

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

Case No. CV 06-0999-RGK (MANx) Date: October 19, 2006  
Title: JASON WHITE, et al. v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Plaintiff Jason White, on behalf of himself and other colleges athletes (collectively "Plaintiffs"), sued the National Collegiate Athletic Association ("NCAA" or "Defendant") for alleged violations of the Sherman Act.

Plaintiffs allege that Defendant and its member institutions entered into a horizontal agreement to adhere to a grant-in-aid ("GIA") cap in their financial aid awards to student athletes.<sup>1</sup> Under this GIA cap, member schools may give student athletes financial aid for their tuition, room and board, and books. Other expenses, such as travel, insurance, laundry or other incidental expenses may not be covered. Plaintiffs allege that this agreement harms competition because, absent any agreement, major collegiate men's basketball and football programs would compete with each other to offer student athletes financial aid packages equal to their full cost of attendance ("COA").

Presently before the Court is the Plaintiffs' Renewed Motion for Class Certification. For the reasons stated below, the Court grants Plaintiffs' Motion.

II. JUDICIAL STANDARD

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on an individual basis." *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing *Crown, Cork & Seal Co. v. Parking*, 462 U.S. 345 (1983)). Federal Rule of Civil Procedure 23 ("Rule 23") governs class actions. A class action "may be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

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To certify a class action, Plaintiffs must set forth prima facie facts that support the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Mego Fin. Corp. Sec. Litig. v. Nadler*, 213 F.3d 454, 462 (9th Cir. 2000) (internal quotations omitted). These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Falcon*, 457 U.S. at 155 (quoting *General Tel. Co. of Northwest v. EEOC*, 446 U.S. 318, 330).

If the district court finds that the action meets the prerequisites of Rule 23(a), the court must then consider whether the class is maintainable under Rule 23(b). A class is maintainable under Rule 23(b)(3) where "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members," and where "a class action is *superior* to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). "The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)). The predominance inquiry measures the relative weight of the common to individualized claims. *Id.* "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (citing *Valentino*, 97 F.3d 1227, 1234 (9th Cir. 1996)). In determining superiority, the court must consider the four factors of Rule 23(b)(3): (1) the interests members in the class have in individually controlling the prosecution or defense of the separate actions; (2) the extent and nature of any litigations concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely encountered in the management of a class action. *Id.* "If the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Id.*

### III. DISCUSSION

#### A. The Proposed Class

Plaintiffs propose a class defined as follows. The individuals who received athletic-based GIAs from colleges and universities that sponsor:

- i. football programs included in NCAA Division I-A ("Major College Football" programs); or
- ii. men's basketball programs sponsored by colleges or universities in the ACC, Big East, Big 10, Big 12, Pac-10, SEC, Mountain West, WAC, Atlantic 10, Conference USA, Mid-American, Sun Belt, West Coast, Horizon League, Colonial Athletic Association, or Missouri Valley Conferences ("Major College Basketball" programs), at any time between February 17, 2002 and the present.

#### B. Rule 23(a)

Plaintiffs must set forth prima facie facts that support the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Mego Fin. Corp. Sec. Litig. v. Nadler*, 213 F.3d 454, 462 (9th Cir. 2000) (internal quotations omitted). The NCAA does not challenge that the proposed class satisfies the numerosity requirement of Rule 23(a)(1), the commonality requirement of Rule 23(a)(2), or the typicality requirement of Rule 23(a)(3). The Court deals briefly with each in turn.

##### 1. *Numerosity*

Rule 23(a)(1) requires any proposed class to be sufficiently large that joinder of all class members to pursue individual claims would be "impracticable." Plaintiffs propose a class of more than 48,000 members. (Def. Opp. at 1.) Joinder is impracticable. The numerosity requirement of Rule 23(a)(1) is met.

##### 2. *Commonality*

Commonality requires "questions of law or fact common to the class." Rule 23(a)(2). The commonality requirement is generally construed liberally; the existence of only a few common legal and factual issues may

satisfy the requirement. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982). The Court finds that the class members's claims derive from a common core of salient facts, and share many common legal issues. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The commonality requirement of Rule 23(a)(2) is met.

### 3. *Typicality*

Typicality requires a determination of whether the named plaintiffs' claims are typical of those of the proposed class they seek to represent. Rule 23(a)(3). A plaintiff's claim is typical of the claims of the proposed class members "if it is aligned with the claims of the other class members." *In re United Energy Corp. Solar Power Modules Tax Shelter Investments Securities Litig.*, 122 F.R.D 251, 256 (C.D. Cal. 1988) (citation omitted). In the antitrust context, "typicality will be established by plaintiffs and all class members alleging the same antitrust violation by defendants." *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D 346, 351 (N.D. Cal. 2005) (quoting *Thomas & Thomas Rodmakers v. Newport Adhesives & Composites*, 209 F.R.D 159 (C.D. Cal. 2002)). Here, Plaintiffs allege a horizontal agreement by the NCAA in violation of the Sherman Act. Plaintiffs and all members of the proposed class allege they were affected by the GIA cap in the same way. The Court finds Plaintiffs have met the typicality requirement of Rule 23(a)(3).

### 4. *Adequacy of Representation*

The NCAA asserts that Plaintiffs inadequately represent the proposed class. The adequacy of representation requirement of Rule 23(a)(4) involves a two-part inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 1020.

The NCAA argues that Plaintiffs do not satisfy the adequacy requirement because they have an inherent conflict of interest with a portion of the putative class. Specifically, the NCAA argues that the quality of student-athlete varies widely in terms of athletic talent. Athletic talent translates into dollar value. According to the NCAA, if the GIA did not limit the amounts of athletics aid then the variation in athletic talent would likely result in the variation of aid amounts. The result, according to the NCAA, is conflict among class members. Each class member would argue that his athletic talents should translate into larger damages in comparison to other class members. The NCAA's argument is logical. But given the specifics of Plaintiffs' damages claim, the Court finds little danger of intra-class conflict.

Plaintiffs argue that demand for student-athletes, coupled with the ability of student-athletes to generate substantial revenues for their institutions, demonstrates that all or nearly all of the student athletes in the proposed class would receive far more than the COA if schools had unfettered discretion to award athletics-based financial aid. (McCormick Supp. Decl. ¶ 18.) Stated in terms of economics, Plaintiffs argue that even the marginal<sup>2</sup> player commands a value greater than his COA. If true, then the NCAA's charge of intra-class conflict is impotent. Each class member would deserve damages based on the difference between his GIA amount and his COA. The Court sees no actual conflict of interest which at this time would preclude class certification. The Court finds that the named plaintiffs are adequate representatives of the proposed class.

### C. Rule 23(b)

A class action can be maintained under Rule 23(b)(3) if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

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<sup>2</sup> The Court uses the term "marginal" to refer to the last person at each school who actually receives a scholarship and thus the person at the margin of the proposed class.

The NCAA's opposition to class certification rests principally on the contention that individual questions of impact and damages will predominate over the issues common to all class members such that class certification should be denied under Rule 23(b)(3). The Court disagrees.

1. *Impact and Damages*

Anti-trust plaintiffs must prove that the alleged antitrust violation caused them to suffer an actual injury to their business or property. *In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. 346, 352 (N.D. Cal. 2005); *Robinson v. Texas Automobile Dealers Assoc.*, 387 F.3d 416, 422 (5th Cir. 2004). Injury is sometimes, as here,<sup>3</sup> termed "impact." Damages reflect the extent of impact, if any, suffered by each member of the proposed class. Plaintiffs, all recipients of GIAs, allege that they were impacted by the GIA cap because it prevented each of them from receiving a larger GIA.

Here, where the issue is whether class certification is proper, the Court must consider whether class-wide methods exist to determine impact and damages for each member of the proposed class. Since there are as many as 48,000 members of the proposed class, certification would be problematic to say the least if the Court was required to embark upon individual inquiries for many or all individual class members. Class certification hinges upon whether class-wide methods exist for assessing the impact suffered by each class member as well as the related question of damages.

a. *Antitrust Impact*

Plaintiffs insist that this Court can determine impact as to each class member without setting a toe into the swamp of individual inquiries warned of by the NCAA. Plaintiffs view of impact is as follows. But for the GIA cap, each and every member of the proposed class would have received not only a higher GIA (alone enough to establish impact) but a GIA which is *equal to or greater than his COA*. (Reply at 11; McCormick Supp. Decl. ¶¶ 11, 14) Plaintiffs' particular view of impact and damages is tailored to permit generalized forms of proof. To prove that every class member would have received a GIA equal to or greater than his COA, Plaintiffs rely upon two general arguments: (1) market demand for the "services" of student-athletes is so great that even the marginal athlete (i.e., the 85<sup>th</sup> man on the football roster and the 13<sup>th</sup> man on the basketball roster)<sup>3</sup> possesses a dollar value which is greater than his COA; (2) there are resources at even the marginal school to pay every player on the roster a GIA which equals his COA. In support of these central arguments, the Court finds that Plaintiffs have offered plausible methods by which the Court may depend on generalized forms of proof and avoid the kind of individual inquiry into questions of impact and damages which would make class certification improper. The Court briefly notes a portion of this generalized proof.

i. *Demand for Student-Athletes*

Plaintiffs argue that market demand for student-athletes demonstrates that all or nearly all of the student-athletes in the proposed class, stars and non-stars alike, would receive far more than the COA if schools had unfettered discretion to award athletics-based financial aid. (McCormick Supp. Decl. ¶ 18.) Plaintiffs' argument is rooted in the standard economic theory of competitive labor markets. Under this theory, workers are hired until the point where marginal revenue product is equal to marginal cost. Plaintiffs claim that marginal revenue product for every class member is high enough that absent the cap, schools could and would increase GIAs up to and beyond the COA if permitted. (McCormick Decl. ¶¶ 37-40.)

One of the ways Plaintiffs propose to demonstrate excess demand for student-athletes is to show how demand has affected GIAs under the cap. If the GIA cap truly acts like a dam holding back churning waters of demand, then Plaintiffs must show the pressure of that demand. For example, Plaintiffs argue that during the relevant time period, virtually every recipient of a GIA received the maximum amount allowable under the rules. (McCormick Supp. Decl. ¶ 14.c.) Similarly, Plaintiffs seek to demonstrate that every school has used its full compliment of GIAs. *Id.* At this early stage of the litigation, the facts thus far presented to the Court do not

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<sup>3</sup> NCAA regulations do not allow colleges to have more than 85 football players or 13 basketball players on scholarship at any one time.

conclusively support Plaintiffs. However, what is important for purposes of Plaintiffs' Motion is the plausibility of resolving these issues on a class-wide basis using general forms of proof. Moreover, the Court is heartened by the apparent abundance of statistical data relied upon by both parties.

Another way Plaintiffs propose to demonstrate demand is by showing that "labor" costs in college sports are artificially low. Plaintiffs compare the labor costs of professional sports leagues with the costs incurred by colleges and universities in major football and major basketball.<sup>4</sup> If substantiated, this evidence may help show that a "labor market" for the services of student-athletes which was unfettered by the GIA cap, would result in "salaries" at least somewhat more in tune with those of professional athletes.

Plaintiffs also offer generalized evidence pertaining to player recruitment expenditures. According to Plaintiffs, to recruit 25 GIA athletes each year, teams expend approximately equal (and on top of) half the actual GIA cost in football and 150% in basketball. (McCormick Supp. Decl. ¶ 14e). In 2002-2003, the average recruiting costs for a basketball player was \$28,492, or 152% of his annual GIA cost.<sup>5</sup> These figures suggest the enormous value of players. Again, the point for purposes of this Plaintiffs' Motion is that Plaintiffs point to generalized, common proof to prove impact to each member of the proposed class.

ii. *Resources*

The NCAA argues that Plaintiffs' theory of demand is false because some schools lack the funds to absorb any cost increases from higher GIAs. Therefore, the NCAA argues that it is not possible to show impact common to every member of the proposed class; individual inquiries would be necessary for each school. The Court need not weigh in on the merits of this issue. Conclusive evidence is lacking. However, Plaintiffs suggest that the question of school resources can be demonstrated by using many of the same sources of generalized proof which are relevant to the question of demand. (McCormick Supp. Decl. ¶¶ 14, 15.) The Court agrees. If further development of the litigation brings forth conclusive evidence to support the NCAA's counter-assertion, then decertification may be appropriate at that time. Fed. R. Civ. P. 23(c)(1).

b. *Damages*

If Plaintiffs establish their view of impact, damages are a relatively simple matter. Plaintiffs' reasoning regarding damages is as follows. GIAs for each class member can be determined by looking at team rosters. COAs are set by federal guideline and can be determined for each school or each student as necessary. Damages equal *the difference between the GIA and COA*. The method is uncomplicated. But as the NCAA correctly points out, this method assumes that other forms of financial aid have no impact upon the GIA a student-athlete received and may be largely ignored.

Both sides agree that many members of the proposed class received other forms of financial aid in addition to their GIAs. The result, according to the NCAA, affects both impact and damages. The NCAA argues that proposed class members whose total aid (GIA plus other aid) was equal to or greater than the class member's respective COA suffered no impact from the GIA cap. The NCAA insists that the possibility of this scenario will force the Court to inquire into the financial aid histories of each class member to determine which class members suffered impact and which did not. Even where the total aid package was less than the COA, in order to estimate damages, the Court would be required to consider each class member's individual circumstances.

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<sup>4</sup> According to Plaintiffs, GIA expenditures average 12 percent of revenue for Division I-A football and 5.9 percent for Division IA basketball. (McCormick Decl. 37.) Even including revenues and GIA costs for other mens' and womens' sports, player costs are less than 15.5 percent of revenues of NCAA member institutions. *Id.* This percentage is extremely low when compared with the professional sports markets that Division I athletes may eventually enter. Professional markets are different from college markets, but they share important characteristics. The production functions (types and number of capital and labor inputs) and revenue generation models are similar. In the NBA and NFL, player compensation is approximately 55-65 percent of total revenues. These percentages offer a reasonable comparison and estimate of player inputs in the production of sports entertainment.

<sup>5</sup> 2002-2003 NCAA Gender Equity Report pp. 31-33.

The Court is not swayed by the NCAA's argument. Most forms of aid are currently independent from and irrelevant to the GIA a student receives. For instance, under current rules, a student athlete may receive a federal Pell grant in addition to a full GIA. The combined amount may be greater than his COA.<sup>6</sup> However, even under this scenario, the student may properly claim impact from the GIA cap. In the proper but for world Plaintiffs correctly assume that all forms of aid, and specifically non-athletic aid, that are currently irrelevant to the question of a full GIA, remain constant and hence irrelevant.<sup>7</sup>

To the extent that certain forms of aid should offset the GIA, a fact the the NCAA has thus-far failed to demonstrate, Plaintiffs plausibly suggest that each school's records would make it a matter of data entry to incorporate into a damages model deduction for such monies. (Pl. Reply at 10-11; McCormick Supp. Decl. ¶¶ 11.b, 11.c.) Of course, if maturation of this litigation renders the NCAA's concerns true, then decertification will be proper at that time.

## 2. *Predominance of Common Issues*

Rule 23(b)(3) recognizes that class actions will involve some individual issues. The relevant question is whether common issues will predominate if the case proceeds as a class action. Common issues predominate in this case. These common issues include:

- (i) The existence, nature and history of the agreement between the NCAA and its member institutions to restrict the amount of athletic-based financial aid received by the Division I athletes in the proposed class, i.e, the so-called GIA cap;
- (ii) Whether the GIA cap constitutes an unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1
- (iii) Whether the GIA cap is reasonably necessary to preserve amateurism or for any other pro-competitive purpose that the NCAA may identify;

Finally, the Court observes that "class actions play an important role in the private enforcement of antitrust actions." *In re Citric Acid Antitrust Litig.*, 1996 WL 655791, at \*8 (N.D. Cal. 1996). "For this reason, courts resolve doubts in these actions in favor of certifying the class." *Id.* (citing *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688-89 (D. Minn. 1995). *See also*, *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 135-41 (2d Cir. 2001); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455-56 (3d Cir. 1977) (showing that generally courts are more inclined to find predominance where, as here, the plaintiffs challenge an agreement to restrict prices.)

At present, Plaintiffs have offered a plausible and logical approach to the main issue confronting the questions of certification, that is, whether the Court can determine impact and damages using generalized proof. However, the Court is keenly aware of the tenuous and theoretical nature of Plaintiffs' methodologies. Plaintiffs lead the Court down a narrow path. With further time and discovery the NCAA may clearly articulate reasons why Plaintiffs methodologies will not work, leaving the Court to face an overwhelming tangle individual inquiries. Accordingly, the Court grants certification while granting leave to the NCAA to move for decertification, if proper, after time for discovery has ended.<sup>8</sup>

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<sup>6</sup> Prior to 2004, this was under NCAA Bylaw 15.2.4.1. Since 2004, this has been covered by Bylaw 15.1.1.

<sup>7</sup> Plaintiffs point out that schools continued to award as much athletic-based aid as possible when the rules were modified in 2004 to allow additional non-athletic aid in excess of a GIA. (Pl. Reply at 12; McCormick Supp. Decl. ¶¶ 14.g, 14.j, 17.)

<sup>8</sup> The NCAA's Ex Parte Application To File Supplemental Declaration In Opposition To Motion For Class Certification is hereby denied. The Court's present ruling was formulated before that Application was made and the Court has not considered those arguments.

IV. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Class Certification is **granted**.

**IT IS SO ORDERED.**

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