

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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SHANNON RAY, KHALA TAYLOR, PETER  
ROBINSON, KATHERINE SEBBANE, and  
RUDY BARAJAS, Individually and  
on Behalf of All Those Similarly  
Situating,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION, an unincorporated  
association,

Defendant.

No. 1:23-cv-00425 WBS CSK

MEMORANDUM AND ORDER RE:  
PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION AND DEFENDANT'S  
MOTION TO EXCLUDE EXPERT  
TESTIMONY

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Plaintiffs Shannon Ray, Khala Taylor, Peter Robinson,  
Katherine Sebbane, and Rudy Barajas brought this putative class  
action against defendant National Collegiate Athletic Association  
("NCAA"), alleging violation of § 1 of the Sherman Antitrust Act,  
15 U.S.C. § 1. (Second Amended Compl. (Docket No. 84) ("SAC").)  
Plaintiffs have moved for class certification. (Docket No. 85  
("Class Cert. Mot.").) Defendant opposes the motion (Docket No.

94) and moves to exclude plaintiff's expert evidence (Docket No. 95 ("Daubert Mot.")).

I. Factual and Procedural Background

The NCAA is an association whose members are colleges and universities competing in intercollegiate athletics. (See Pl. Ex. 7 (Docket No. 85-10); Expert Report of Orley Ashenfelter ("Ashenfelter Rep.") (Docket No. 113-2) ¶ 16; Expert Report of Jee-Yeon K. Lehmann ("Lehmann Rep.") (Docket Nos. 119-2, 122-2) ¶ 21.) The NCAA governs student athletic competition at its member schools. (See id.)

NCAA schools are divided into three divisions: Division I, Division II, and Division III. (Id.) Division I schools, which are at issue in this litigation, generally "manage the largest athletic budgets and offer the highest number of athletics scholarships." (See id.) Coach compensation is the largest athletics expense for NCAA Division I schools. (Ashenfelter Rep. ¶ 19.)

NCAA bylaws limit the number of coaches that Division I schools can hire in a given sport. (Lehmann Rep. ¶ 24; Ashenfelter Rep. ¶ 26.) Prior to 2023, Division I programs other than basketball and men's bowl-division football were permitted to hire a certain number of "unrestricted coaches," who had no restrictions on compensation, plus one or two "volunteer coaches."<sup>1</sup> (See Lehmann Rep. ¶ 27; Ashenfelter Rep. ¶¶ 26-28.) The bylaw at issue here, NCAA Bylaw 11.01.06 (hereinafter

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<sup>1</sup> Most single-gender sports programs were permitted to hire one volunteer coach, while most combined-gender programs were permitted to hire two volunteer coaches. (Lehmann Rep. ¶ 27.)

1 "Volunteer Coach Bylaw" or "the Bylaw"), defined a "volunteer  
2 coach" as "any coach who does not receive compensation or  
3 remuneration" from the school's athletics department. (See  
4 Docket No. 85-12 at 62; Lehmann Rep. ¶ 28.)<sup>2</sup>

5 Following the repeal of the Volunteer Coach Bylaw,  
6 effective July 2023, the volunteer coach designation was  
7 eliminated and the number of unrestricted coaches was increased,  
8 typically by the number of volunteer coaches allowed under the  
9 prior rule. (Ashenfelter Rep. ¶ 29.) For instance, programs  
10 previously permitted one volunteer coach were allotted one  
11 additional paid coach. (See Lehmann Rep. ¶ 29.)

12 Plaintiffs brought this putative class action alleging  
13 that the Volunteer Coach Bylaw violated § 1 of the Sherman Act.  
14 The proposed class consists of "[a]ll persons who, from March 17,  
15 2019, to June 30, 2023, worked for an NCAA Division I sports  
16 program other than baseball<sup>3</sup> in the position of 'volunteer  
17 coach,' as designated by NCAA Bylaws." (SAC ¶ 19.)

## 18 II. Plaintiffs' Expert Report

19 Plaintiffs' motion for class certification relies  
20 primarily on an expert report authored by Dr. Orley Ashenfelter.  
21 (Ashenfelter Rep.) Plaintiffs have also provided a supplemental  
22 declaration from Dr. Ashenfelter that provides additional  
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24 <sup>2</sup> Volunteer coaches were allowed to receive certain  
25 benefits from schools, for example tickets to home games, meals  
26 during team events, and compensation for working at sports camps  
and clinics. (Lehmann Rep. ¶ 28.)

27 <sup>3</sup> The related case Smart v. NCAA, a parallel class action  
28 representing baseball coaches, recently settled. (See 2:22-cv-  
02125, Docket No. 70.)

1 explanation of his methodology and updates based on additional  
2 data. (Ashenfelter Suppl. Decl. (Docket Nos. 115-2, 121-1).)<sup>4</sup>  
3 Defendant seeks to exclude all evidence from this expert, as  
4 discussed below.

5 Dr. Ashenfelter is an emeritus professor of economics  
6 at Princeton University and has extensive experience and  
7 professional qualifications in the area of labor economics. (See  
8 App. A to Ashenfelter Rep. (Docket No. 85-4 at 49-79).) In  
9 support of plaintiffs' motion for class certification, Dr.  
10 Ashenfelter created a statistical model to estimate the damages  
11 suffered by the members of the proposed class.

12 To formulate his model, Dr. Ashenfelter relied upon

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13 <sup>4</sup> The supplemental declaration was provided as an exhibit  
14 to plaintiffs' opposition to defendant's Daubert motion to  
15 exclude Dr. Ashenfelter's testimony. Defendant filed an  
16 evidentiary objection in which it argues that the court should  
17 not rely upon the supplemental declaration in ruling on class  
18 certification, instead limiting the court's consideration of the  
19 new material to its ruling under Daubert. (See Docket No. 104.)  
20 Defendant argues that it would be unfair for the court to rely  
21 upon the supplemental declaration because defendant has not been  
22 given a chance to respond to it in its class certification  
23 briefing, as the declaration was filed following defendant's  
24 filing of its opposition to class certification. Alternatively,  
25 defendant seeks leave to file an additional brief in opposition  
26 to the motion for class certification addressing the supplemental  
27 declaration. (See id.)

28 Contrary to defendant's objection, defendant has had a  
chance to address Dr. Ashenfelter's supplemental declaration in  
its reply brief in support of its Daubert motion, and indeed has  
done so at length. (See Docket No. 111.) Defendant has also  
deposed Dr. Ashenfelter concerning his supplemental declaration.  
(See id. at 2 n.1.) Further, the supplemental declaration does  
not change the underlying methodology or reasoning plaintiff  
relies upon in arguing the class certification requirements are  
met. Because defendant has had a fair opportunity to respond,  
the court may rely on the supplemental Ashenfelter declaration in  
ruling on both the Daubert and class certification issues.  
Defendant's objection (Docket No. 104) is therefore OVERRULED.

1 wage data and other documentation from hundreds of NCAA Division  
2 I schools, focusing on those that expanded their coaching staff  
3 beyond the prior limits on the number of unrestricted coaches  
4 following the repeal of the Volunteer Coach Bylaw. (See  
5 Ashenfelter Rep. ¶ 61; Ashenfelter Suppl. Decl. ¶¶ 11, 21.) He  
6 focuses on this subset of schools because they “provide the best  
7 currently-available evidence of what a competitive market will  
8 look like” in the absence of the repealed Bylaw. (Ashenfelter  
9 Suppl. Decl. ¶ 21.) The model uses actual coach salary data  
10 following the Bylaw repeal as a “benchmark” to estimate the “but-  
11 for” compensation class members would have received. (See  
12 Ashenfelter Rep. ¶ 40.) “But-for” analysis refers to the  
13 practice in antitrust cases of calculating classwide damages  
14 based on what class members’ economic position would have been  
15 absent the alleged antitrust violations (i.e., in the world that  
16 would have existed but for the alleged violation). See Comcast  
17 Corp. v. Behrend, 569 U.S. 27, 36 (2013); ABA Section of  
18 Antitrust Law, *Proving Antitrust Damages: Legal and Economic*  
19 *Issues* § II.4.B (2d ed. 2010).

20 Dr. Ashenfelter’s analysis proceeds in two steps. In  
21 the first step, Dr. Ashenfelter categorizes sports programs  
22 according to how many unrestricted coaches each program was  
23 permitted to have under NCAA rules beginning July 1, 2023 (i.e.,  
24 following the repeal of the Bylaw). (Ashenfelter Rep. ¶ 66.) He  
25 ranks coaches within each “program” (each sport within each  
26 school, broken down by gender if applicable) according to their  
27 actual annual pay. (See id. ¶ 67; Ashenfelter Suppl. Decl. ¶ 22  
28

1 n.39.) He then employs a regression analysis<sup>5</sup> to calculate the  
2 "step-down" -- i.e., degree of difference -- in pay between the  
3 lowest-paid and second-lowest-paid coaches. (Ashenfelter Rep. ¶¶  
4 67-68.) For example, the model concluded based on currently  
5 available data that for sports with a three-coach limit (for  
6 instance tennis), the lowest-paid coach received pay 45% lower  
7 than that of the second-lowest-paid coach. (See id. ¶ 68.)

8 In the second step, Dr. Ashenfelter produces an  
9 estimate of the compensation class members would have received in  
10 the "but-for" world. (See id. ¶ 70.) Within each sport at each  
11 school, the model uses the step-down differential identified at  
12 step one to calculate a salary value one or more steps lower than  
13 the lowest-paid coach. (See id. ¶ 71.) So, in the example  
14 above, the but-for compensation of a volunteer tennis coach based  
15 on one "step" down would be 45% lower than the salary of the  
16 lowest-paid coach. The number of steps down that are applied  
17 varies based on school-specific factors for a given sport. (See  
18 id.) The model determines the damages allegedly suffered by a  
19 given class member based on the step-down level and actual salary  
20 data associated with the sports program that employed him or her.

### 21 III. Defendant's Daubert Motion

22 Defendant seeks to exclude the expert report of Dr.  
23 Ashenfelter pursuant to Daubert v. Merrell Dow Pharmaceuticals,  
24 Inc., 509 U.S. 579, 580 (1993). Daubert requires "a flexible  
25 inquiry focused 'solely on principles and methodology, not on the

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26 <sup>5</sup> A regression analysis models the relationship between  
27 the target dependent variable -- here, coach salary -- and one or  
28 more independent variables. See Proving Antitrust Damages §  
II.6.C.1.

1 conclusions that they generate.'" United States v. Prime, 431  
2 F.3d 1147, 1153 (9th Cir. 2004) (quoting Daubert, 509 U.S. at  
3 595). "[T]he trial court must act as a 'gatekeeper' to exclude  
4 junk science that does not meet Federal Rule of Evidence 702's  
5 reliability standards by making a preliminary determination that  
6 the expert's testimony is reliable." Ellis v. Costco Wholesale  
7 Corp., 657 F.3d 970, 982 (9th Cir. 2011) (citing Kumho Tire Co.  
8 v. Carmichael, 526 U.S. 137, 145, 147-49 (1999)). "Daubert does  
9 not require a court to admit or to exclude evidence based on its  
10 persuasiveness; rather it requires a court to admit or exclude  
11 evidence based on its scientific reliability and relevance."  
12 Id.; see also Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)  
13 ("Shaky but admissible evidence is to be attacked by cross  
14 examination, contrary evidence, and attention to the burden of  
15 proof, not exclusion.").

16 "The manner and extent to which the Daubert framework  
17 applies at the class certification stage is an unsettled  
18 question." Lytle v. Nutramax Lab'ys, Inc., 114 F.4th 1011, 1030  
19 (9th Cir. 2024) (collecting cases). However, the Ninth Circuit  
20 explained in Lytle that at class certification, where the  
21 plaintiff's expert is relied upon for purposes of the  
22 predominance inquiry under Rule 23, "such Daubert factors as peer  
23 review of the proffered model may be highly relevant, while  
24 others, such as known error rate, may be more applicable to the  
25 later-executed results of the test." Id. Further, "whether a  
26 'full' or 'limited' Daubert analysis should be applied may depend  
27 on the timing of the class certification decision." Id. at 1031.  
28 "If discovery has closed and an expert's analysis is complete and

1 her tests fully executed, there may be no reason for a district  
2 court to delay its assessment of ultimate admissibility at  
3 trial.” Id.

4 But where “an expert’s model has yet to be fully  
5 developed, a district court is limited at class certification to  
6 making a predictive judgment about how likely it is the expert’s  
7 analysis will eventually bear fruit,” and therefore a “full-blown  
8 Daubert assessment of the results of the application of the model  
9 would be premature.” Id. In the instant case, discovery is  
10 ongoing and Dr. Ashenfelter is still receiving new data and  
11 updating his analysis, which indicates that a full Daubert  
12 analysis is “premature” at this stage of the proceedings. See  
13 id.

14 It is undisputed that Dr. Ashenfelter possesses  
15 extensive experience and qualifications in the field of labor  
16 economics and that he based his analysis on the review of  
17 reliable documentation produced by NCAA Division I member  
18 schools. Regression analysis based on a “benchmark” or  
19 “yardstick,” like that employed by Dr. Ashenfelter, is a well-  
20 established method of calculating class-wide antitrust impact.  
21 See Proving Antitrust Damages § II.4.C. Dr. Ashenfelter  
22 represents that a similar methodology to the one applied here has  
23 previously been used to evaluate the class-wide antitrust impact  
24 of NCAA coach compensation restrictions. (See Ashenfelter Suppl.  
25 Decl. ¶ 23 n.41 (discussing expert method relied upon in Law v.  
26 Nat’l Collegiate Athletic Ass’n, 5 F. Supp. 2d 921 (D. Kan.  
27 1998)).) Further, Dr. Ashenfelter has previously performed  
28 similar statistical analysis in antitrust cases. See, e.g.,



1 Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2013 WL  
2 1721651, at \*1 (E.D. Mich. Apr. 22, 2013) (denying Daubert motion  
3 to exclude Dr. Ashenfelter's "benchmark" analysis of but-for  
4 wages in alleged wage-fixing conspiracy). These factors indicate  
5 that his evidence is sufficiently reliable at this stage. See  
6 Lytle, 114 F.4th at 1031 (expert's "unchallenged credentials,"  
7 "review of documentary evidence and . . . data," use of a "well-  
8 established" methodology, and the fact expert had "successfully  
9 performed" similar analyses in prior cases established that  
10 expert evidence was admissible under Daubert at class  
11 certification).

12 Defendant argues that Dr. Ashenfelter's report is  
13 nonetheless inadmissible because it fails to account for several  
14 key factors. First, defendant contends that Dr. Ashenfelter's  
15 model fails to control for the experience and skill level of  
16 coaches because (1) his calculations did not incorporate  
17 experience level as a variable, and (2) he did not address  
18 potential selection bias in the sample of additional paid coaches  
19 hired after the bylaw repeal, who could have higher experience  
20 levels and therefore warrant higher wages. These arguments are  
21 factually unfounded, as Dr. Ashenfelter's analysis does account  
22 for experience using both pay ranking within the coaching  
23 hierarchy and age as proxies for experience. (See Ashenfelter  
24 Rep. ¶ 71; Ashenfelter Suppl. Decl. ¶¶ 32-35).

25 Second, defendant argues that Dr. Ashenfelter "excluded  
26 evidence from schools that did not add paid coaching positions  
27 after the bylaws were amended." (Daubert Mot. at 21.) Again,  
28 this argument is unfounded. (See Ashenfelter Rep. ¶ 71 ("If

1 . . . a program reports an unrestricted coach who earns no  
2 compensation, then the volunteer coach is estimated to also earn  
3 no compensation [under the but-for analysis]. However, this case  
4 is rare: according to my analysis of the schools' data, more than  
5 99% of unrestricted coaches are paid."").)

6 Finally, defendant argues that Dr. Ashenfelter's  
7 analysis is based around groupings of dissimilar sports and  
8 "tries to estimate market rates of pay for coaches in one sport  
9 by using salaries for coaching in other sports that are  
10 determined by different supply and demand conditions." (Daubert  
11 Mot. at 29.) This argument mischaracterizes Dr. Ashenfelter's  
12 analysis. While the calculation of the step-down differential at  
13 step one uses groupings of sports based on how many coaches the  
14 NCAA permits a school to hire, the damage calculation at step two  
15 uses actual salary data from each sports program at each school  
16 and therefore accounts for differences across sports. (See  
17 Ashenfelter Rep. ¶ 71.)

18 To the extent that defendant thinks Dr. Ashenfelter's  
19 analysis inadequately accounts for the variables discussed above,  
20 that is not a basis for exclusion under Daubert, but rather goes  
21 to the weight of the evidence. See Obrey v. Johnson, 400 F.3d  
22 691, 695 (9th Cir. 2005) ("[O]bjections to a [statistical]  
23 study's completeness generally go to 'the weight, not the  
24 admissibility of the statistical evidence,' and should be  
25 addressed by rebuttal, not exclusion.") (quoting Mangold v. Cal.  
26 Pub. Utils. Comm'n, 67 F.3d 1470, 1476 (9th Cir. 1995)).  
27 Defendant has failed to establish that Dr. Ashenfelter's  
28 "methodology is flawed or that there is a likelihood that he will

1 improperly apply that method to the facts.” See Lytle, 114 F.4th  
2 at 1031. Accordingly, defendant’s motion to exclude Dr.  
3 Ashenfelter’s expert report will be denied.<sup>6</sup>

4 IV. Class Certification

5 The proposed class consists of “[a]ll persons who, from  
6 March 17, 2019, to June 30, 2023, worked for an NCAA Division I  
7 sports program other than baseball in the position of ‘volunteer  
8 coach,’ as designated by NCAA Bylaws.” (SAC ¶ 19.)

9 To prevail on class certification, plaintiffs must  
10 establish “by a preponderance of the evidence” that the proposed  
11 class satisfies the requirements of Federal Rules of Civil  
12 Procedure 23(a) and 23(b). Olean Wholesale Grocery Coop., Inc.  
13 v. Bumble Bee Foods LLC, 31 F.4th 651, 664-65 (9th Cir. 2022).

14 “Rule 23 does not set forth a mere pleading standard.”  
15 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).  
16 “[C]ertification is proper only if ‘the trial court is satisfied,  
17 after a rigorous analysis, that the prerequisites of Rule 23(a)  
18 have been satisfied.’” Id. at 350-51 (quoting Gen. Tel. Co. of  
19 Sw. v. Falcon, 457 U.S. 147, 161 (1982)). “Merits questions may  
20 be considered to the extent -- but only to the extent -- that  
21 they are relevant to determining whether the Rule 23  
22 prerequisites for class certification are satisfied.” Amgen Inc.  
23 v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

24 A. Rule 23(a)

25 Rule 23(a) restricts class actions to cases where: “(1)  
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27 <sup>6</sup> The court expresses no opinion at this time as to  
28 whether any evidence would be admissible or inadmissible at  
trial.

1 the class is so numerous that joinder of all members is  
2 impracticable [numerosity]; (2) there are questions of law or  
3 fact common to the class [commonality]; (3) the claims or  
4 defenses of the representative parties are typical of the claims  
5 or defenses of the class [typicality]; and (4) the representative  
6 parties will fairly and adequately protect the interests of the  
7 class [adequacy of representation]." See Fed. R. Civ. P. 23(a).

8 Defendant appears to concede that the numerosity,  
9 commonality, and typicality requirements are satisfied, as its  
10 brief does not address them. The court nonetheless addresses all  
11 factors as part of its "rigorous" analysis. See Wal-Mart, 564  
12 U.S. at 350-51.

13 1. Numerosity

14 "Although 'no specific minimum number of plaintiffs  
15 asserted' is required to obtain class certification, 'a proposed  
16 class of at least forty members presumptively satisfies the  
17 numerosity requirement.'" Alger v. FCA US LLC, 334 F.R.D. 415,  
18 422 (E.D. Cal. 2020) (England, J.) (quoting Nguyen v. Radiant  
19 Pharmaceuticals Corp., 287 F.R.D. 563, 569 (C.D. Cal. 2012)).

20 Here, plaintiffs present evidence that the putative  
21 class has thousands of members (see Ashenfelter Rep. ¶ 63), which  
22 defendant does not dispute. The proposed class therefore  
23 satisfies the numerosity requirement.

24 2. Commonality

25 Commonality requires that the class members' claims  
26 "depend upon a common contention" that is "capable of classwide  
27 resolution -- which means that determination of its truth or  
28 falsity will resolve an issue that is central to the validity of

1 each one of the claims in one stroke.” Wal-Mart, 564 U.S. at  
2 350. “[A]ll questions of fact and law need not be common to  
3 satisfy the rule,” and the “existence of shared legal issues with  
4 divergent factual predicates is sufficient, as is a common core  
5 of salient facts coupled with disparate legal remedies within the  
6 class.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir.  
7 1998). “So long as there is even a single common question, a  
8 would-be class can satisfy the commonality requirement of Rule  
9 23(a)(2).” Wang v. Chinese Daily News, Inc., 737 F.3d 538, 544  
10 (9th Cir. 2013) (internal citation and quotation marks omitted).

11 The question of whether the Volunteer Coach Bylaw  
12 violated antitrust law is common to the entire class. “Antitrust  
13 liability alone constitutes a common question that will resolve  
14 an issue that is central to the validity of each class member’s  
15 claim in one stroke, because proof of an alleged conspiracy will  
16 focus on defendants’ conduct and not on the conduct of individual  
17 class members.” In re High-Tech Emp. Antitrust Litig., 985 F.  
18 Supp. 2d 1167, 1180 (N.D. Cal. 2013) (internal quotation marks  
19 and citations omitted). Thus, “[w]here an antitrust conspiracy  
20 has been alleged, courts have consistently held that ‘the very  
21 nature of a conspiracy antitrust action compels a finding that  
22 common questions of law and fact exist.’” See id. at 1181  
23 (quoting In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D.  
24 583, 593 (N.D. Cal. 2010)). Because plaintiffs have identified a  
25 common question applicable to the whole class, they have  
26 satisfied the commonality requirement.

### 27 3. Typicality

28 Typicality requires that named plaintiffs have claims

1 "reasonably coextensive with those of absent class members," but  
2 their claims do not have to be "substantially identical."  
3 Hanlon, 150 F.3d at 1020. The test for typicality "is whether  
4 other members have the same or similar injury, whether the action  
5 is based on conduct which is not unique to the named plaintiffs,  
6 and whether other class members have been injured by the same  
7 course of conduct." Hanon v. Dataproducts Corp., 976 F.2d 497,  
8 508 (9th Cir. 1992) (citation omitted).

9 Here, each class representative -- like each class  
10 member -- worked as a volunteer coach at an NCAA Division I  
11 school, was subject to the NCAA's Volunteer Coach Bylaw  
12 precluding them from receiving compensation, and alleges  
13 antitrust injury under the Sherman Act. "In antitrust cases,  
14 this uniformity of class members' injuries, claims, and legal  
15 theory is typically sufficient to satisfy Rule 23(a)(3)." See In  
16 re NCAA Student-Athlete Name & Likeness Licensing Litig. ("NCAA  
17 Name & Likeness Litig."), No. 09-cv-1967 CW, 2013 WL 5979327, at  
18 \*5 (N.D. Cal. Nov. 8, 2013) (finding typicality requirement  
19 satisfied for class consisting of all Division I men's football  
20 and basketball players subject to an NCAA policy alleged to  
21 violate antitrust law). Because defendant has not identified  
22 "any unique defenses which threaten to become the focus of the  
23 litigation" that would cut against these similarities, see Hanon,  
24 976 F.2d at 508, plaintiffs have satisfied the typicality  
25 requirement.

#### 26 4. Adequacy of Representation

27 To resolve the question of adequacy, the court must  
28 consider two factors: (1) whether the named plaintiffs or their

1 counsel have any conflicts of interest with other class members,  
2 and (2) whether the named plaintiffs and their counsel will  
3 vigorously prosecute the action on behalf of the class. In re  
4 Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 566 (9th Cir.  
5 2019).

6 a. Conflicts of Interest

7 The first portion of the adequacy inquiry “serves to  
8 uncover conflicts of interest between named parties and the class  
9 they seek to represent.” Kim v. Allison, 87 F.4th 994, 1000 (9th  
10 Cir. 2023) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591,  
11 625 (1997)). Here, the class representatives “possess the same  
12 interest and suffer[ed] the same [alleged] injury as the class  
13 members,” indicating that their interests are “aligned.” See  
14 Amchem, 521 U.S. at 625-26.

15 Defendant argues that each class member would need to  
16 prove that a given school would have added paid positions for  
17 their sport, creating a conflict with other class members who  
18 coached for a different sport at the same school. As discussed  
19 in greater detail below, this argument is premised on a merits-  
20 based dispute between the parties’ experts about how but-for  
21 damages should be calculated. Further, plaintiffs and their  
22 expert expressly reject defendant’s contention that they will  
23 need to prove what hiring decisions would have been made by each  
24 school, instead relying on a different method of calculating  
25 antitrust injury. The issue identified by defendant therefore  
26 presents only a “speculative conflict” that is not “fundamental  
27 to the suit.” See In re Online DVD-Rental Antitrust Litig., 779  
28 F.3d 934, 942 (9th Cir. 2015). Accordingly, there are no

1 conflicts of interest precluding class certification.

2 b. Vigorous Prosecution

3 The second portion of the adequacy inquiry examines the  
4 vigor with which the named plaintiffs and their counsel have  
5 pursued the class's claims. "Although there are no fixed  
6 standards by which 'vigor' can be assayed, considerations include  
7 competency of counsel." Kim, 87 F.4th at 1002 (quoting Hanlon,  
8 150 F.3d at 1021).

9 Plaintiffs are represented by the firms Gustafson  
10 Gluek, Kirby McInerney, and Fairmark Partners. The extensive  
11 experience and strong qualifications of plaintiffs' counsel in  
12 litigating complex antitrust cases, including litigation against  
13 the NCAA concerning allegedly anticompetitive restrictions on  
14 coach compensation, are undisputed. (See Decl. of Dennis Stewart  
15 (Docket No. 85-1); Decl. of Robert Gralewski, Jr. (Docket No. 85-  
16 2); Decl. of Michael Lieberman (Docket No. 85-3).) Plaintiffs'  
17 counsel represents that they have expended thousands of hours and  
18 considerable resources in litigating this case thus far. (See  
19 Class Cert. Mot. at 19.) The court's review of the docket and  
20 plaintiffs' filings supports this conclusion. Further, there is  
21 no indication that the named plaintiffs will fail to vigorously  
22 prosecute this case. (See Decl. of Michael Lieberman ¶ 8  
23 (describing named plaintiffs' efforts to support this litigation,  
24 including responding to interrogatories, searching for responsive  
25 documents, sitting for depositions, and consulting with counsel  
26 about case strategy and discovery).) Accordingly, plaintiffs and  
27 their counsel satisfy the adequacy requirement.



1 B. Rule 23(b)

2 After fulfilling the threshold requirements of Rule  
3 23(a), the proposed class must satisfy the requirements of one of  
4 the three subdivisions of Rule 23(b). Leyva v. Medline Indus.  
5 Inc., 716 F.3d 510, 512 (9th Cir. 2013). Plaintiffs seek  
6 certification under Rule 23(b)(3), which provides that a class  
7 action may be maintained only if the court finds that (1)  
8 "questions of law or fact common to class members predominate  
9 over questions affecting only individual members," and (2) "a  
10 class action is superior to other available methods for fairly  
11 and efficiently adjudicating the controversy." Fed. R. Civ. P.  
12 23(b)(3). Defendant disputes that the predominance requirement  
13 is satisfied, but does not address superiority.

14 1. Predominance

15 "The predominance inquiry asks whether the common,  
16 aggregation-enabling, issues in the case are more prevalent or  
17 important than the non-common, aggregation-defeating, individual  
18 issues." Olean, 31 F.4th at 664 (quoting Tyson Foods, Inc. v.  
19 Bouaphakeo, 577 U.S. 442, 453 (2016)). "When one or more of the  
20 central issues in the action are common to the class and can be  
21 said to predominate, the action may be considered proper under  
22 Rule 23(b)(3) even though other important matters will have to be  
23 tried separately, such as damages or some affirmative defenses  
24 peculiar to some individual class members." Tyson Foods, 577  
25 U.S. at 453 (cleaned up).

26 "'Considering whether questions of law or fact common  
27 to class members predominate begins, of course, with the elements  
28 of the underlying cause of action.'" Olean, 31 F.4th at 665

1 (quoting Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S.  
2 804, 809 (2011)) (cleaned up). The elements of a claim under § 1  
3 of the Sherman Act are "(i) the existence of an antitrust  
4 violation; (ii) 'antitrust injury' or 'impact' flowing from that  
5 violation (i.e., the conspiracy); and (iii) measurable damages."  
6 Id. at 666. Antitrust impact is "injury of the type the  
7 antitrust laws were intended to prevent and that flows from that  
8 which makes defendants' acts unlawful." Id. (quoting Brunswick  
9 Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).

10 Accordingly, "to prove there is a common question of  
11 law or fact that relates to a central issue in an antitrust class  
12 action, plaintiffs must establish that 'essential elements of the  
13 cause of action,' such as the existence of an antitrust violation  
14 or antitrust impact, are capable of being established through a  
15 common body of evidence, applicable to the whole class." Id.  
16 (quoting In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305,  
17 311 (3d Cir. 2008)). In other words, plaintiffs' evidence must  
18 be "capable of answering a common question for the entire class  
19 in one stroke" and of "reasonably sustain[ing] a jury verdict in  
20 favor of the plaintiffs, even though a jury could still decide  
21 that the evidence was not persuasive." See id. at 668 (citing  
22 Tyson Foods, 577 U.S. at 453; Halliburton Co. v. Erica P. John  
23 Fund, Inc., 573 U.S. 258, 276 (2014)).

24 "In determining whether the 'common question'  
25 prerequisite is met, a district court is limited to resolving  
26 whether the evidence establishes that a common question is  
27 capable of class-wide resolution, not whether the evidence in  
28 fact establishes that plaintiffs would win at trial." Olean, 31

1 F.4th at 666-67. "While such an analysis may 'entail some  
2 overlap with the merits of the plaintiff's underlying claim,' the  
3 'merits questions may be considered [only] to the extent [ ] that  
4 they are relevant to determining whether the Rule 23  
5 prerequisites for class certification are satisfied.'" Id.  
6 (quoting Wal-Mart, 564 U.S. at 351; Amgen, 568 U.S. at 466)  
7 (alterations in original).

8 It is undisputed that there are common questions  
9 concerning the existence of an antitrust violation. "The  
10 question of whether an antitrust violation under Section 1 exists  
11 naturally lends itself to common proof, because that  
12 determination 'turns on defendants' conduct and intent along with  
13 the effect on the market, not on individual class members.'" In  
14 re Coll. Athlete NIL Litig. ("House"), No. 20-cv-03919 CW, 2023  
15 WL 8372787, at \*8 (N.D. Cal. Nov. 3, 2023) (quoting In re  
16 Glumetza Antitrust Litig., 336 F.R.D. 468, 475 (N.D. Cal. 2020)).  
17 See also Law v. Nat'l Collegiate Athletic Ass'n, No. 94-2053-KHV,  
18 1998 U.S. Dist. LEXIS 6608, at \*15-16 (D. Kan. Apr. 17, 1998)  
19 (requirements of Rule 23(b)(3) satisfied where "the NCAA adopted  
20 a scheme to fix salaries for restricted earnings coaches . . .  
21 the purpose and effect of [which] was to make coaching salaries  
22 unresponsive to forces that would normally prevail in a  
23 competitive marketplace," and the "plaintiff class members were  
24 employed in the restrained market and . . . subjected to  
25 defendant's illegal scheme").

26 Defendant argues that despite the presence of common  
27 questions, individual issues predominate because plaintiffs have  
28 not proffered a viable form of common evidence on the issue of

1 antitrust impact. Defendant's expert, Dr. Jee-Yeon Lehmann,  
2 contends that Dr. Ashenfelter's model is incapable of providing  
3 common proof because it does not address (1) whether each school  
4 would have added an additional paid coaching position in the  
5 absence of the Bylaw rather than choosing to provide zero pay,  
6 and (2) whether each class member would have been hired for that  
7 additional paid position. (See Lehmann Rep. ¶¶ 31, 33, 77.) Put  
8 differently, defendant argues that if the Volunteer Coach Bylaw  
9 had not been in place, NCAA schools could have nonetheless chosen  
10 to provide zero compensation to the additional coaches; and even  
11 if they did decide to pay the additional coaches, it is not a  
12 given that the proposed class members would have been hired for  
13 those positions. Defendant refers to this as the "substitution  
14 effect," so called because other individuals could have been  
15 substituted for the class members in the but-for world.

16 Plaintiffs contend that the "substitution effect" is  
17 not grounded in accepted economic theory or binding case law and  
18 instead, the proper focus in constructing the but-for world is on  
19 what competitive wages would have been for plaintiffs' coaching  
20 positions absent the Bylaw. Dr. Ashenfelter avers that his  
21 analysis uses the proper framing of the but-for world and that in  
22 prior wage-fixing cases he has worked on, he has never been  
23 required to show that the class members would also have been  
24 hired in the but-for world. (See Ashenfelter Suppl. Decl. at 6  
25 n.14.)<sup>7</sup>

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26 <sup>7</sup> Plaintiffs argue that this court already took a  
27 position on the merits of the "substitution theory" in its order  
28 denying defendant's motion to dismiss. (See Docket No. 38.) The  
court did not do so. (See Docket No. 50 (explaining that the

1 This issue comes down to a merits-based dispute between  
 2 the parties' experts concerning the appropriate method for  
 3 measuring impact. Both positions strike the court as plausible.  
 4 Indeed, some authorities support plaintiffs' position,<sup>8</sup> while

5  
 6 court's order on the motion to dismiss "did no more nor no less  
 7 than dispose of the motion which was before the court").)

8 <sup>8</sup> See House, 2023 WL 8372787, at \*8 (Antitrust "injury  
 9 and damages are determined by comparing, on the one hand, the  
 10 payments that each class member . . . received in the real world  
 11 with, on the other hand, the payments that that same class member  
 12 would have received in the but-for world," and "the identity of  
 13 the class members does not change between the real world and the  
 14 but-for world . . . Accordingly, the so-called substitutions or  
 15 displacements that may or may not take place in a hypothetical  
 16 but-for world are irrelevant."); Law v. Nat'l Collegiate Athletic  
 17 Ass'n, 185 F.R.D. 324, 330 n.6 (D. Kan. 1999) (rejecting the  
 18 merits of NCAA's "substitution theory" argument that plaintiffs  
 19 suffered no damage because they would not have been hired at all  
 20 absent the rule at issue, which "was not anchored in established  
 21 case law"); Tawfilis v. Allergan, Inc., No. 8:15-cv-00307 JLS  
 22 JCG, 2017 WL 3084275, at \*11-12 (C.D. Cal. June 26, 2017) ("[A]n  
 23 antitrust impact analysis for direct purchasers need not consider  
 24 downstream substitution effects that could have affected the  
 25 amount of the product purchased in the but-for world."); Kamakahi  
 26 v. Am. Soc'y for Reprod. Med., 305 F.R.D. 164, 192-93 (N.D. Cal.  
 27 2015) (rejecting argument that "substitution theory" defeated  
 28 predominance and noting that "[t]o allow the specter of  
 substitution to defeat class certification, without evidence that  
 substitution would actually occur, would have wide ranging  
 effects on the ability to resolve antitrust claims as class  
 actions").

22 Plaintiffs' position also aligns with authorities  
 23 discussing the but-for analysis more generally. See Comcast, 569  
 24 U.S. at 36 (After determining "a 'but for' baseline -- a figure  
 25 that would show what the competitive prices would have been if  
 26 there had been no antitrust violations" -- damages are  
 27 "determined by comparing to that baseline what the actual prices  
 28 were during the charged period.") (emphasis added); ABA Section  
 of Antitrust Law, Econometrics: Legal, Practical and Technical  
 Issues § 13.B.1.c (2d ed. 2014) ("A test of classwide impact  
 requires the estimation of 'but-for prices' (i.e., prices that  
would have prevailed but for the alleged anticompetitive act).")  
 (emphasis added); Proving Antitrust Damages § II.4.B ("[I]t is

others support defendant's.<sup>9</sup> It is not for the court to engage in a "battle of the experts" over the merits at this juncture. See In re NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 WL 1207915, at \*11 (W.D. Wash. May 3, 2006) (declining to take a position on the "fundamental difference between Plaintiffs' expert and the NCAA's expert" concerning the appropriate "frame" of the but-for analysis, which was a merits issue not suited for consideration at class certification). See also Comcast, 569 U.S. at 35 (plaintiffs' damage model must measure damages attributable to the theory advanced by plaintiffs); Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc., 773 F.2d 1506, 1512-13 (9th Cir. 1985) (noting "deficiencies" in plaintiff's damages model which did not

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not relevant that the defendant . . . could theoretically have caused the same harms through lawful means," for instance by choosing to fix prices individually rather than as part of a cartel.).

<sup>9</sup> See NCAA Name & Likeness Litig., 2013 WL 5979327, at \*8 (crediting the NCAA expert's "substitution theory" model and denying class certification because plaintiffs failed to "provide[] a feasible method for determining which members of the [proposed class] would still have played for Division I teams -- and, thus, suffered the injuries alleged here -- in the absence of the challenged restraints"); Rock v. Nat'l Collegiate Athletic Ass'n, No. 1:12-cv-01019 TWP DKL, 2016 WL 1270087, at \*14 (S.D. Ind. Mar. 31, 2016) (denying class certification in challenge to NCAA rule that limited athletic scholarships because "the facts do not support [plaintiffs' expert's] extreme position that all members of the [proposed class] would have received a [scholarship] in the absence of the challenged rules"). See also Walk-On Football Players Litig., 2006 WL 1207915, at \*1 (denying class certification because plaintiffs failed to provide method of proving their own theory that the class members would have received scholarships absent the NCAA rule at issue, but taking no position on whether plaintiffs' or the NCAA's conception of the but-for world was appropriate).

1 sufficiently address competitive behavior in the but-for world,  
2 but reversing grant of summary judgment and allowing the issue of  
3 damages to proceed to trial).

4 “Rule 23 grants courts no license to engage in [such]  
5 free-ranging merits inquiries at the certification stage.” See  
6 Amgen, 568 U.S. at 466. Cf. Van v. LLR, Inc., 61 F.4th 1053,  
7 1067-68 (9th Cir. 2023) (individual issues predominated where  
8 court and parties agreed that presence of individual discounts  
9 defeated claim for relief, and defendants provided evidence of  
10 individual discounts that would “bar recovery,” which raised “the  
11 spectre of class-member-by-class-member adjudication of the  
12 issue”).

13 Defendant presents a litany of other critiques of Dr.  
14 Ashenfelter’s analysis -- for instance, that it does not account  
15 for benefits that class members received by virtue of their  
16 volunteer coach positions that could reduce their damages, and  
17 does not sufficiently control for variations across different  
18 sports and schools in different regions -- arguing that these  
19 issues would necessitate individual damage inquiries that would  
20 predominate. These critiques similarly speak to the weight of  
21 plaintiffs’ evidence as applied to merits issues. See Tyson  
22 Foods, 577 U.S. at 457 (arguments that an expert study is  
23 “unrepresentative or inaccurate” go to the merits and do not  
24 defeat class certification).

25 Further, the Ninth Circuit has repeatedly held that  
26 individualized damage calculations alone do not defeat class  
27 certification. See, e.g., Olean, 31 F.4th at 681-82 (“there is  
28 no per se rule that a district court is precluded from certifying

1 a class if plaintiffs may have to prove individualized damages at  
2 trial”) (citing Halliburton, 573 U.S. at 276); Leyva, 716 F.3d at  
3 514 (“the amount of damages is invariably an individual  
4 question,” and “the potential existence of individualized damage  
5 assessments does not detract from the action’s suitability for  
6 class certification”) (quoting Blackie v. Barrack, 524 F.2d 891,  
7 905 (9th Cir. 1975); Yokoyama v. Midland Nat. Life Ins. Co., 594  
8 F.3d 1087, 1089 (9th Cir. 2010)). Defendant has not established  
9 that individualized inquiries into damages would predominate over  
10 the common issues already identified. See Olean, 31 F.4th at  
11 679–80 (“While individualized differences among the [actual  
12 damages of each class member as compared to the regression  
13 model’s estimates] may require a court to determine damages on an  
14 individualized basis, such a task would not undermine the  
15 regression model’s ability to provide evidence of common  
16 impact.”).

17 As discussed in detail above, Dr. Ashenfelter has  
18 provided a model that estimates but-for wages for each proposed  
19 class member based on extensive documentation produced by NCAA  
20 Division I schools. His model uses regression analysis based on  
21 a benchmark, a widely accepted form of expert evidence, and Dr.  
22 Ashenfelter avers that his analysis provides “a reasonable  
23 methodology by which to estimate damages using data” and employs  
24 “methods that are common to the class.” (See Ashenfelter Rep. ¶  
25 10.) Plaintiffs have established that Dr. Ashenfelter’s model is  
26 “capable of showing that the [proposed class] members suffered  
27 antitrust impact on a class-wide basis, notwithstanding [Dr.  
28 Lehmann’s] critique,” which is “all that [is] necessary at the



1 certification stage.” See Olean, 31 F.4th at 681 (emphasis  
2 added); see also id. at 683 (“a regression model . . . may be  
3 capable of showing class-wide antitrust impact, provided that the  
4 district court considers factors that may undercut the model’s  
5 reliability”). Accordingly, plaintiffs have established that  
6 common questions of law and fact predominate.

## 7 2. Superiority

8 The second part of the inquiry under Rule 23(b) (3) asks  
9 whether “a class action is superior to other available methods  
10 for fairly and efficiently adjudicating the controversy.”

11 “Generally, the factors relevant to assessing superiority include  
12 ‘(A) the class members’ interests in individually controlling the  
13 prosecution or defense of separate actions; (B) the extent and  
14 nature of any litigation concerning the controversy already begun  
15 by or against class members; (C) the desirability or  
16 undesirability of concentrating the litigation of the claims in  
17 the particular forum; and (D) the likely difficulties in managing  
18 a class action.’” Wolin v. Jaguar Land Rover N. Am., LLC, 617  
19 F.3d 1168, 1175 (9th Cir. 2010) (quoting Fed. R. Civ. P.  
20 23(b) (3)).

21 The proposed class contains thousands of individuals,  
22 and the parties have not identified any competing litigation  
23 involving members of the proposed class. It appears unlikely  
24 that the amount of damages each coach suffered is high enough to  
25 make individual litigation an efficient method of resolving their  
26 claims, especially given the complexity of antitrust litigation  
27 and the presence of several common legal and factual questions.  
28 “Forcing individual [class members] to litigate their cases,

1 particularly where common issues predominate for the proposed  
2 class," would be "an inferior method of adjudication." See  
3 Wolin, 617 F.3d at 1176. Accordingly, "class-wide adjudication  
4 of 'common issues will reduce litigation costs and promote  
5 greater efficiency,'" and the superiority requirement is  
6 satisfied. See id. (quoting Valentino v. Carter-Wallace, Inc.,  
7 97 F.3d 1227, 1234 (9th Cir. 1996)).

8 For the foregoing reasons, the class certification  
9 requirements of Rules 23(a) and 23(b) (3) are satisfied.

10 V. Appointment of Class Counsel

11 "An order that certifies a class action . . . must  
12 appoint class counsel under Rule 23(g)." Fed. R. Civ. P.  
13 23(c) (1) (B). In appointing class counsel, the court considers  
14 "(i) the work counsel has done in identifying or investigating  
15 potential claims in the action; (ii) counsel's experience in  
16 handling class actions, other complex litigation, and the types  
17 of claims asserted in the action; (iii) counsel's knowledge of  
18 the applicable law; and (iv) the resources that counsel will  
19 commit to representing the class." Fed. R. Civ. P. 23(g) (1). As  
20 discussed above, plaintiffs' counsel has considerable knowledge  
21 and experience in antitrust litigation and has dedicated  
22 significant effort and resources to litigating this action.  
23 Accordingly, the court will appoint Gustafson Gluek, Kirby  
24 McInerney, and Fairmark Partners as co-lead class counsel.


25 IT IS THEREFORE ORDERED that defendant's motion to  
26 exclude expert testimony (Docket No. 95) be, and the same hereby  
27 is, DENIED.

28 IT IS FURTHER ORDERED that plaintiffs' motion for class

1 certification (Docket No. 85) be, and the same hereby is,  
2 GRANTED. The certified class consists of: All persons who, from  
3 March 17, 2019, to June 30, 2023, worked for an NCAA Division I  
4 sports program other than baseball in the position of "volunteer  
5 coach," as designated by NCAA Bylaws.

6 Plaintiffs Shannon Ray, Khala Taylor, Peter Robinson,  
7 Katherine Sebbane, and Rudy Barajas are hereby appointed as class  
8 representatives. The law firms Gustafson Gluek, Kirby McInerney,  
9 and Fairmark Partners are hereby appointed as co-lead class  
10 counsel.

11 Dated: March 10, 2025

  
12 **WILLIAM B. SHUBB**  
13 **UNITED STATES DISTRICT JUDGE**  
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