, "premature[ly] ending" their athletic careers. *Id.* ¶¶5-6. That agonizing choice faces every player cut because of the roster limits.

The transfer portal is no solution. Coach Reese predicts that, if the Settlement is approved as-is, "then within five years[,] the number of Division I men's swimming and diving teams will be reduced" from "over 140" to "***under 50***" as schools cut whole teams in response to the changed economic landscape in college sports. *Id.* at ¶7 (emphasis added).[14] The number of roster spots available across ***all*** schools will plummet, leaving student-athletes who are cut – even those at the pinnacle of their sports – with no teams to transfer ***to***.[15]

[14] Swim and dive teams have already been cut at California Polytechnic State University and the University of Virginia. *See* Ex. E; Andy Berg, *Cal Poly Cites NCAA's $2.8B Settlement as Reason for Cutting Swimming and Diving Program*, Athletic Business (Mar. 10, 2025), https://bit.ly/4iymfZU. These developments have immediately proven wrong Rascher's speculation that the Settlement "would not require any school to cancel any so called 'non-revenue' sports programs." Rascher Final Approval Decl. ¶71.

[15] The transfer portal is not a short-term solution, either. Because the roster limits are not being phased in, the portals for the most heavily impacted sports are already flooded. *See, e.g.,* Objector Decls. at 28, 32, 55, 109.

B. The "Benefits" Of Lifting Scholarships Caps Do Not Outweigh The Harms Caused By The Roster Limits

1. The Roster Limits Are Not Required To Lift Scholarship Caps

The parties claim the harms caused by the roster limits are outweighed by the benefit of more scholarships being available. *See* Pl. Mot. at 43-47; Def. Mot. at 8. That argument depends on the false premise that lifting the NCAA's existing scholarship caps ***requires*** imposing roster limits. No evidence supports that proposition, and the parties never explain why they could not have simply lifted scholarship caps without imposing roster limits. Class Counsel has given different (and unconvincing) excuses to Objectors' counsel,[16] reporters,[17] and concerned parents,[18] but ***none appears in their motion papers. That's because no defensible reason exists***.

The benefit to the class, moreover, is exaggerated. Plaintiffs proclaim (at 2) that they have achieved "the eradication of ***all limitations*** on athletic scholarships." That's not true. ***The roster limits*** inherently restrict athletic scholarships. *See* Obj. at 19; *see* Injunctive Relief Settlement, art. 3, § 3(b) ("Other than the roster limits discussed in Article 4, Section 1, there shall be no NCAA Division I limitation on how many new athletic scholarships may be awarded by a school."); Dkt. 717-2 ("Rascher Final Approval Decl.") ¶ 15 (the number of scholarships schools may offer is "subject to the number of athletes allowed on each team"). And schools are only ***permitted*** to increase scholarships. Injunctive Relief Settlement, art. 3, § 3(b). Thus, even if lifting existing scholarship caps required some roster limits, there is no assurance that many class members will realize the so-called "life-changing benefits." Pl. Mot. at 44. The roster limits, by contrast, ***guarantee*** that a large segment of the class will receive no benefit and be immediately harmed as schools are forced to slash existing rosters and rescind long-promised recruitment offers. *See Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2012 WL 1156399, at *8 (N.D.

[16] *See* Dkt. 587-1.

[17] Amanda Christovich, *House v. NCAA Objections Highlight Three Major Concerns*, Front Office Sports (Jan. 30, 2025), https://bit.ly/41znDo5; Eddie Pells, *Objections Flow In on NCAA Settlement Over 'Unnecessarily Harsh' Impact of Roster Limits*, Associated Press (Jan 29, 2025), https://bit.ly/41SEYZ5.

[18] *See* Ex. B at 10-13 (Appendix B).

Cal. Apr. 6, 2012) ("Settlements in which the class or a significant subclass will receive no benefit[s] . . . are not fair, adequate, and reasonable for all class members.").

2. Harmed Class Members Cannot Be Ignored

The parties cannot dismiss the harms to class members or whitewash the chaos with misleading (and false) statistics. Pl. Mot. at 45; Def. Mot at 12-13. Plaintiffs' claim (at 43-44) that roster limits will merely affect "the least competitive walk-on athletes" is insulting and untrue. Student-athletes on scholarships are ***also*** being cut, and in droves. *See* Objector Decls. at 3, 58-59, 96-97, 130-31, 140-41, 216, 269-70, 276-77, 309-10, 345-49, 565-66, 606-07; Ex. B at 3-4, 22-25.[19]

Plaintiffs claim the roster limits will not adversely impact many class members because some roster limits have been set above current average roster sizes for most Division I sports. *See* Pl. Mot. at 45; *see* Obj. at 7-8. Not so. Averages are vulnerable to distortion by outliers, thus providing limited information about the total number of student-athletes who ***must*** be cut under the roster limits. *See* Obj. at 8 n.8 (describing rosters of premier swim teams much larger than the average size). And available roster spots in different sports are not substitutable. An open spot on the women's equestrian team (which has a roster limit of 50, 128% more than the current average of 39.0 riders) does not help a female soccer player who was cut because the roster limit is set at 28 (11% less than the current average of 31.2 players). *See* Rascher Final Approval Decl. ¶71 (Exhibit 2). Finally, no party explains why ***any*** roster limit is set below the current average of ***any*** sport, thereby ensuring roster cuts.

Defendants absurdly compare the roster limits to metrics of student-athlete participation "measured by actual appearance in at least one contest during that sport's season." Def. Mot. at

[19] That athletic scholarships are somewhat protected in the Settlement is no great comfort, especially because the parties have failed to effectively communicate with the class or schools. Pl. Mot. at 14. On February 20, 2025, Class Counsel reached out to Objectors' counsel regarding two student-athletes who declared that their athletic scholarships were at risk. *See* Pl. Mot. at 57 n.41. Objectors' counsel spoke with one student-athletes who confirmed that his school did not provide any information about any further consequences of being cut from the team, including with respect to financial aid. Objectors' counsel was unable to reach the other Objector. Regardless, the Settlement only protects a student-athlete's scholarship if it is already guaranteed for all four years, or if the student-athlete does not attempt to transfer.

10 & n.4. That statistic is irrelevant. In any season, rosters include student-athletes who do not regularly compete in matches, meets, or games. *See* Dkt. 628-4 at 1-4 ("Farooq Decl.") ¶6 ("It's not unusual for a student-athlete to learn and develop for a year or more before competing in a conference or NCAA championship."); *see also* 628-4 at 9-10 ("Fairley Decl.") ¶2.

Plaintiffs suggest the roster limits have had limited adverse impact, because "[o]nly nine objectors" had "actually been cut" by the time of the objection deadline. Pl. Mot. at 45. In fact, 18 of the Menke-Weidenbach Objectors alone had been cut. *See* Weidenbach Objectors at 8, 11-12; Objectors Decls. at 3, 59, 131, 141, 174, 216, 248, 270, 277, 310, 349, 367, 444, 458, 478-79, 510. Five more were informed that they will be cut if the Settlement is approved. *See* Objectors Decls. at 191, 431, 505, 526. The rate of roster cuts has since accelerated. Twelve were cut in the last six weeks alone, *see* Ex. B, and two more were told they will be cut next year if the Settlement is approved, *see* Ex. C.[20]

These objections do not include the multitude of student-athletes who contacted Objectors' counsel after they were cut, but who wished to object anonymously for fear of retaliation. *See* Ex. D at 23; Dkt. 628-2 ("Wiegand Decl.") ¶7; *see also* Dkts. 573, 604, 605, 625, 641, 658, 686, 707, 709. They also don't include the 35 student-athletes who contacted Objectors' counsel after the deadline, either because they did not know about it, the Settlement, their right to object, or how to object until they were cut. *See* Exs. D, E; *see also* Dkts. 645, 646, 648, 698.

Plaintiffs also claim (at 8) that the class overwhelmingly supports the Settlement because "only 0.11%" of the class objected before the deadline. That figure is useless for gauging the true reaction of the class because of the uniquely hierarchical power dynamics in college sports. *See* Obj. at 25; Wiegand Decl. ¶7; *see also* Ex. B at 21 ("I am . . . concerned that I was cut because I objected to the House Settlement on January 31."). Class members in the Injunctive Relief Class,

[20] More roster cuts occurring after the objection deadline makes sense because the NCAA imposed an internal deadline of March 1, 2025 for non-defendant schools to declare their intent to opt in to the Settlement. *See* Matthew Postins, *NCAA Pushes Back Full Revenue Sharing Opt-In Date for Non-Defendant Schools*, Sports Illustrated (Mar. 2, 2025), https://bit.ly/4bWYesX. Schools have until June 15, 2025 to commit to opting in for the 2025-2026 school year. *Id.* As that deadline approaches, the rate of roster cuts will skyrocket unless final approval is denied.

almost all teenagers and young adults, are also unlikely to publicly object because of their youth and inexperience with formal legal proceedings.

Plaintiffs finally state (at 45) that "24 class member objectors, all represented by Molo Lamken, are athletes at schools in the Ivy League and William & Mary, who will not be impacted at all by the roster limits that they are complaining about" because the Ivy League and William & Mary announced they are opting out of the Settlement. Every word is false. None of the Menke-Weidenbach Objectors who are Ivy League students objected to roster limits. *See generally* Objector Decls. In fact, 17, not 24, student-athletes from William & Mary objected.[21] William & Mary opted out ***after*** the objection deadline, so Objectors' fears were well-founded at the time they objected. *See* William & Mary Athletics, *William & Mary to Opt In to House Settlement in 2026* (Feb. 28, 2025), https://bit.ly/3FymtSk. And William & Mary ***only opted out until 2026***, as it announced on the ***webpage Plaintiffs cite***. *See* Pl. Mot. at 45 n.44.

Plaintiffs' cases are inapt. The "harm" found acceptable in the class action settlement in *White v. NFL* ("*White I*"), 822 F. Supp. 1389, 1412-13 (D. Minn. 1993) – some veteran NFL players having a more difficult time transferring teams due to a right of first refusal and high salary tender requirements – is not comparable to the personal, life-changing harms inflicted on Objectors through the forced roster cuts here. The terms objected to in *White* were free agency rules restricting NFL player movement that only impacted the amount of objectors' expected compensation by making it more difficult for them to transfer teams. *See id.* The terms didn't force teams to ***fire players***. *See id.*

Similarly, the injunctive relief in the class settlements in *Bayat v. Bank of the West*, No. C-13-2376, 2015 WL 1744342 (N.D. Cal. Apr. 15, 2015), and *In re Motor Fuel Temperature Sales Pracs. Litig.*, No. 07-cv-1840, 2012 WL 1415508 (D. Kan. Apr. 24, 2012), *aff'd*, 872 F.3d 1094 (10th Cir. 2017), did not make objecting class members worse off than the status quo. Those settlements simply did "not benefit" the objectors. *Motor Fuel*, 2012 WL 1415508, at *14; *see*

[21] *See* Objector Decls. at 5-7, 8-10, 76-78, 101-03, 133-35, 136-38, 158-60, 169-72, 207-09, 259-61, 272-74, 381-83, 410-12, 429-32, 446-48, 487-89, 557-59.

Bayat, 2015 WL 1744342, at *6. Here, Objectors do not just miss out on the benefits of the Settlement – they lose their entire identities as athletes.

Defendants contend that Objectors simply prefer an "'unlawful'" status quo. Def. Mot. at 12. No. The unlawful status quo includes scholarship caps, and no party has explained why those could not be eliminated without roster limits. *See* p. 11, *supra.*

3. Plaintiffs' Remaining Arguments Are Meritless

Plaintiffs protest (at 46) that the NCAA and conferences can impose roster limits without the Settlement. True, but irrelevant. The reason the roster limits are in the Settlement is obvious. It broadly immunizes Defendants and all Division I schools from claims "arising out of, or resulting from . . . new or revised NCAA and conference rules agreed to as part of the Injunctive Relief Settlement, regarding . . . ***NCAA roster and scholarship limits*** as agreed to in the Injunctive Relief Settlement." 2d Am. Settlement § A.1(pp) (emphasis added). If the roster limits had not been bundled into the Settlement, the NCAA could not impose them without being sued.[22]

The same is true of the lower 22-man roster limit for men's swimming and diving announced this academic year by the Southeastern Conference ("SEC"). *See* Obj. at 7 n.5.[23] Plaintiffs wrongly assert (at 46-47) that male swimmers cut from an SEC roster cannot trace their harms to the NCAA roster limits in the Settlement. The SEC's timing confirms it is taking advantage of the broad release, as the Settlement explicitly permits conferences to slash rosters further. *See* Injunctive Relief Settlement, art. 4, § 1 ("Conferences each maintain the right to unilaterally reduce . . . the roster limits"). Tellingly, the SEC has not reassured the Court that it and its member schools will not attempt to raise the Settlement as a defense to any lawsuit brought because of its lower roster limits.

[22] Plaintiffs split a fine hair by insisting that the roster limits are only permitted, not required, by the Settlement. See Pl. Mot. at 46. Defendants certainly are not saying that. Nor are they saying they would impose the same roster limits absent the Settlement. And if the roster limits are so optional, Appendix B should be excised from the Injunctive Relief Settlement, and claims from student-athletes cut because of the roster limits should be carved out from the release.

[23] Eddie Pells, *Roster Limits in College Small Sports Put Athletes on Chopping Block While Coaches Look for Answers*, Associated Press (Nov. 12, 2024), https://bit.ly/3P4xigj.

C. The Roster Limits Create Irreparable Intra-Class Conflict

The named class representatives – all world-class athletes – do not adequately represent the average student-athlete impacted by the roster limits. *See* Obj. at 19-20. By pitting class members against one another for arbitrarily limited roster spots, the roster limits create a severe intra-class conflict. The chaos unleashed proves the Settlement is "so unfair in [its] terms to one subset of class members" that it "cannot but be the product of inadequate representation of that subset." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 608 (9th Cir. 2018).

Relying on *Cohen v. Brown Univ.*, 16 F.4th 935 (1st Cir. 2021), Plaintiffs protest there is no intra-class conflict because class members are all interested in "a more competitive market" with "increased compensation." Pl. Mot. at 48. But *Cohen* recognizes the existence of an intra-class conflict when there is an "unacceptable risk that one group would trade away the other groups' most cherished benefit." *Id*. That is what happened here. Under the Settlement, all the "increased compensation," Pl. Mot. at 48, will flow to star athletes at the expense of others' "most cherished benefit:" their roster spot.

Plaintiffs correctly note that "the objective in any antitrust case" is to promote competition. Pl. Mot. at 47. But roster limits do not do that. Teams must cut rosters to comply with arbitrary limits, not improve competitiveness. The resulting intra-class conflict is so severe that "wins" for some do not just result in some "losses" for others – they result in ***removal from the class***.

Plaintiffs' assertion (at 47) that the Court has already rejected this issue is equally baseless. No one was kicked off their teams in *Alston* and *O'Bannon*. Their other cases are also inapt. *Sims v. Montgomery Cnty. Comm'n*, 890 F. Supp. 1520, 1526-29 (M.D. Ala. 1995), and *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989), involved employee competition for promotions – no one was at risk of losing their job. *Sharif ex rel. Salahuddin v. N.Y. Educ. Dep't*, 127 F.R.D. 84, 89-90 (S.D.N.Y. 1989), involved student competition for scholarships – no one was kicked out of college.

Objectors are not "'hold out[s] for more money[;]'" concerns about "Balkanization" are misplaced; and "'lesser-value claims'" have not been "'enhanced'" by being negotiated alongside higher value claims. Pl. Mot. at 28-29 (quoting *Volkswagen*, 895 F.3d at 607). Objectors are concerned ***only*** with being able to play the sports they love. Nothing in the Settlement suggests that interest was considered.

Class Counsel's failure to provide a credible explanation for the roster limits' inclusion in the Settlement reveals "irreparable conflict," *Volkswagen*, 895 F.3d at 608, and calls for independent representation of student-athletes impacted by the roster limits.

III. THE PARTIES FAIL TO EXPLAIN HOW THE SPENDING CAP, SYSTEM FOR NIL DEAL REVIEW, AND ROSTER LIMITS COMPLY WITH ANTITRUST LAW

The Settlement swaps the NCAA's current cartel for another. The spending cap establishes a paradigmatic horizontal price-fixing agreement between the NCAA, conferences, and member schools to exploit student-athletes' labor at submarket prices. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). The parties cannot dispute that it is *prima facie* anticompetitive, and they fail to demonstrate any redeeming procompetitive effects. The NCAA veto over third-party NIL deals only reinforces its illegality. And the roster limits fix the price of student-athlete compensation no differently than existing scholarship caps.

A. The Spending Cap Illegally Restrains The Student-Athlete Market

1. The Rule of Reason Does Not Immunize Class Action Settlements

The parties declare the Settlement must be approved because the spending cap has not been "'held to be illegal per se in any previously decided case.'" Pl. Mot. at 24 (quoting *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977)); *see* Def. Mot. at 8. They contend there is no need for review because its legality would be analyzed under the Rule of Reason. Pl. Mot. at 21-22. That is not the law.

The Rule of Reason does not provide "near-automatic antitrust immunity" to settlements. *FTC v. Actavis Inc.*, 570 U.S. 136, 158 (2013). The Supreme Court has struck down settlements

as unlawfully anticompetitive even when the Rule of Reason applied, because the harm of "significant anticompetitive effects" "outweigh[s] . . . the desirability of settlements." *Id*.

The parties' approach also raises serious fairness and adequacy problems under Rule 23. Fed. R. Civ. P. 23(e)(2). The Court's review of a class action settlement is the last opportunity to study the "adequacy of the proposed relief" to the class. Fed. R. Civ. P. 23 Committee Notes on Rules – 2018 Am. If the Court does not test the legality of the spending cap now, it will ***never*** be tested. *See* 2d Am. Settlement § E.21-22. The Court's determination of the spending cap's lawfulness is particularly necessary and straightforward here, since the parties' primary justification is that the new price-fixing scheme is ***less illegal*** than the old one. Pl. Mot. at 21-24; Def. Mot. at 8-9.

2. The Spending Cap Has No Procompetitive Justification

The spending cap is *prima facie* anticompetitive. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015). It limits the total sum schools may spend for student-athletes' talent – an obvious horizontal price-fixing agreement. *See Law v. NCAA*, 134 F.3d 1010, 1019-25 (10th Cir. 1998) (salary caps for college coaches violates the Sherman Act). The legality of the cap therefore hinges on the existence of a valid procompetitive justification. *NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984).

The parties' proffered justifications are conclusory and meaningless. Defendants name "competitive balance" and "ensur[ing] the greatest output of student athletic opportunity" as supposedly procompetitive benefits. Def. Mot. at 3. But they do not explain how any compensation cap – much less this cap, at this price – enhances competitive balance. Def. Mot. at 3.[24] As ***Plaintiffs' own expert*** states, "the link" between compensation caps and competitive

[24] Defendants cite the Expert Report of Gautam Gowrisankaran, but that report is sealed and unavailable to Objectors. *See* Def. Mot. at 3; Dkts. 414-2 (Berman Declaration); 414-3 Ex. 1-11 (sealed placeholder); 415-8 Ex. 6 (sealed). This is not the first time parties have relied on sealed expert reports to seek Settlement approval. *See* Obj. at 14 n.15; Dkt. 474 at 10 n.7. Absent class members are entitled to examine materials related to settlement approval. *See* Obj. at 14 n.15 (citing cases). The parties should be compelled to unseal all expert reports cited in their briefs in support of all motions for Settlement approval. *See Shane Grp. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 302 (6th Cir. 2016).

balance is "not generally supported by the field of economics." Daniel Rascher et al., *The Unique Economic Aspects of Sports* (July 23, 2019), at 4 ("*Unique Economic Aspects*"); *see O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 978 (N.D. Cal. 2014) (noting the NCAA is "unconcerned with achieving competitive balance," and citing literature by Rascher). On the contrary, Rascher observes that "the genuine appeal" of compensation caps "likely comes from the fact that such policies are highly effective in suppressing salaries and payroll." *Unique Economic Aspects*, at 8; *see also id.* at 13.

That is the case here. The spending cap does not "level an uneven playing field" or "reduce [ ] inequities" between student-athletes. *Law*, 134 F.3d at 1024. It enriches the NCAA, conferences, and schools at the expense of student-athletes. "[T]he appeal to competitive balance is more a means of marketing the restraints to consumers and athletes (and perhaps antitrust authorities)" – and the Court – "rather than valid economics." *Unique Economic Aspects*, at 8.

The structure of the spending cap bears that out. Schools cannot provide compensation above 22% of shared average revenues each year. *See* Injunctive Relief Settlement, art. 3, § 1(d)-(g); NCAA Research, *Division I Athletics Finances 10-Year Trends from 2013-2022* (Dec. 2023), https://bit.ly/3WWI8cY. The cap barely increases over ten years, failing to keep pace with the NCAA's historically huge year-over-year profitability even as "enormous sums of money flow" to the NCAA. *NCAA v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring); *see* Injunctive Relief Settlement, art. 3, § 1(g). Thus, over time, the spending cap facilitates transferring more revenues to schools at the expense of student-athletes, which is the "more likely motivation" for its inclusion in the Settlement than any pretextual interest in competitive balance. *Unique Economic Aspects*, at 13.

Defendants' assertion that the spending cap "open[s] the door" to the same outcome a competitive market would achieve is not credible. Def. Mot. at 4-5. The only way to know what the free market will produce is to allow the free market to work. *Alston*, 594 U.S. at 86 (majority opinion), 110 (Kavanaugh, J. concurring). The Settlement "extinguishes" the free market instead, creating a "textbook antitrust problem." *Id.* at 110. The cap prevents student-athletes from

knowing what their talents and efforts would demand in an unrestrained market until ***2036***. That is far too long to force the class to endure another NCAA price-fixing scheme.

Plaintiffs' speculation that the spending cap will spur "'substantially more competition'" in student-athlete compensation is also baseless. Pl. Mot. at 23 (quoting Rascher Decl. ¶21). Plaintiffs present no evidence that the cap is appropriately tailored under the antitrust laws or provides adequate relief to the class. The Court cannot "dismiss" the "'anticompetitive price-fixing agreement as benign' simply because . . . the fixed prices are more reasonable than they used to be." *In re NCAA Athlete Grant-in-Aid Cap Litig.*, 375 F. Supp. 3d 1058, 1095 (N.D. Cal. 2019). Plaintiffs fail to address ***their own economist's*** view that compensation caps lack procompetitive basis and will "almost always succeed in shifting income from players to owners." *Unique Economic Analysis*, at 13.

3. The Spending Cap Is Not Analogous to Professional Compensation Caps

The parties' reliance on professional sports caps is misplaced. Absent congressional action, only collective bargaining can insulate spending caps from federal antitrust law. *See Nat'l Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1076 (S.D.N.Y. 1994). Because the cases Plaintiffs cite involve caps incorporated into collective bargaining agreements, they are inapt. *See Bridgeman v. Nat'l Basketball Ass'n*, 675 F. Supp. 960, 962, 967 (D.N.J. 1987) (discussing incorporation of the *Robertson* settlement into a collective-bargaining agreement, and negotiation of compensation caps as part of the collective-bargaining process). The Department of Justice agrees. *See* Dkt. 595 at 8-9.

White is not to the contrary, as the details of its procedural history ignored by Plaintiffs demonstrate. *See* Pl. Mot. at 24. In *White*, the NFL Player's Association ("NFLPA") entered a collective-bargaining agreement – ***prior to final approval*** of a class settlement that included a salary cap, which objectors challenged as anticompetitive. *White v. NFL* ("*White II*"), 836 F. Supp. 1458, 1467 (D. Minn. 1993). The NFLPA consulted with class counsel in negotiating the settlement, *White I*, 822 F. Supp. at 1421; endorsed the settlement, *id*. at 1397; and "incorporate[d] almost verbatim" the challenged settlement terms in the collective-bargaining agreement,

White II, 836 F. Supp. at 1487. When granting final approval, the court found it was "significant that all aspects" of the challenged terms, "including the salary cap provisions," would be in the collective-bargaining agreement, which would be exempt from antitrust law under the non-statutory labor exemption. *White I*, 822 F. Supp. at 1421. The court also ***delayed entering final judgment until the collective-bargaining agreement was ratified***, rendering the salary cap "exempt from antitrust challenge." *White II*, 836 F. Supp. at 1466, 1487.

B. The NCAA Veto Enforces The Illegal Spending Cap

The Settlement grants the NCAA power to veto NIL compensation from "Associated Entities or Individuals" unless it deems the deals legitimate on a case-by-case basis. *See* Injunctive Relief Settlement, art. 4, § 3. This process is not fully defined, and the NCAA has extremely broad discretion under the terms of the Settlement to veto NIL deals over $600. *See id.*, art. 2, § 4; art. 4, § 3; art. 6, § 2. The incentives for abuse are obvious, and by enforcing the spending cap, the NCAA veto is an integral component of the Settlement's price-fixing scheme.

Plaintiffs insist that the veto is benign because it "do[es] not apply to any payments made by the schools directly." Pl. Mot. at 20. But that's why the veto is so pernicious. It artificially limits student-athlete compensation from parties who are not subject to the spending cap. The result – a *de facto* ban on any third-party NIL deal the NCAA doesn't like – enhances Defendants' market power and "deprive[s]" student-athletes of compensation they would obtain "in the absence of the restraints." *Grant-in-Aid*, 375 F. Supp. 3d at 1068.

The NCAA veto is also not a "small compromise," Pl. Mot. at 20-21, because the spending cap cannot fully restrain the market without it. The spending cap first limits the compensation that schools may pay student-athletes, *see* pp. 17-20, *supra*. Then the NCAA, at its discretion, can prevent "Associated Entities or Individuals" from compensating athletes above the cap – "depriv[ing]" student-athletes of compensation they would obtain "in the absence of the restraints." *Grant-in-Aid*, 375 F. Supp. 3d at 1068. That is a comprehensive antitrust conspiracy, not a small concession.

The parties also haven't met their burden of offering a compelling procompetitive justification for the veto. *O'Bannon*, 802 F.3d at 1070. The veto obviously obstructs the unrestricted access to third-party deals currently enjoyed by the class. *See* Obj. at 22-23. It doesn't matter if the veto is "narrower" than NCAA restrictions upheld under different circumstances. Pl. Mot. at 20. "[M]arket realities" have "change[d]." *Alston*, 594 U.S. at 93 (Kavanaugh, J., concurring). Since the NCAA suspended enforcement of its NIL rules in 2021, the third-party NIL marketplace, especially from so-called "Associated Entities or Individuals," has exploded.[25] There is no reason for the NCAA to be the final arbiter of the value of student-athletes' NILs under the fiction that NIL compensation must serve "a valid business purpose." Injunctive Relief Settlement, art. 4, § 3.

Finally, the parties' answer to the obvious potential for abuse of the veto is that student-athletes may always challenge it in neutral arbitration. *See* Injunctive Relief Settlement, art. 6, § 2. That does not alleviate the problem. *See* Obj. at 22. The parties still supply no details about how arbitrations will proceed in practice, and they have not reassured the Court that student-athletes will face no retaliation after arbitration concludes. *See id.*

C. The Parties Offer No Procompetitive Rationale For Roster Limits

As with the spending cap, the parties do not dispute that roster limits are a *prima facie* anticompetitive agreement. Pl. Mot. at 21-22; Def. Mot at 8-9. They fix the price of scholarship compensation at the size of each permitted roster. And – as with the spending cap – the parties fail to offer a procompetitive rationale supporting the restraint. The roster limits fare no better than the spending cap under antitrust law.

Defendants point again to "competitive balance." Def. Mot. at 12. That is a farce. *See* pp. 19-20, *supra*. And any competition promoted between schools to recruit and retain student-athletes cannot negate the antitrust violation in the absence of collective bargaining. *See McNeil v. NFL*, No. 90-CV-00476, 1992 WL 315292, at *3 (D. Minn. Sept. 10, 1992) (identifying

[25] Andy Berg, *Report: Total NIL Market for 2024-25 Expected To Hit $1.67B*, Athletic Business (Dec. 16, 2024) https://bit.ly/4kLF3qn ("The total NIL market is projected to reach an astronomical $1.67 billion in 2024-25, which is up from the $917 million in 2021-22 when college NIL was introduced.").

antitrust injury as the inability to compete in the relevant market for professional football players). Unlike the professional leagues that have adopted roster caps, the roster limits in the Settlement are not subject to the non-statutory labor exemption. *See Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). Without it, roster limits are clearly illegal. *See* pp. 20-21, *supra*.

IV. THE SETTLEMENT INADEQUATELY COMPENSATES ATHLETIC SERVICES CLAIMS

The athletic services claims – essentially wage claims – alleged in *Carter v. NCAA*, No. 3:23-cv-06325 (N.D. Cal.), were never litigated. *See* Obj. at 23-25. The Court must therefore apply a "more exacting review . . . to ensure that class representatives and their counsel do not secure a disproportionate benefit 'at the expense of the unnamed plaintiffs who class counsel had a duty to represent.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir. 1998)). The *Carter* settlement fails to meet this "higher standard of fairness." *Id.*

Plaintiffs estimate that the $600 million fund provides 31.6% of the full value of athletic services claims to the class. Pl. Mot at 39. They can only speculate about that full value because ***they never litigated the claims***. *See* Obj. at 24. The adequacy of the fund is further doubtful because class members will receive much less than minimum wage for their athletic labor. *Id.*[26]

Plaintiffs defend the fund by relying on *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826 (N.D. Cal. Apr. 1, 2011), and *In re Apple iPhone 4 Prods. Liab. Litig.*, No. 5:10-MD-2188 RMW, 2012 WL 3283432 (N.D. Cal. Aug. 10, 2012). *See* Pl. Mot. at 12. Those cases are inapposite. The settlements in those cases were approved after extensive discovery. *Wren*, 2011 WL 1230826, at *6-7; *In re Apple*, 2012 WL 3283432, at *1-2. Here, the

[26] The average student-athlete spends 30 to 40 hours a week on their sport when in-season. *See* NCAA Convention, *GOALS Study: Understanding the Student-Athlete Experience* 19, https://bit.ly/3WE7BXm. Assuming a ten-week season and a $125 per year distribution from the athletic services Settlement fund – what most student athletes will receive – class members will get a shocking ***41 cents per hour*** for their labor. *See* Dkt. 450-4 ¶81. To put that in perspective, Class Counsel's average hourly rate for their work on this litigation is $768.94 per hour ($54.4 million lodestar divided over a total 70,697.05 hours spent on *House* and *Carter*). Dkt. 583 at 14-15, 23, 35.

parties ask the Court to approve releasing the *Carter* claims without ***any*** discovery and for an inadequate sum. That does not meet the "more exacting review" required for pre-certification class action settlements. *Lane*, 696 F.3d at 819.

Leaving open the potential for future collective bargaining, moreover, does nothing for the class ***now***. *See* Pl. Mot. at 25. The "compensable work" class members ***already*** performed remains inadequately compensated. *Johnson v. NCAA*, 108 F.4th 163, 178 (3d Cir. 2024).

CONCLUSION

The Menke-Weidenbach Objectors respect the efforts of the parties and this Court to reach a fair and equitable settlement compliant with Rule 23. The Settlement, in its current form, fails to do that.

We recognize the task before the Court now is to approve or reject the Settlement. While judicial modification of the Settlement may not be possible, the Court could issue an order noting deficiencies and how they might be addressed for the Settlement to pass Rule 23 muster. *See In re NFL Players' Concussion Injury Litig.*, No. 2:12-md-2323 (E.D. Pa. Feb. 2, 2015), Dkt. 6479.

Respectfully, while numerous approaches could be taken to address the flaws Objectors have identified, the Court could suggest the following:

- A redistribution of the damages funds to comply with Title IX and account for Defendants' anticompetitive conduct toward women.
- Elimination of roster limits, or, at minimum, a rethinking of roster management to comply with antitrust law and a phasing in of any new system to eliminate the unfairness of disruption to current Division I athletes and high school athletes aspiring to be Division I athletes.
- Elimination of the spending cap and the NIL veto, and allowing a free-market approach absent a collective-bargaining agreement.
- Renegotiation of the compensation claims following targeted fact and expert discovery.

Given the unfairness imposed on women and student-athletes adversely affected by roster limits, the Court should also appoint counsel for those two groups.

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Respectfully submitted,

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