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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

AREZOU MANSOURIAN, LAUREN CASE NO. CIV. S-0302591 FCD/PAN
MANCUSO, NANCY NIEN-LI CHIANG, (JFM)
and CHRISTINE WING-SI NG; and all those
similarly situated,

Plaintiffs,

vs.

BOARD OF REGENTS OF THE
UNIVERSITY OF CALIFORNIA AT
DAVIS, et al.,

Defendants.

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION**

Date: April 21, 2006
Time: 10:00 a.m.
Courtroom: #2

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I.

PROCEDURAL HISTORY

This action was filed on December 18, 2003. Plaintiffs, three former and one current undergraduate students at U.C. Davis have sued the REGENTS OF THE UNIVERSITY OF CALIFORNIA ("UNIVERSITY"); the Chancellor of U.C. Davis, the U.C. Davis Athletic Director and two Assistant Athletic Directors, and a former Associate Vice Chancellor. They assert the following claims for relief:

1. Violation of Title IX in regard to equal athletic participation opportunities. This claim is asserted only against the UNIVERSITY. Plaintiffs MANSOURIAN and MANCUSO, who are described in the Complaint as the "class plaintiffs" (Exhibit A, Complaint, ¶ 107) assert this claim on behalf of themselves and all others similarly situated under F.R.C.P. 23(a) and (b)(2). Plaintiffs NG and CHIANG assert this claim on behalf of themselves only. Plaintiffs contend that "they and all present and future female students at U.C. Davis should have equal access and opportunity to receive these same benefits that male students at U.C. Davis already have, including athletic participation opportunities in wrestling." (Exhibit A, ¶ 127)

2. Violation of Title IX in regard to equal athletic financial assistance. This claim is asserted against the UNIVERSITY only. MANSOURIAN and MANCUSO assert this claim on behalf of the putative class, while Plaintiffs NG and CHIANG assert it only on behalf of themselves. Plaintiffs contend that "they and all present and future female students at U.C. Davis should have equal access to athletic scholarship funding and should receive the same benefits that male students at U.C. Davis already have, including athletic scholarships for wrestling." (Exhibit A, ¶ 138)

3. Retaliation in violation of Title IX. This claim is asserted against the UNIVERSITY only and is not alleged on behalf of any putative class.

4. Violation of 42 U.S.C. section 1983 for alleged discrimination on the basis of gender in regard to athletic participation opportunities, financial assistance, and wrestling opportunities. This claim is asserted against the UNIVERSITY but only for injunctive relief, and against all individual Defendants. MANSOURIAN and MANCUSO assert this claim on behalf of the putative class, while Plaintiffs NG and CHIANG assert it only on behalf of themselves.

1 5. Violation of the California Unruh Civil Rights Act. This claim is brought by
2 MANSOURIAN and MANCUSO on behalf of the putative class and by the remaining Plaintiffs on
3 behalf of themselves. It is asserted against all Defendants. Plaintiffs contend they were denied equal
4 opportunities in athletic participation, financial assistance, and opportunities to participate in wrestling.

5 6. The sixth claim for relief is entitled "California Public Policy." It is asserted against all
6 Defendants by MANSOURIAN and MANCUSO on behalf of the putative class and by the remaining
7 Plaintiffs on behalf of themselves. Relying on various sections of the California Education Code and
8 two portions of the California Constitution, Plaintiffs contend they were denied equal opportunities in
9 athletic participation, financial assistance, and opportunities to participate in wrestling.

10 Defendants filed an answer denying Plaintiffs' claims and that they are entitled to damages or
11 injunctive relief. This case is set for trial on November 28, 2006. Dispositive motions must be filed
12 by June 30, 2006 and the final pre-trial conference is on September 29, 2006.

13 By way of their motion, Plaintiffs seeks certification of the following class:

14 "All current, prospective, and future female students at the University of
15 California, Davis, who are denied, and all females who are deterred from
16 enrolling at U.C. Davis because they would be denied, an equal
17 opportunity to participate in varsity intercollegiate athletics and/or to
18 receive athletic financial assistance because of their sex."

18 For the reasons set forth below, Defendants contend that Plaintiffs' motion should be denied.

19 **II.**

20 **FACTS PERTAINING TO CLASS CERTIFICATION MOTION**

21 **A. Intercollegiate athletics, sport clubs, and intramural sports at U.C.Davis**

22 U.C. Davis is a National Collegiate Athletic Association (N.C.A.A.) member institution. It is a
23 Division II¹ school in all intercollegiate sports except women's gymnastics and wrestling.² The campus
24 is in the process of moving from Division II to Division I, a transition that should be completed by
25

26
27
28 ¹ In general, the status of an institution in a particular N.C.A.A. division depends on the number of teams sponsored by the institution. There are also requirements regarding competition and scheduling, and the availability of athletic financial aid.

² See below. Those sports have competed in Division I for over ten years.

1 February 2007. This change was supported by a student referendum that was passed in 2002, known as
 2 Campus Expansion Initiative. (Exhibit K, Declaration of GREG WARZEKCA, ¶ 2)

3 U.C. Davis sponsors 26 varsity (intercollegiate athletic) teams. The teams are: baseball, men's
 4 basketball, women's basketball, men's and women's cross country, football, men's golf, women's golf,
 5 women's gymnastics, women's lacrosse, women's rowing, men's soccer, women's soccer, softball,
 6 men's and women's swimming and diving, men's tennis, women's tennis, men's and women's indoor
 7 track, men's and women's outdoor track, volleyball, men's water polo, women's water polo and
 8 wrestling. In total, there are twelve men's varsity sports and fourteen women's varsity sports. (Exhibit
 9 K, ¶ 3) This is significantly more than the national average of 8.45 women's sports per college or
 10 university (See "Women in Intercollegiate Sport: A Longitudinal, National Study Twenty Seven Year
 11 Update (1977-2006)" by Linda Jean Carpenter and R. Vivian Acosta in conjunction with the National
 12 Association of Collegiate Women Athletic Administrators, Exhibit G).

13 There are also many sport clubs at U.C. Davis. The sport club program is designed to provide
 14 students with the opportunity to learn sports skills, develop an individual potential in a particular sport,
 15 become physically fit, engage in competition with teams from other colleges, universities and amateur
 16 clubs, and to engage in social interaction and leadership opportunities. (Exhibit X, Declaration of Gary
 17 Colberg, ¶ 4) There are three levels of competition for sport clubs. Recreational teams focus on
 18 instruction and recreational activities on campus. Competitive II teams travel and compete against
 19 teams from other universities, colleges and amateur organizations. Competitive I teams also travel and
 20 compete against teams from other universities, colleges and amateur organizations but in a format
 21 leading up to a national championship. There are national championships for badminton, cycling,
 22 gymnastics, horse polo, men's roller hockey, women's soccer, men's and women's ultimate sports,
 23 men's and women's volleyball and water skiing. Most of the Competitive I and Competitive II club
 24 sports belong to a conference, compete within that conference, and follow that conference's rules. In a
 25 number of sports, the Competitive I club team is the equivalent to a junior varsity team. (Exhibit X, ¶
 26 2)

27 Any undergraduate student may participate in a club sport or submit an application to establish a
 28 club sport. In general, the purpose of the club must be consistent with the sport club program; the club

1 must engage in sporting activity; there must be a minimum of ten students interested in participating in
 2 the club; suitable facilities must be available for practice and competitions; and the club must be
 3 financially self-reliant. There are some funds available for distribution to sport clubs, but the bulk of
 4 financial support for each club sport is the result of fundraising. The sport clubs use campus
 5 recreational facilities and may use University vehicles for transportation to meets and tournaments.
 6 (Exhibit X, ¶ 3; Exhibit Y, Criteria for starting club sport and application).

7 There are currently 35 active sport clubs on campus. An application has been submitted to add
 8 judo as a sport club this spring. The current club sports are alpine skiing, badminton, baseball, boxing,
 9 Brazilian Ju Jitsu, men's crew, cycling, equestrian, fencing, field hockey, gymnastics, horse polo, men's
 10 ice hockey, kendo, kung fu, men's and women's lacrosse, racquetball, men's roller hockey, men's and
 11 women's rugby, men's and women's soccer, softball, squash, table tennis, tae kwon do, triathlon, men's
 12 and women's ultimate, men's and women's volleyball, men's and women's water polo and water
 13 skiing. Twenty-four of the teams are at the Competition I level; five are at the Competition II level; and
 14 six are at the recreational level. The Competition I club sports include field hockey, horse polo and
 15 women's rugby. There are 1,139 participants among the 35 active clubs. (Exhibit X, ¶ 4)

16 There is also an extensive intramural sports program available to students. For most intramural
 17 sports, there are a variety of leagues offered from "AA" to "C" for men's, women's and coed play.
 18 "AA" teams are primarily made up of highly skilled, experienced (intercollegiate, club and
 19 professional) and competitive team members. "A" teams consist primarily of athletes with above
 20 average skills and a limited number of experienced members. "B" teams are designed for the average
 21 athlete; no experienced players are permitted on the team. "C" teams are for beginners in a sport.
 22 There are intramural teams for badminton, basketball (3-aside and 5-aside), flag football (4-aside, 7-
 23 aside and 8-aside), floor hockey, dodgeball, grass volleyball, indoor soccer, innertube water polo,
 24 kickball, poker, racquetball, soccer (9-aside and 7-aside), tennis, table tennis, ultimate frisbee,
 25 volleyball, and wiffleball. For the university calendar year 2004-2005, there were 2528 intramural
 26 teams with a total of 12,961 unique intramural participants among the 22 sports offered. (Exhibit H,
 27 Declaration of Laura Hall, ¶ 2)

28 U.C. Davis has received prominent recognition for the quality of its athletic program for

1 women. In 1999 and 2000, it was named as the best Division II school for women athletes by Sports
2 Illustrated for Women. U.C. Davis has produced no less than three N.C.A.A. Women of the Year
3 winners since that program started in 1991. The Woman of the Year Award is given to senior student-
4 athletes who distinguish themselves in the area of academic achievement, athletics, service and
5 leadership. U.C. Davis was the N.C.A.A. Division II champion in women's tennis in 1990 and 1993; in
6 women's rowing in 2002 and 2003; and in softball in 2003. It has produced N.C.A.A. individual
7 champions in women's swimming (2003), women's indoor track (1996 and 2000), and diving (1996).
8 Six members of the women's gymnastics team have won thirteen individual championships at the
9 U.S.A.G. Collegiate National championships. Eleven U.C. Davis women's teams have participated in,
10 or been represented at, fifty-nine N.C.A.A. Division II championships and one N.C.A.A. Division I
11 championship since 1995. Between 1995 and 2005, U.C. Davis female student-athletes received a total
12 of 253 All-American awards. This status is determined either by order of finishing in the national
13 championships or via selection by coaches, media or another organization. (Exhibit I, Declaration of
14 Mike Robles, ¶ 2)

15 The N.C.A.A. sponsors the following sports for men: baseball, basketball, cross country,
16 fencing, football, golf, gymnastics, ice hockey, lacrosse, rifle, skiing, soccer, swimming, tennis, indoor
17 track, outdoor track, volleyball, water polo and wrestling. It sponsors the following sports for women:
18 basketball, bowling, cross country, fencing, field hockey, golf, gymnastics, ice hockey, lacrosse, rifle,
19 rowing, skiing, soccer, softball, swimming, tennis, indoor track, outdoor track, volleyball and water
20 polo. It also sponsors mixed gender teams for fencing and rifle. The N.C.A.A. does not sponsor
21 women's wrestling as a separate sport. (Exhibit J, Declaration of Wendy Walters, ¶ 3) All of the
22 varsity sports sponsored by U.C. Davis are N.C.A.A. sponsored sports. (Exhibit K, ¶ 3).

23 The change from Division II status to Division I status will also include a change in Conference
24 membership for U.C. Davis. It will become a full member of the Big West Conference in July 2007
25 after it obtains Division I status. The Big West Conference covers men's and women's basketball,
26 baseball, women's volleyball, softball, men's and women's soccer, men's and women's cross country,
27 men's and women's swimming and diving, men's and women's golf, men's and women's tennis and
28 men's and women's track and field. The remaining U.C. Davis teams compete in various other

1 conferences. (Exhibit K, ¶ 4)

2 **B. The U.C. Davis wrestling team**

3 In 1993, U.C. Davis made the decision to have its women's gymnastics team and the wrestling
4 team compete in Division I rather than Division II because of lack of available competition in Division
5 II schools in this geographic area. (Exhibit L, Declaration of Michelle Roppeau, ¶ 4) The U.C. Davis
6 wrestling team competes in the Pac-10 conference. (Exhibit M, Declaration of LARRY SWANSON, ¶
7 3)

8 Pursuant to 34 C.F.R. section 106.41, an educational institution that receives federal funds may
9 operate separate teams for members of each sex where selection for inclusion on the team is based on
10 competitive skill or the sport is a contact sport. Contact sports include boxing, wrestling, rugby, ice
11 hockey, football, basketball and any other sports that have a purpose or major activity that involves
12 bodily contact. If a school has a team for members of one sex but not the other, and opportunities for
13 the latter sex to participate in athletics have previously been limited, members of that sex must be
14 allowed to try out for the team unless it is a contact sport. There is no requirement that the students be
15 placed on the team-they simply must be given a chance to try out, unless the sport is a contact sport.
16 Although wrestling is considered a contact sport under this regulation, for a number of years U.C. Davis
17 has permitted women to try out for the team. (Exhibit M, ¶ 2). If, in the opinion of the head coach, a
18 woman has the necessary skills and abilities to earn a spot on the team, she will be given one. Selection
19 of members of the team on any varsity sport is the prerogative of the head coach.

20 The U.C. Davis wrestling team is counted as a men's sport for purposes of compliance with
21 N.C.A.A. regulations. (Exhibit M, ¶ 2) There has never been a women's varsity wrestling team at U.C.
22 Davis. To the knowledge of the Associate Athletic Director who oversees the sport of wrestling, none
23 of the schools in the Pac-10 have a women's varsity wrestling team. (Exhibit M, ¶ 3)

24 During the time that Michael Burch was the head wrestling coach at U.C. Davis (1995-June,
25 2001) he allowed women to work out with the team and to be part of the team, even though they did not
26 have to try out or compete for a place on the roster (see subsection F, below). In 1998, U.C. Davis
27 instituted a roster management program designed to limit the number of team members in men's sports.
28 This was done in order to comply with the requirements of Title IX and for budgetary reasons. The

1 Athletic Director gave the head coaches of the men's teams some time to adjust to the roster
 2 management program, but by the fall of 2000 was requiring compliance with the upper limits assigned
 3 to each team. The wrestling team was limited to 30 members on its roster. Burch petitioned Athletic
 4 Director WARZECKA to add four more spots. His request was granted. Burch filled all of the
 5 additional spots with men. (Exhibit F, deposition of Mike Burch, p. 308:12-p.309:5; p. 310:2-21);
 6 Exhibit CC, e-mail from Burch to WARZECKA) The issue of what Burch did, or did not do, with the
 7 status of the women wrestlers after that is a key issue in the case of Burch v. Regents, et. al., which is
 8 pending before Judge Shubb. Defendants in that case (who are the same as the Defendants in this case)
 9 contend Burch wrongfully told the women wrestlers the Athletic Department administration did not
 10 want them on the team, when the truth was that Burch did not want to allot any of his limited roster
 11 spots to the women because he knew they did not have the skills necessary to compete at the varsity
 12 level. Burch's actions came to light in May 2001 when NG and MANSOURIAN filed a complaint with
 13 the Office for Civil Rights. After conducting an investigation and working with O.C.R., the campus
 14 agreed to reinstate the women to the wrestling team for what remained of the 2000/2001 season and set
 15 forth criteria for selection for membership on the team for all candidates in the future. Consistent with
 16 the past practice, students of both genders may try out for the team. The head coach retains the sole
 17 discretion to select those who are most qualified for a place on the team. O.C.R. approved of this
 18 approach.³ (Exhibit HH, Letter from O.C.R.)

19 In the spring of 2000, Assistant Athletic Director GILL-FISHER had spoken with some of the
 20 women wrestlers and asked them if they were interested in forming a women's wrestling club team so
 21 that they could actually spar against and compete against other women, rather than being a small, non-
 22 competitive part of the primarily male wrestling team. Their response was to eschew the offer because
 23 they claimed they were "varsity athletes". (Exhibit O, Declaration of PAM GILL-FISHER, ¶ 4)

24 ///

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 27
 28 ³ In their Complaint, Plaintiffs alleged that O.C.R. found that U.C. Davis had discriminated against them on the basis of gender. This allegation is reiterated in the declaration submitted by MANSOURIAN in support of this motion. At a recent hearing on an issue pertaining to discovery from the O.C.R., Plaintiffs' counsel admitted that no such finding had ever been made. See Defendants' objections to evidence submitted by Plaintiffs.

1 **C. Process for consideration of club sports for varsity status**

2 The Intercollegiate Athletics program is funded to a large degree by student fees as authorized
 3 by various campus initiatives. The Athletic Director, in conjunction with the Vice Chancellor for
 4 Student Affairs, has the authority to consider the addition of a new varsity sport if there is sufficient
 5 room in the budget to fund the sport. (Exhibit K, ¶¶5, 7) Money is always an issue. When WARZECKA
 6 became the Athletic Director in 1995, the Athletic Department budget was in a deep deficit. It took
 7 until 2003 to eliminate the deficit. The budget for 2005/2006 is approximately \$150,000.00 in the red.
 8 In considering whether to add a new varsity sport, one of the factors taken into account is the budget.
 9 Unfortunately, there has never been enough money in the budget to field a team in every sport that a
 10 student or group of students might be interested in. (Exhibit K, ¶ 5)

11 U.C. Davis has a detailed procedure that is followed when proposals for the addition of new
 12 varsity sports are made. This process is specific to adding new women's varsity sports; there have not
 13 been any newly added men's teams in many years. The club sport or organization seeking elevation to
 14 varsity status must prepare a written proposal. It is the responsibility of those students who are
 15 interested in having a sport considered for elevation to take the time and effort to prepare the proposal
 16 or request that another person prepare it for them, and complete the entire review process. After the
 17 proposals are received, the Athletic Director or his designee meets with the sport representative. A
 18 committee comprised of representatives from the Athletic Administrative Advisory Committee, the
 19 Student Athletic Advisory Committee, the Sports Club Council and the Athletic Administration reviews
 20 the proposals and makes a recommendation to the Athletic Director. The Athletic Director then makes
 21 a recommendation to the Vice Chancellor for Student Affairs. The recommendation is also reviewed
 22 by the campus Title IX workgroup. (Exhibit K, ¶ 6)

23 In 1995, a call was made to add new varsity sports for women. Proposals were submitted for
 24 water polo, crew, badminton, lacrosse and field hockey. There was no proposal submitted on behalf of
 25 women's wrestling. After going through the review process, the decision was made to add crew,
 26 lacrosse and water polo, all of which had long histories as a club sport on campus and a solid source of
 27 competition from other schools within the geographic area. (Exhibit K, ¶ 7) In 2003, another call was
 28 made for proposals to consider adding new women's varsity sports. Five women's sports submitted

proposals: bowling, field hockey, golf, horse polo and rugby. Neither the Plaintiffs nor anyone else submitted a proposal on behalf of women's wrestling. (Exhibit O, ¶ 2; Exhibit DD, Proposals for Elevation to Varsity Status). The Committee prepared a review and summary of the proposals and submitted it to the Athletic Director. (Exhibit O, ¶ 3; Exhibit EE, Report to Athletic Direc.) WARZECKA recommended to the Vice Chancellor that women's golf be added as a new varsity sport. The reasons he recommended golf over the other sports proposed were that golf is a championship sport in the Big West Conference and per Conference rules, U.C. Davis is required to add sports that are already part of that conference before adding non-conference sports; women's golf is offered by 451 universities, 27 community colleges, and 639 California high schools; the N.C.A.A. has a golf championship in all three divisions; U.C. Davis received many inquiries from female high school students who are interested in golf; and the local community had indicated a strong support of golf, including use of a golf course. (Exhibit K, ¶ 7; Exhibit FF, Recommendation to Vice Chancellor). Women's golf was added as a varsity sport with competition starting in the 2005/2006 school year.

D. Interest in wrestling at the high school and collegiate level

The National Federation of State High School Associations is the national service and administrative organization for high school athletics (see www.nfhs.org). Each year it conducts a nationwide survey of the participation levels in sports at the high school level. In 2002, 3,405 high school girls participated in wrestling. The number of participants in that sport was much lower than other girls' high school sports, such as basketball (456,169), volleyball (395,124) or even field hockey (60,737) which was rated tenth out of ten of the top sports for girls that year. (Exhibit Q, NFSHSA 2002 Survey Results) In 2004, the number of girls participating in wrestling nationwide increased to 4,334 but it still lagged far behind the tenth out of ten most popular sports for that year, which was golf (64,245). Girls' wrestling never came close to breaking into the top ten most popular sports. (Exhibit R, NFSHSA 2004 Survey Results)

The California Interscholastic Federation (C.I.F.) gathers participation numbers for high school students in the state of California, which is where the vast majority of students who attend U.C. Davis live. During the 2004/2005 school year, there were 1,230 girls who participated in wrestling in this state. (Exhibit S, C.I.F. Survey) That number was exceeded by the number of girls who played

1 badminton (4,500), golf (5,972) and most other sports, which had participation numbers in the
2 thousands or tens of thousands.

3 During the time Burch coached the wrestling team, there were never more than five or six
4 female students who expressed an interest in wrestling. Lennie Zalesky took over as the head wrestling
5 coach in the fall of 2001. In the four and a half years that he has held that position he has received only
6 somewhere between five to ten inquiries from female students, both at the high school and college
7 level, regarding participation in the wrestling program. (Exhibit N, Declaration of Lennie Zalesky, ¶
8 7)

9 The number of women participating in wrestling at the collegiate level is very small, compared
10 to other sports. The N.C.A.A. does not sponsor women's wrestling as a separate sport. There are a few
11 schools that have women's teams, such as Menlo College, but those wrestlers compete primarily in
12 open tournaments or with teams in Canada. (Exhibit T, Deposition of Lee Allen, p. 48:1-17; p.72:10-
13 17; Exhibit V, Menlo College team schedule.) The participation numbers for women in N.C.A.A.
14 sponsored sports that are not currently varsity sports at U.C. Davis are notably larger than the number
15 of women who wrestle at the college level. In short, Plaintiffs are attempting to force the campus to
16 establish a varsity program for a sport that has very little interest among its students.

17 The limited nature of interest in women's wrestling at the collegiate varsity level, as compared
18 to other sports, is also reflected by the fact that it is not even considered an "emerging sport" by the
19 N.C.A.A. That entity has identified certain sports for women as "emerging sports". In order to be
20 considered an "emerging sport", the sport must meet the following criteria: (1) the activity must be
21 defined as a sport and there must be regularly scheduled head to head competition within a defined
22 competitive season and standardized rules ratified by regulatory agencies; (2) there must be twenty or
23 more varsity teams and/or competitive club teams that currently exist on college campuses in the sport;
24 (3) data must exist that demonstrates support for the sport; (4) there must be a demonstrated
25 understanding by potential participant schools that if the sport is identified as an emerging sport, all
26 N.C.A.A. member institutions will comply with that entity's regulations, and there must be a proposal
27 submitted to the N.C.A.A. outlining suggestions for championship rules and a format for the sport; and
28 (5) ten letters of support must be submitted by the president or athletic directors from member

1 institutions confirming they will sponsor the sport. The women's sports that are currently identified as
 2 "emerging" are archery, badminton, equestrian (Division I and II only), rugby, squash, synchronized
 3 swimming and team handball. Women's wrestling has never been included on the list of emerging
 4 sports, nor has any organization (such as USA Wrestling) submitted a proposal requesting that it be
 5 considering as an emerging sport. (Exhibit J, ¶ 4)

6 **E. Plaintiffs**

7 **1. AREZOU MANSOURIAN**

8 MANSOURIAN started wrestling in her sophomore year in high school. (Exhibit B, Deposition
 9 of MANSOURIAN, p. 66:1-11). She was on the junior varsity team, and was not required to engage in
 10 a wrestle-off⁴ to secure a spot on the team, as was done for the varsity team. (Exhibit B, p. 70:17-24; p.
 11 71:18-21) Plaintiff entered U.C. Davis in the fall of 2000 and graduated in June 2004. (Exhibit B, p.
 12 22:24-p.23:6) She carried a full load of classes throughout the time she was in attendance and
 13 graduated in four years. (Exhibit B, p. 119:9-13; p. 53:1-6)

14 Per MANSOURIAN, Burch told her that if she attended U.C. Davis she could be on the
 15 wrestling team but would not have to compete against any males. (Exhibit B, p. 103:13-24) He did not
 16 encourage her to develop her skills to the point where she could compete against males, nor did
 17 MANSOURIAN really have an interest in doing so. (Exhibit B, p. 105:1-12) Burch did not require
 18 MANSOURIAN to compete against any other wrestler to earn a spot on the team, nor was she required
 19 to compete with any other wrestler to determine who would be a starter in her weight class. (Exhibit B,
 20 p. 147:8-16). In Burch's opinion, none of the women had the strength or skills to compete with males.
 21 (Exhibit F, p. 218: 16-24; p. 372:22-24)

22 During her first year at U.C. Davis (2000/2001), MANSOURIAN observed only one other
 23 female actively participating in wrestling - CHRISTINE NG. She and NG sparred with each other at
 24 practices; they did not practice with the men on the team. (Exhibit B, p. 139:1-p.140:1)
 25 MANSOURIAN and NG were never provided with team uniforms. (Exhibit B, p. 144:8-11; Exhibit C,
 26 Deposition of NG, p. 127:19-22, p. 138:8-10) MANSOURIAN did not compete in any of the matches
 27
 28

⁴ A wrestle-off is a one on one competition between two wrestlers in the same weight class to determine who will make the team.

1 or meets during the regular 2000/2001 season. The only tournament she competed in was the Aggie
 2 Open in January 2001. MANSOURIAN wrestled against two women in the tournament and lost to
 3 both. (Exhibit B, p. 27:23-p.29:5)

4 MANSOURIAN did not compete for a place on the wrestling team in the fall of 2001, after
 5 Burch was gone. (Exhibit N, ¶ 4) Burch had sent an e-mail to NG, MANSOURIAN and MANCUSO
 6 urging them to “make” new head coach Zalesky cut them from the team “because [the women]
 7 supposedly can’t compete with the men.” In Burch’s opinion, this would “help their case”.
 8 MANSOURIAN did not even bother to try out. (Exhibit B, p. 326-327, Exhibit GG, e-mail from
 9 Burch) She has never wrestled in a national wrestling tournament, has never participated in the Pan
 10 American games, never tried out for the U.S. Olympic team, and never held any national or
 11 international rankings as a wrestler. (Exhibit B, p. 32:20-p.34:3)⁵

12 **2. CHRISTINE NG**

13 NG started wrestling in her senior year of high school as part of the school team. (Exhibit C, p.
 14 44:8-14) She was unable to defeat either the boys or the girls that she wrestled against at the high
 15 school level. (Exhibit C, p. 51:9-20) NG was not recruited by any school at the college level. (Exhibit
 16 C, p. 51:21-24) She entered U.C. Davis as a freshman in the fall of 1998 and graduated in September
 17 2002. (Exhibit C, p. 16:14-21)

18 NG had no desire to practice or wrestle against men; she was more interested in simply working
 19 out than she was in competing. (Exhibit C, p. 122:21-p.123:7). She admitted during her deposition that
 20 “I guess the thing is for me, like I have a fear of competing. And so I tend to avoid it when I can. So
 21 that’s why I’m not exactly up for competing.” (Exhibit C, p. 131:12-15)

22 NG was not required to compete for a place on the U.C. Davis wrestling team or engage in a
 23 wrestle-off. (Exhibit C, p. 135:19-p.136:12; p. 146:19-24) She was never given a uniform or
 24 equipment. (Exhibit C, p. 127:19-p. 128:12; p. 138:8-16) During the three years she participated in

25
 26 ⁵ In paragraphs 85 and 86 of their Complaint, Plaintiffs allege that before the purported end of women participating in
 27 wrestling at U.C. Davis “female wrestlers had the opportunity to participate in wrestling... and to improve their skills to
 28 such an extent that some became nationally ranked, participated in national women’s wrestling tournaments, participated at
 members of the U.S. National women’s wrestling team, finished high in the Pan-American games and World Wrestling
 Championships and are expected to be members of the United States Olympic team in 2004 when women’s wrestling
 becomes a gold medal sport for the first time. Without the benefits obtained from their participation as female wrestlers at
 U.C. Davis, these nationally and internationally ranked female wrestlers would not likely have achieved such a high level
 of success on their own.” (Exhibit A, ¶¶ 85-86) None of the Plaintiffs have ever reached such levels in wrestling.

1 wrestling when Burch was the coach, NG participated in only one match or tournament - the National
 2 Girls Wrestling tournament in Michigan, held in the spring of 2000. (Exhibit C, p. 98:14-p. 99:4)
 3 Burch did not accompany her to the tournament, she did not wear a U.C. Davis uniform during it, and
 4 she did not place. (Exhibit C, p. 5-11; p. 25:22-p.26:5; p. 26:13-p.27:7) She signed up for the Aggie
 5 Open wrestling tournament in her freshman and sophomore years at U.C. Davis but no one in her
 6 weight class showed up to compete and thus she did not participate. (Exhibit C, p. 99:5-p.100:8)

7 As of the spring of her junior year (2001), NG was aware of only herself and MANSOURIAN
 8 as female U.C. Davis students interested in wrestling. Samantha Reinis and Abbe Schwartzburg had
 9 participated in wrestling in the past, but Reinis was graduating and Schwartzburg had left school.
 10 CHIANG had also left school, due to mental health reasons. (Exhibit C, p. 211:1-18)

11 NG tried out for the team in the fall of 2001. She understood that Coach Zalesky required all
 12 hopefuls to engage in a wrestle-off to determine who would make the team. (Exhibit C, p. 211:23-
 13 p.212:24; p. 245:14-20) NG participated in a wrestle-off with incoming freshman Plaintiff
 14 MANCUSO, who pinned her. (Exhibit C, p. 254:22-p.255:20) NG was eliminated from a place on the
 15 team after this defeat. She did not pursue Zalesky's suggestion that she consider wrestling at the club
 16 sport level because she only wanted to be a varsity wrestler. (Exhibit C, p. 258:14-p.259: 4)

17 **3. NANCY CHIANG**

18 CHIANG did not wrestle until her senior year of high school. (Exhibit D, Deposition of
 19 CHIANG, p. 113:25- p. 114: 4; p. 123:22-25) She participated in only one wrestling match or
 20 tournament in high school, losing once by decision and once by pin. (Exhibit D, p. 126:13-p.127:23)

21 Burch did not sponsor her for admission, nor was she recruited. (Exhibit D, p. 134:23-p.136:1;
 22 p. 138: 21-24; p. 169:16-p.170:3) Plaintiff entered U.C. Davis as a freshman in the fall of 1998 and
 23 took a full load of classes. (Exhibit D, p. 93:25-p.94:1; p. 164:21-24) CHIANG was not cleared to
 24 practice with the team until well into the season, because she didn't obtain her required medical
 25 clearance until January 1999. Prior to that time, she could only work out by herself. (Exhibit D, p.
 26 185:9-p.186:11) Burch required the male students to engage in a wrestle-off to attain a spot on the
 27 team, but did not make the women do so. (Exhibit D, p. 157:6-25; p. 158:1-4).

28 CHIANG was not given a U.C. Davis uniform, nor did she ever observe a woman wrestler in

one. (Exhibit D, p. 154:10-22) The only match or tournament she participated in during her freshman year was the Aggie Open in January 1999. CHIANG wrestled against a woman from a wrestling club and was defeated. (Exhibit D, p. 196:10-13; p. 190:1-p.191:2)

Contrary to a principle rule of collegiate athletics, particularly at an institution such as U.C. Davis that prides itself on its students' academic success above all other interests, CHIANG purposely flunked out of her general chemistry class during the winter of her freshman year because it conflicted with wrestling practice and she knew she could take the course again. She also failed her introduction to literature class because she didn't go to class. (Exhibit D, p. 200:2-14; p. 166:1-20)

CHIANG started her sophomore year in the fall of 1999. She attended wrestling practices, but again was not required to engage in a wrestle-off for a place on the team as the male students were required to do. (Exhibit D, p. 231:19-21; p. 234:11-14) The only match or tournament that CHIANG participated in during her second year was the 2000 Aggie Open. She wrestled against two women, using freestyle rules, and was defeated both times. (Exhibit D, p. 218:7-p.219:22; p. 224:16-22)

During her second year at U.C. Davis, CHIANG struggled with pre-existing mental health issues. Her mental health deteriorated to the point where she barely attended classes. (Exhibit D, p. 73:3-p.74:1; p. 75:8-13). CHIANG enrolled in classes for the spring quarter, but went to only one class and then withdrew. She chose instead to concentrate on working at her job at the Bakers Square restaurant because "it was more beneficial for me to work than to go to school at that time." (Exhibit D, p. 251: 7-p.252:2; p. 249:19-23). In the summer of 2000, CHIANG was hospitalized following a suicide attempt. (Exhibit D, p. 75:17-p.76:22). She attempted to return to U.C. Davis in the fall of 2000 but left again after in mid-October. Before leaving, CHIANG reverted to her practice of failing to attend class. She dropped one course because she didn't like the instructor and he made her sleepy. (Exhibit D, p. 80:13-p.81:23)

CHIANG never returned to U.C. Davis. Since 2001, she has been employed full time. (Exhibit D, p. 19:23-p.21: 24). In the summer of 2002, CHIANG started attending Sacramento City College, and is still doing so. Sacramento City College has a wrestling team but she has never tried out for it because she does not have the time and is not certain she wants to wrestle at this point in her life. (Exhibit D, p. 47:3-p.48:6; p. 274:6-24)

1 CHIANG has never participated in any world wrestling championship, nor has she participated
 2 in the Pan American Games. She never competed in the World Wrestling Championships or tried out
 3 for the Olympic wrestling team. CHIANG has never held a national or international ranking in
 4 wrestling. (Exhibit D, p. 38:3-14; p. 38: 23-p.39:5)

5 **4. LAUREN MANCUSO**

6 MANCUSO attend St. Francis High School, which did not have its own wrestling team.
 7 (Exhibit E, Deposition of Lauren Mancuso p. 59:10-11; p. 72:9-21) She practiced with the wrestling
 8 teams at Jesuit and Ponderosa High Schools. (Exhibit E, p.72:19-p.73:11) MANCUSO participated in
 9 several tournaments at the high school level. (Exhibit E, p. 33:16-17; p. 58:19-25) She also was a
 10 member of the St. Francis soccer team for four years. (Exhibit E, p. 72:22-73:4)

11 Plaintiff applied to U.C. Davis in her senior year, but was not accepted initially. (Exhibit E,
 12 p.117:27-118:24) She had a G.P.A. of 3.38 and SAT scores of 1100, well below the median scores for
 13 accepted freshmen. (Exhibit E, p. 97:10-12; 99:25-100:6) MANCUSO spoke to Burch, who made
 14 arrangements for her to be sponsored for admission by Mary Claire Robinson, the coach of the varsity
 15 women's soccer team at U.C. Davis. MANCUSO understood that if she was sponsored for admission
 16 by the soccer coach she was expected to try out for the soccer team in a competitive process. Armed
 17 with this sponsorship, she was then admitted. (Exhibit E, p.120:2-121:1; 126:15-21; 132:10-21)
 18 Notwithstanding her promise to make a good faith effort to try out for soccer because she was
 19 sponsored by Robinson for admission, MANCUSO used the sponsorship solely as a vehicle to be
 20 admitted so that she could participate in the wrestling program; she was not really interested in playing
 21 soccer. (Exhibit E, p. 132:19-133:23) MANCUSO was never a member of the varsity soccer team at
 22 U.C. Davis. (Exhibit E, p. 136:10-21) She was cut from the soccer team after attending a few practices
 23 and was not disappointed that she was. (Exhibit E, p. 134:6-25; 135:12-19) MANCUSO did not want
 24 to compete with men or wrestle against them; she simply wanted to use the wrestling facilities and
 25 coaching staff at U.C. Davis to work toward her goal of reaching the Olympics. (Exhibit E, p. 184:21-
 26 185:23; 188:15-23)

27 MANCUSO entered U.C. Davis as a freshman in the fall of 2001. She took a full-time course
 28 load throughout her four and a half years at the campus. (Exhibit E, p.39:3-8; 40:5-13; 42:11-15; 43:7-

1 18; 44:2-5;44:18-45:7; 46:21-25;47:1-25; Exhibit W, academic transcript) She filed to graduate in the
 2 fall of 2005 and is awaiting an award of a degree in geology. (Exhibit E, p. 48:15-23) MANCUSO is
 3 not currently enrolled in any classes. (Id.) She started a full-time job on January 31, 2006 (Exhibit E,
 4 p.53:15-p. 54:16)

5 Plaintiff has no personal knowledge about the events that took place during the 2000/2001
 6 school year in regard to the U.C. Davis wrestling team as she was still in high school. (See
 7 accompanying objections to Plaintiff's evidence) All of her "knowledge" is based on what others told
 8 her or she read in the newspaper. She contends that in May 2001, either MANSOURIAN, Burch or a
 9 friend named Beau Weiner told her that the campus had agreed to "reinstate opportunities in wrestling
 10 as part of a resolution with O.C.R." MANCUSO believed this included an agreement that the women
 11 would be permitted to wrestle with the team, receive coaching and use the facilities as they had when
 12 Burch was the head coach. She did not know whether the University had actually agreed to this.
 13 (Exhibit E, p. 152:23-153:17) In fact, the campus had made no such agreement. As noted above, the
 14 Athletic Department administration learned that Burch had not told the women the truth about their
 15 status. The campus entered into a Voluntary Resolution Plan with O.C.R. that stated: (1) all men and
 16 women athletes are encouraged to try out for a position on the wrestling team. The coach will select
 17 those athletes who demonstrate the highest skill and competitive ability in their weight class for a place
 18 on the roster; (2) the coach will recruit the best qualified athletes for the team, regardless of gender; and
 19 (3) in order to further the development of wrestling and to ensure opportunities for women to engage in
 20 competitive wrestling, a wrestling sport club would be formed and operated along the same lines as all
 21 other sport clubs. (Exhibit HH) There was no promise made that persons coming out for the team in the
 22 fall of 2001 would not have to compete for a spot on the team, or that women would be permitted to try
 23 out using freestyle rules. MANCUSO tried out for the wrestling team in the fall of 2001, under Coach
 24 Zalesky. She admitted she did not have the skill to beat any of the men who tried out. (Exhibit E, p.
 25 192:25-193:4) MANCUSO and NG engaged in a wrestle-off match; MANCUSO prevailed with a pin.
 26 (Exhibit E, p. 228:10-16) She then wrestled off against a male and was pinned. (Exhibit E, p. 229:1-
 27 230:3) MANCUSO was cut from the team as was the male who defeated her because neither had the
 28 necessary skills. (Exhibit N, ¶ 4) MANCUSO was never a member of the wrestling team or any

1 varsity team at U.C. Davis. (Exhibit E, p. 233:17-21; 257:2-7)

2 In her declaration in support of this motion, MANCUSO claims that the fact she was not
3 personally alerted to the date of the Aggie Open wrestling tournament in January 2002 shows some
4 type of systemic discrimination against women. She admitted she did not ask Zalesky about the 2002
5 Aggie Open. (Exhibit E, p. 265:7-10) The Aggie Open is advertised in a number of places, including
6 the school newspaper and the wrestling team web site. (Exhibit N, ¶ 6; Exhibit B, p. 302:9-12)
7 MANCUSO found out about the date of the Open and attended it. After she sent an accusatory e-mail
8 to the Chancellor and SWANSON because they didn't personally invite her to the Open, Zalesky sent a
9 message back to her pointing out the errors in her assumptions. (Exhibit N, ¶ 6; Exhibit II, e-mail;
10 Exhibit E, p. 289:11-14)

11 MANCUSO has never participated in World Wrestling Championships, the Pam American
12 Games or held a national or international ranking. MANCUSO has never tried out for the Olympic
13 team but "plans to in the future". (Exhibit E, p. 91:5-92:10)

14 III.

15 OVERVIEW OF LEGAL ISSUES PERTAINING TO THIS MOTION

16 A. Title IX and the three part test

17 Although a motion for class certification is not addressed to the merits of the case, in ruling on
18 the motion the Court takes into account the elements of the plaintiffs' claims and the proof necessary on
19 them in order to envision the form the trial would take. Elliot v. ITT Corp, 150 F.R.D. 569, 572
20 (D.Ill.1992). Courts have looked to the three prong test established by Department of Education's
21 Office for Civil Rights regulations in determining whether an institution is in compliance with Title IX
22 and is offering equal athletic opportunities for men and women. "A university's athletic program is
23 Title IX-compliant if it satisfies one of the following conditions: (1) intercollegiate level participation
24 opportunities for male and female students are provided in numbers substantially proportionate to their
25 respective enrollments, or (2) where the members of one sex have been and are underrepresented
26 among intercollegiate athletes, ...the institution can show a history and continuing practice of program
27 expansion which is demonstrably responsive to the developing interests and abilities of the members of
28 that sex, or (3) where the members of one sex are underrepresented among intercollegiate athletes, and

the institution cannot show a continuing practice of program expansion such as that cited above, ...it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the current program.” Neal v. Board of Trustees of the California State University, 198 F.3d 763, 768 (9th Cir. 1999). U.C. Davis has demonstrated a commitment to continuous expansion of its women’s intercollegiate athletic program (prong 2). In 1994, women’s indoor track and field was added. Three women’s varsity sports were added in 1996 (water polo, rowing and lacrosse). Women’s golf was added in 2005. Each addition provided more opportunities for female students to participate in varsity athletics.

There is no statutory or constitutional right to participate in college athletics or to be given a spot on a particular team simply because a student desires to participate in that sport. Miami University Wrestling Club v. Miami University, 302 F.3d 608, 615 (6th Cir. 2002); Burrows v. Ohio High Sch. Athletic Ass’n, 891 F.2d 122, 125 (6th Cir. 1989). An educational institution is not required to field a team in any particular sport; the decision on which teams will be sponsored lies solely within the discretion of the school. “Title IX does not require institutions to fund any particular number or type of athletic opportunities - only that they provide those opportunities in a non-discriminatory fashion if they wish to receive federal funds.” Cohen v. Brown University, 991 F.2d 888,906 (1st Cir.1983).

B. Class Certification Standards

A party seeking to certify a class must demonstrate that it has met all four requirements of Federal Rule of Civil Procedure 23(a), and at least one of the requirements of Rule 23(b). Valentino v. Carter-Wallace, Inc., 97 F.3d 1227,1234 (9th Cir. 1996). The Rule 23(a) factors are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately represent the interests of the class. These requirements of numerosity, commonality, typicality and adequacy effectively “limit the class claims to those fairly encompassed by the named plaintiffs’ claims by ensuring that the named plaintiffs have suffered the same injury and possess the same interest as the other class members.” Gen’l Tel. v. Falcon, 457 U.S. 147, 156 (1982). If the moving parties establish the preliminary criteria of F.R.C.P. 23(a), they must then establish at least one of the criteria of F.R.C.P. 23(b). Plaintiffs contend this case

1 falls within the parameters of subsection (b)(2). In Falcon, the Court signaled that plaintiffs cannot rely
 2 on conclusory and speculative assertions in support of their class petitions. “After General Telephone
 3 Co. v. Falcon, allegations alone of a pattern and practice of discrimination...are inadequate to satisfy
 4 the commonality requirement. What is necessary is a *specific showing of underlying facts* which might
 5 raise an inference of a common question of pattern and practice through allegations of *specific incidents*
 6 *of discrimination, supporting affidavits or evidence at the class certification hearing. Pleadings should*
 7 *be factual and specific.* Newberg on Class Actions, sec.24.21, at 24-89-95 (3rd ed. 1992) (emphasis
 8 added)

9 Plaintiffs’ motion should be denied because (1) the interests of the Plaintiff conflict with the
 10 interests of the proposed class, thus defeating commonality and typicality requirements; (2) the
 11 individual nature of Plaintiffs’ claims predominates, causing a conflict of interest with any potential
 12 class members; (3) the proposed class representatives lack standing; and (4) the scope of the proposed
 13 class, and the identified class representatives, exceeds the scope of the class and representatives
 14 identified in the Complaint.

15 IV.

16 THE CONFLICT OF INTEREST BETWEEN PLAINTIFFS AND OTHER FEMALE 17 STUDENT ATHLETES DEFEATS COMMONALITY AND TYPICALITY REQUIREMENTS

18 Commonality and typicality are closely related issues, but there are differences. Commonality
 19 requires an examination of the relationship of common facts and legal issues among the class members.
 20 Typicality requires an examination of the relationship of facts and legal issues between the class
 21 representatives and the class members. Conte and Newberg on Class Actions, Vol. I at p. 411 (4th Ed.)

22 Plaintiffs’ motion fails to establish the commonality requirement. They contend that all current
 23 and future female student athletes at U.C. Davis have been subjected to the same alleged discriminatory
 24 treatment, but offer no evidence to support their argument other than the declarations of
 25 MANSOURIAN and MANCUSO and statistics about the number of women participating in club
 26 sports. The declarations of MANSOURIAN and MANCUSO delineate their unique experiences with
 27 the wrestling program. There are no declarations from current or potential future female students who
 28 are interested in sports other than wrestling. There are no declarations from anyone other than these

1 two Plaintiffs setting forth allegations that the UNIVERSITY allegedly discriminates against women in
2 regard to athletic opportunities. There is no evidence that any other female students demanded to be
3 allowed to participate on a varsity team, even though they did not have the requisite skills or abilities to
4 earn a spot on the roster. To the contrary, the common or typical experience of a student who wants a
5 place on a varsity team is that she must compete with other hopefuls and that the head coach ultimately
6 makes a selection based on the skills and abilities demonstrated by the students during the try-outs.

7 The fact that there are other female student athletes attending the school is not sufficient to
8 establish commonality. Scofield v. Board of Trustees, 65 F.R.D.595, 602 (D.C.Miss.1975). Where the
9 experiences of the class representatives is different than those of the putative class, or where the trier of
10 fact would be required to make individual findings on each claim, commonality is not satisfied. See
11 e.g. Lowery v. Adams, 344 F.Supp.446,459 (D.C.Ky. 1972) [civil rights actions arising out of actions
12 of four university students who were disciplined for disrupting a school event could not be maintained
13 as class actions because actions were unique to the plaintiffs]; Jamerson v. Board of Trustees, 80
14 F.R.D.744, 746 (D.C.Ala.1978) ["But as to the class issue, the first question is whether others exist who
15 are similarly situated and who may pose the same or similar questions as their self-proclaimed
16 representative. Thus, the scope of this study [on commonality] is limited to determining whether there
17 are others like the named plaintiff and whether the class method suits the action."]

18 Typicality is also a problem for Plaintiffs. In Rappaport v. Katz, 62 F.R.D. 512,513-514
19 (D.N.Y.1974), the court relied on Wright & Miller in denying certification of a class that would
20 potentially include persons who met the definition of the proposed class but did not have the same
21 interests as the class representative. A putative class representative cannot meet the typicality
22 requirement simply by alleging that gender discrimination has occurred, as Plaintiffs do here. Alston v
23 Virginia High School League, 184 F.R.D. 587, 579 (D.Va. 1999). When considering the issue of
24 typicality the district court should seek to "uncover conflicts of interests between named parties and the
25 class they seek to represent" and ask whether class representatives "possess the same interest and suffer
26 the same injury" as the class members. Id. at p. 578. In Alston the district court refused to certify a
27 class where it was evident that most of the girls who would be included in the class did not have the
28 same interest in reclassifying the scheduling of girls' high school athletics as the proposed class

1 representatives did. "This conflict prevents plaintiffs from satisfying the typicality requirement as well
2 as the adequacy of representation requirement. Plaintiffs have presented nothing to dispel the
3 defendant's suggestion that there is a schism between girls who may benefit from reclassification and
4 those who are injured by reclassification. A girl who could not previously play two sports because they
5 occurred in the same season may be able to play those two sports when a school is reclassified and the
6 seasons for some sports change. Such girls would not bring claims like the ones brought here by
7 plaintiffs. Thus it cannot be said that as goes the claim of these plaintiffs, so go the claims of all others
8 in the class." *Id.* at p. 579.

9 Where the class representatives have interests different than the members of the proposed class,
10 due process issues are implicated. Hansberry v. Lee, 311 U.S.32, 45 (1940). Members of a rule
11 23(b)(2) class may not opt out of the class. Thus, the due process concerns of those who will be
12 included in the class become paramount, as they will be bound by any finding in the case. In
13 determining whether due process will be afforded to the class members, the Court must consider two
14 questions: (1) do the class representatives and their counsel have any conflicts of interest with other
15 class members; and (2) will the named plaintiffs and their counsel vigorously prosecute the action on
16 behalf of all class members. Hanlon v. Chrysler Chevrolet, 150 F.3d 1011, 1020 (9th Cir.1998). In this
17 case, the answers to those questions are "Yes" and "No, they cannot because their interests are different
18 than the interests of other female student athletes." Plaintiffs' interest is in establishing a separate
19 women's wrestling team for the purpose of providing them with coaching and experience so they can
20 compete in open tournaments rather than in conference competition. Instead of going through the
21 established process for submitting a proposal to establish women's wrestling as a varsity sport, they are
22 attempting to jump to the front of the line via this suit. Their interests and actions are completely at
23 odds with the interests of the club sports that went through the effort to submit proposals for
24 consideration for varsity status and want to establish teams in their own sports. For example, the
25 women wrestlers would be competing with the women's field hockey club team. The latter has an
26 established track record as a club sport (women's wrestling does not), is an N.C.A.A. sponsored sport in
27 all three divisions (women's wrestling is not), is part of a conference (women's wrestling is not) and
28 has far more participants nationally (5,296 athletes among 252 N.C.A.A. teams) than women's

1 wrestling. (Exhibit DD) These facts distinguish women's wrestling and suggest that there is a greater
2 and sustained level of interest in sports other than women's wrestling, one of the factors that must be
3 considered by U.C. Davis in determining whether a new varsity sport should be added. See 44 Fed.
4 Reg. 71413,71418(1979). Therefore, an inherent conflict exists between Plaintiffs and their goal of
5 establishing a female wrestling program and the goals of women participating in other club sports. The
6 irreconcilable nature of this conflict precludes Plaintiffs from representing the putative class.

7 The I.C.A. program is funded by a finite budget. (Exhibit K, ¶ 5). Plaintiffs would be
8 competing for limited funding with women who participate or are interested in participating in other
9 sports. The court in Bryant v. Colgate, 1996 U.S. Dist. LEXIS 8393 (D.N.Y. 1996) recognized the
10 inherent conflict in the battle for limited funds: "In an era of static enrollment and increasing financial
11 demands on institutions of higher learning, the resources available for intercollegiate athletics are finite
12 and subject to larger budgetary concerns. ... It would seem that where the number of programs available
13 are limited, plaintiffs' interests would be antagonistic to those of other interested and able athletes who
14 might desire elevation of their own sport. Such circumstances could render plaintiffs' representation
15 inadequate under Rule 23(a)." Id. Further, there are conflicts between women's wrestling and those
16 sports that are parts of a conference and are N.C.A.A. sponsored. The Athletic Director at U.C. Davis
17 would be very hesitant to recommend adding a varsity sport that is not part of a conference because of
18 the difficulties in scheduling competition. If the money was available to add a new sport, he would be
19 more inclined to recommend addition of a sport that is either a N.C.A.A. championship sport or an
20 emerging sport. Women's wrestling does not fall within either category. (Exhibit K, ¶ 8)

21 Finally, many, if not all, of the women athletes participating in other sports that are not yet at the
22 varsity level would not consider Plaintiffs' attitudes or experiences to represent their concept of varsity
23 athletics. NG is afraid of competition, one of the hallmarks of varsity athletics. NG, MANSOURIAN
24 and CHIANG did not have to try out for the wrestling team under Burch's coaching. A competitive
25 selection process to ensure that the most skilled athletes comprise the team's roster is an essential part
26 of varsity sports. The women wrestlers never competed in regular meets or matches; they only
27 participated in one or two open tournaments. Members of true varsity teams engage in head to head
28 competition in a regular season schedule. Perhaps most importantly, many women athletes in the

1 existing club sports may well be offended by Plaintiffs' efforts to bypass the process for elevating a
2 sport to varsity status and their insistence that they are entitled to a place on a team even though they do
3 not have the skills or ability to earn one. This conclusion is bolstered by the absence of even one
4 declaration from a member of a club sport in support of this motion.

5 The fact that Plaintiffs are seeking establishment of a women's wrestling program via injunctive
6 relief sets them apart from other female students who may be interested in having a varsity team
7 established for another sport. This conflict defeats typicality. O'Connor v. Boeing North America, 180
8 F.R.D. 359,375 (D.Cal. 1997). It would be impossible for MANSOURIAN, MANCUSO or CHIANG
9 to adequately represent the interests of female field hockey players, female bowlers, female horse polo
10 players or any other female athletes because Plaintiffs will put their interest in having a women's
11 wrestling program established before all other interests. If the Court were to issue injunctive relief in
12 the form of ordering U.C. Davis to add one more women's varsity sport, Plaintiffs would argue for the
13 addition of wrestling. The due process rights of the other members of the class they seek to represent
14 would be trampled as the women interested in establishing other varsity sports would be bound by the
15 order, without having had a chance to make an argument for the addition of a different sport. Such a
16 conflict is fatal to Plaintiff's quest to have this action certified. Greene v. Southland Corp., 83 F.R.D.
17 117, 123 (D.Tex. 1979).

18 MANSOURIAN has already graduated from U.C. Davis, CHIANG dropped out of U.C. Davis,
19 and MANCUSO will graduate this June. Their eligibility to participate in intercollegiate athletics has
20 expired (in the case of MANSOURIAN and CHIANG) or will shortly (in the case of MANCUSO).
21 Based on this status, it cannot be said that they have the same interests as currently eligible female
22 students, or students who may become eligible in the future.

23 In conclusion, Plaintiffs' unique experiences set them apart from other female student athletes,
24 as does their quest to establish a varsity team in a sport that does not have sufficient competition in the
25 local area and is not an N.C.A.A. sanctioned sport. This case consists of individual claims, not a class
26 claim.

27 ///

28 ///

1 **A. Even if the Court limited the class to women wrestlers, Plaintiffs cannot establish the**
 2 **requisite numerosity**

3 Faced with the problems attendant to their typicality and commonality issues, Plaintiffs may
 4 revert to the definition of the class asserted in the complaint (see *infra*) and instead ask the Court to
 5 define the class to include only current and future female students at U.C. Davis who are eligible to, and
 6 want to, participate in intercollegiate varsity wrestling. Even if this definition was used, Plaintiffs still
 7 fail to establish the necessary showing for certification.

8 Rule 23(a)(1) raises the issue of numerosity; are there so many members of the proposed class
 9 that joinder would be impracticable? While there is no specific minimum number of members in the
 10 class, Plaintiffs have the burden of demonstrating the existence of the persons they seek to represent
 11 and cannot rely on speculation or conclusory allegations to do so. Gevedon v. Purdue Pharmaceuticals,
 12 212 F.R.D. 333, 338 (D.Ky.2002). Plaintiffs engage in significant speculation by arguing that “the vast
 13 majority” of the 1,000 or so high school girls who participate in wrestling in California would apply to
 14 U.C. Davis for admission. While it is theoretically possible that the “vast majority” might apply,
 15 statistically, very few would meet the rigorous criteria for admission to U.C. Davis. In the past four
 16 years, U.C. Davis received 30,000-32,000 freshmen applications per year. Overall, 55-65% of those
 17 applicants (approximately 17,000-18,000) are offered admission. Of those offered admission, 24-26%
 18 (4,300-4,600) actually enroll. (Exhibit U, Declaration of Judy Sakaki, ¶ 2). Per the California Master
 19 Plan for Higher Education, only 12.5% of the state’s public high school graduates should be considered
 20 for admission to the University of California system. The competition for admission to U.C. Davis is
 21 stringent; the class entering in 2005 had a median grade point average of 3.92 and a median SAT score
 22 of 1,270. (Exhibit U, ¶¶ 3, 4) A student who is recruited to the campus because of athletic skills still
 23 must meet U.C. eligibility standards. (Id. ¶ 4)

24 When these figures are applied to Plaintiffs’ speculative argument, its weaknesses become
 25 obvious. The C.I.F. survey showed 1,230 girls wrestled in this state last year. There is no indication of
 26 how many of those girls were seniors and of that group, how many enrolled at a college or university
 27 after they graduated. Plaintiffs have not made any showing on how many of those girls have a median
 28 grade point average of 3.92 or a median SAT score of 1,270. Absent these specific factors, Plaintiffs

1 cannot rely on raw numbers. See Kohn v. Mucia, 776 F.Supp. 348, 353 (D.Ill.1991). Even if one were
2 to engage in hypotheticals and gross speculation, the numbers do not satisfy the numerosity
3 requirement. If all of the girls who wrestled last year intended to go to college and if all 1,230 applied
4 to the University of California system (which is statistically improbable), per the California Master Plan
5 only 12.5% or 153 would even be considered for admission to the U.C. system. There is no way to
6 determine how many of the theoretical 153 would apply to U.C. Davis, as opposed to the other nine
7 U.C. campuses. Even in the statistically improbable event that all 153 applied, only 50% would be
8 offered admission (see Exhibit U), bringing the number to 76. Of that 76, statistically only 25% would
9 actually enroll, bringing the number to 19. Of this small number, there is no guarantee that all would be
10 interested in wrestling at the collegiate level. Due to the heightened skill level required for participation
11 in varsity sports at the collegiate level as compared with the skills necessary to participate in high
12 school sports, as well as many other reasons such as the rigors of college academics, many students
13 choose not to continue their athletic pursuits at the college level. Per the deposition testimony of the
14 Plaintiffs, between 1998 and 2001 there were only six women who demonstrated an interest in
15 wrestling. Numbers in this low range are not sufficient to meet the numerosity requirement.

16 Citing to the number of women participating in sport clubs on campus does not help Plaintiffs
17 either. In Siles v. ILGWU Nat'l Retirement Fund, 783 F.2d 923,930 (9th Cir.1986) the Ninth Circuit
18 affirmed the lower court's denial of a request for class certification on the grounds that the plaintiff
19 offered evidence only that within certain years, 31,000 employees covered under the pension plan in
20 issue lost their jobs. The plaintiff failed to demonstrate how many of these employees failed to receive
21 a pension or met the criteria to receive one. Thus, numerosity was not satisfied. Similarly, in
22 Stambaugh v. Kansas Dep't of Corrections, 151 F.R.D.664, 671 (D.Kan.1993), the court did not accept
23 the plaintiffs' argument that simply because there were 794 female employees in the department, all
24 must have been subject to gender discrimination. "The wide gap between an individual's claim of
25 discrimination and the existence of a class of persons who have suffered the same injury cannot be
26 bridged by conclusory allegations of several instances of discrimination in a single D.O.C. facility." Id.
27 at p. 676. Here, Plaintiffs cannot bridge the gap between their claim that they were treated differently
28 in regard to the wrestling team under the lead of a coach other than Burch and their claim that the entire

1 varsity sports program at U.C. Davis discriminates against women. They have not established the
2 requisite numerosity.

3 V.

4 **THE CLAIMS OF THE PUTATIVE CLASS PLAINTIFFS ARE SUBJECT TO UNIQUE**
5 **DEFENSES AND ARE NOT TYPICAL OF ANY CLAIM THAT MIGHT BE RAISED BY A**
6 **CLASS MEMBER**

7 In considering the issue of typicality the Court must look at the issues of whether focus on the
8 class issues will be subsumed by the individual claims and whether the claims made by the putative
9 class representatives are subject to unique defenses that threaten to become the focus of the litigation.
10 Hanon v. Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992). The test of typicality “is whether the other
11 members have the same or similar injury, whether the action is based on conduct which is not unique to
12 the named plaintiffs, and whether other class members have been injured by the same course of
13 conduct. [citation].” Id. at p. 508. This is in keeping with the Supreme Court’s directive that “A class
14 representative must be part of the class and possess the same interest and suffer the same injury as the
15 class members.” Gen’l Tel. Of the West v. Falcon, supra at p. 156 . Plaintiffs in this case cannot meet
16 this standard because their experiences with the wrestling team are unique and have no application to,
17 or relevance to, the experiences of any female student athletes seeking to establish a sport as a varsity
18 team for purposes of intercollegiate competition. The primary focus of this litigation is Plaintiffs’
19 disparate treatment contentions that are based on the events that took place in the fall of 2000.

20 **A. Plaintiffs’ claims and experiences are different than any potential claim by a putative**
21 **class member**

22 Plaintiffs purport to speak on behalf of, and represent the interests of, female student-athletes
23 who are currently participating in a number of club sports or who have an interest in doing so,
24 notwithstanding the fact their motion is devoid of even one declaration from a current or future U.C.
25 Davis female student (other than the Plaintiffs) who believes she has been denied the opportunity to
26 participate in athletics. There is a vast difference between the experiences of the Plaintiffs in regard to
27 their efforts to either be part of the wrestling team or to have the school establish a separate women’s
28 wrestling program so that they can train for open meets, and the experiences of women who want to, or

1 do, try out for a place on the roster on a women's varsity team in an N.C.A.A. sanctioned sport.

2 NG, CHIANG and MANSOURIAN were never required to try out for a place on the wrestling
3 team. This is an aberration in the world of varsity sports. The general process followed by head
4 coaches in selecting members of a varsity team is to have the candidates engage in competition with
5 each other to determine which athletes demonstrate exceptional skills. (Exhibit K, ¶ 9). Former coach
6 Burch was of the opinion that none of the Plaintiffs had the skills necessary to actually make the team.
7 They were permitted to practice with the team, but it is questionable whether they had a true varsity
8 experience when their only taste of competition was one open meet, if that. There is a very significant
9 factual dispute as to the events that took place in the fall of 2000 which led to the women being left off
10 of the roster for the wrestling team. The Plaintiffs and their former coach contend some of the
11 Defendants told the coach that women were not permitted to be on the team. Defendants contend that
12 Burch was unwilling to allot any of his limited roster spots to the women, who could not come
13 anywhere close to competing against wrestlers in Division I schools. However, rather than tell them the
14 truth about his assessment of their skills and his unwillingness to give up a spot to them that could
15 otherwise go to a competitive male wrestler, Burch lied to the women and told them they were off the
16 team because of the desires of the Athletic Department administration. During this same period of
17 time, Burch was in an ongoing dispute with his employer because he wanted a full-time appointment as
18 the head wrestling coach. It is Defendants' belief that Burch used the issue of the women wrestlers for
19 his own purposes to attempt to leverage more pay for him.⁶ Plaintiffs contend that the roster cap should
20 not apply to them because of their gender. Defendants dispute this. If women who could not earn a
21 place on the team by their skills were permitted to remain on the roster, they would be receiving
22 preferential treatment over males who could not make the team based on their skills.

23 These factual disputes constitute the bulk of this case. The focus of the case will be on the very
24 unique experiences of NG, CHIANG, and MANSOURIAN, who contend they were "varsity wrestlers"
25 yet never had to try out for a place on the team and engaged in no regular conference competition. The
26 focus will also be on the very unique experience of MANCUSO, who used a soccer sponsorship to gain
27

28 ⁶ The extent of the factual dispute on this issue is reflected by the motion for summary judgment filed in the suit filed by
Burch (Burch v. Regents of the University of California, et. al., [#S 04-38 WBS/GGH] See accompanying request for
judicial notice.

1 admittance to U.C. Davis even though she had no intention of actually trying to make the soccer team.
 2 Instead, relying on hearsay (and erroneous hearsay at that) from others, she assumed she could simply
 3 become part of the wrestling team without having to compete for one of the limited roster spots. The
 4 coach who replaced Burch followed the long-standing tradition used in every competitive sport to
 5 require those interested in obtaining a place on the team to demonstrate their athletic skills and abilities
 6 and show they are the best qualified. These experiences are far different than the experiences of any yet
 7 unnamed or identified female student athletes who try out for a place on a women's varsity team.

8 Cases that are fact-specific such as this one are not appropriate for class action status. In
 9 Pinkard v Pullman, 678 F.2d 1211, 1214 (5th Cir. 1982), four African-American plaintiffs sought class
 10 certification in an action where they claimed systemic discrimination. The district court's denial of
 11 certification was upheld by the Fifth Circuit, which stated "It is well settled that, where a case requires
 12 detailed investigations of the circumstances surrounding the claims of the individual class members,
 13 that case does not lend itself to treatment as a class action." Judge Levi's opinion in Stevens v. Harper,
 14 213 F.R.D. 358, 367 (E.D.Cal. 2002) is also instructive on this point. The plaintiffs alleged they were
 15 entitled to certification of their claims as a class action against the California Youth Authority, even
 16 though the claims arose out of different situations involving different wards at different institutions.
 17 Judge Levi noted that the plaintiffs provided only minimal information concerning their right to
 18 equitable relief, and that "nor are many of the claims for class-wide equitable relief tightly connected to
 19 the present circumstances of the individual named plaintiffs." Id. at p. 367. After decrying the fact that
 20 the plaintiffs had been content to simply allege one past violation at one CYA facility and then claim
 21 standing and imminent harm on a system-wide basis, Judge Levi held that "in the absence of specific
 22 factual allegations connecting the named plaintiffs' individual claims to particular CYA policies and
 23 procedures, the complainant's class allegations provide no additional insight into whether the named
 24 plaintiffs face a sufficient individual likelihood of future injury to pursue equitable relief." Id. at p.
 25 368-9.

26 **B. Plaintiffs' claims are subject to unique defenses such as the statute of limitations**

27 Various affirmative defenses raised by Defendants threaten to shift the focus away from the
 28 class. The statutes of limitations for a Title IX claim and a claim under 42 U.S.C. section 1983 are

1 derived from the state law limitation for personal injury claims. Stanley v. Trustees of the California
 2 State University, 443 F.3d 1129, 1134 (9th Cir. 2006). California Code of Civil Procedure section
 3 335.1, which sets forth a two year statute of limitations for personal injury claims, became effective on
 4 January 1, 2003. Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). Prior to that date the statute of
 5 limitations for such claims was one year. The new two year statute does not apply retroactively. Id.
 6 Claims that accrued prior to that date are governed by the former one year statute. Abreu v. Ramirez,
 7 284 F.Supp.2d 1250, 1255 (D.Cal.2003). The statute of limitations on a claim begins to run when the
 8 plaintiff knows or has reason to know of the alleged injury which forms the basis of the action. Stanley,
 9 supra at p. 1136.

10 MANSOURIAN and NG contend that in October 2000, they were told by Burch that “the
 11 administration” did not want women on the wrestling team and thus they could not have a spot on the
 12 roster. CHIANG was not at the meeting when he made this statement, but was still enrolled at U.C.
 13 Davis at the time and heard about it from her co-plaintiffs. MANCUSO entered U.C. Davis in the fall
 14 of 2001. Per the requirements of the new wrestling coach, all persons seeking a place on the roster of
 15 the wrestling team had to compete with other hopefuls in a wrestle-off. MANCUSO participated in the
 16 wrestle-offs but was defeated and not selected for the team. NG was also not selected because she was
 17 defeated by MANCUSO. MANSOURIAN did not bother to try out for the team in the fall of 2001 and
 18 CHIANG failed to return to school that quarter. This suit was not filed until December 18, 2003. The
 19 claims of MANSOURIAN and CHIANG had expired by October 2001. At the latest, the claims of NG
 20 and MANCUSO ripened on the day they were cut from the team, which was October 30, 2001. Their
 21 claims expired on October 30, 2002. All of these claims were “dead” when the complaint was filed on
 22 December 18, 2003 as they all fell within the previous one year statute of limitations. Litigation of this
 23 issue will play a key role in this case.

24 VI.

25 PLAINTIFFS DO NOT HAVE STANDING TO BE CLASS REPRESENTATIVES

26 CHIANG and MANSOURIAN contend they can adequately represent the interests of the
 27 proposed class. Whether that class is the class of current or future female students who might be
 28 interested in wrestling at the collegiate level, or whether it is the more broad definition suggested by

1 Plaintiffs in this motion, CHIANG and MANSOURIAN do not fall into the proposed class because
 2 they have both graduated and exhausted their athletic eligibility under N.C.A.A. rules. MANCUSO's
 3 eligibility has not currently expired, but it will by June 2006 (see below). Even if the Court were to
 4 certify a class, Defendants would move to decertify it upon MANCUSO's actual graduation.

5 A plaintiff in a Title IX case must have standing to assert each and every claim she makes in her
 6 complaint. Beasley v. Alabama State University, 3 F.Supp. 2d 1325, 1343 (D. Ala. 1998). A plaintiff's
 7 claim must be live not only at the time the suit is filed, but throughout the litigation. If a plaintiff loses
 8 her standing during the pendency of the suit, she loses the right to assert the claim. Id. at p. 1344. A
 9 student-athlete who had N.C.A.A. eligibility and thus standing at the time a suit was filed, but whose
 10 eligibility expires before the end of the suit and before a class is certified no longer has standing to
 11 assert Title IX and related discrimination claims. Ibid. Similarly, a student who has graduated lacks
 12 standing to complain about a school's athletic program. Ritacco v. Norwin School District, 361
 13 F.Supp.930, 931 (D.Pa.1973); Cook v. Colgate, 992 F.2d 17,18(2d Cir.1993)[compiling cases on
 14 mootness of Title IX cases based on graduation]. The wrestling team at U.C. Davis is an N.C.A.A.
 15 sponsored sport. Student-athletes who participate in intercollegiate athletics at U.C. Davis are subject
 16 to that entity's eligibility rules. (Exhibit L, ¶¶ 3-4). As a general rule, a student-athlete cannot
 17 participate in a Division I sport for more than four seasons of intercollegiate competition. Further, a
 18 student-athlete must complete his/her seasons of eligibility within five years of the first quarter in which
 19 the student is registered as a full-time student. (Id.) While the N.C.A.A. rule on this issue is couched in
 20 terms of calendar years, as a practical matter it applies to academic years because there is no
 21 intercollegiate competition or required practices in the summer months. MANSOURIAN entered U.C.
 22 Davis in the fall of 2000 as a full-time student and graduated in June of 2004. Her N.C.A.A. eligibility
 23 expired in June of 2005. (Exhibit L, ¶ 5) None of the exceptions to the five year rule (military service,
 24 religious missions, Peace Corps service or pregnancy) apply to her. CHIANG entered U.C. Davis in
 25 the fall of 1998 as a full time student. Her eligibility expired in June of 2003. Her ineligibility is
 26 further compounded by the fact in the Winter Quarter of 2001 she became academically ineligible
 27 because of her poor grades. (Id.)

28 MANCUSO has never been a member of the varsity wrestling team, or any other team, at U.C.

1 Davis. (Exhibit E, p. 233:17-21; 257:2-7) She entered U.C. Davis in the fall of 2001 and filed to
 2 graduate in November 2005. By the time this motion is heard, MANCUSO should have received her
 3 degree and graduated. Her N.C.A.A. eligibility expires in June 2006 (Exhibit L, ¶5)

4 None of the Plaintiffs can demonstrate that they are entitled to the injunctive relief they seek
 5 because none of them can show that they face exclusion from participation in varsity wrestling (or any
 6 other sport) at U.C. Davis in the future. Without this essential element, there is no basis for injunctive
 7 relief and no basis for claiming they can act as class representatives. City of Los Angeles v. Lyons, 461
 8 U.S.95, 105-106 (1983); Doe v. District of Columbia, 216 F.R.D. 5, 12 (D.D.C. 2003). Plaintiffs
 9 cannot show they face imminent injury or damage. Courts are very hesitant to inject themselves into
 10 the operation of state agencies under such circumstances. "In general, injunctive relief is to be used
 11 sparingly, and only in a clear and plain case, especially when the court is enjoining the conduct of a
 12 state agency. [citation] The rigorous preconditions to such injunctions reflect both federalism and
 13 separation of powers principles. ... Thus, the requirement that plaintiffs establish a particularized risk of
 14 imminent injury before seeking prospective relief ensures that federal courts refrain from intervening in
 15 the administration of state institutions absent a clearly defined legal dispute." Stevens v. Harper, 213
 16 F.R.D. 358, 367 (E.D.Cal. 2002)

17 In Grandson v. University of Michigan, 272 F.3d 568 (8th Cir. 2001) the university was notified
 18 by the Office for Civil Rights in September 1996 that an administrative complaint had been filed
 19 against it alleging it was not effectively accommodating the athletic interests and abilities of its female
 20 students; that it failed to provide female athletes with proportional athletic financial assistance; and it
 21 failed to provide female athletes with equal services such as training, travel and recruiting. In February
 22 1997, plaintiff/student Julie Grandson filed suit against the University of Michigan, seeking injunctive
 23 and monetary damages due to alleged gender discrimination. She was a member of the women's
 24 varsity soccer team. Three months later, plaintiffs Thompson, Lindahl, and Jeffries (known collectively
 25 as the "Thompson plaintiffs") filed suit on behalf of themselves and a purported class of all similarly
 26 situated female students. Grandson's claims were dismissed by the trial court because she failed to
 27 demonstrate that she complained to University officials about alleged disparate treatment and failed to
 28 show intentional discrimination or deliberate disregard for women's athletics in regard to funding

1 issues. The claims of the Thompson plaintiffs were dismissed because they either had not played a
 2 varsity sport or because their N.C.A.A. eligibility had expired. In upholding the trial court's rulings,
 3 the Eighth Circuit Court of Appeals did not share the plaintiffs' vision that the judicial system act as "a
 4 de-facto super-athletic department director." *Id.* at p. 573. Although the class certification issue was
 5 decided on a timeliness basis rather than the merits, the Court held that plaintiffs Grandson, Thompson
 6 and Jeffries had no standing to seek prospective injunctive relief because they had no further N.C.A.A.
 7 eligibility, and that Lindahl lacked standing for such relief because she never played on a varsity team.
 8 In this case, neither MANSOURIAN nor CHIANG have standing to seek the relief identified in their
 9 Complaint because their N.C.A.A. eligibility has long expired. MANCUSO was never a member of a
 10 varsity team at U.C. Davis, and her N.C.A.A. eligibility will expire prior to the time the issue of
 11 injunctive relief will be before the Court.

12 Where class certification is sought under rule 23(b)(2), any claim for monetary damages
 13 asserted must be secondary to the claim for injunctive or declaratory relief. *Molski v. Gleich*, 318 F.3d
 14 937, 947 (9th Cir. 2003). If Plaintiffs do not have standing to claim entitlement to injunctive relief, their
 15 damages claim is limited to their request for monetary damages, which would become predominant and
 16 would render a rule 23(b)(2) class improper, given the unique factual allegations giving rise to their
 17 damages claim.

18 Since Plaintiffs lack standing, they are not adequate class representatives.

19 VII.

20 PLAINTIFFS SHOULD BE LIMITED TO CONSIDERATION OF THE PROPOSED CLASS 21 AND REPRESENTATIVES IDENTIFIED IN THE COMPLAINT

22 The scope of the pleadings defines the issues to be adjudicated in a case, including issues
 23 pertaining to a putative class. *Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976). In their
 24 Complaint, the "class plaintiffs" allege they "seek to represent the class of all present and future female
 25 students at U.C. Davis who are denied equal athletic participation opportunities and scholarships in
 26 **women's wrestling** by Defendants' discriminatory actions." (*Exhibit A*, ¶ 108, emphasis added). A
 27 perusal of the allegations in the Complaint shows that the vast majority of them pertain to wrestling at
 28 U.C. Davis, not other sports. By this motion Plaintiffs seek to have a different class certified: "all

1 current, prospective, and future female students at the University of California, Davis, who are denied,
 2 and all females who are deterred from enrolling at U.C. Davis because they would be denied, an equal
 3 opportunity to participate in varsity intercollegiate athletics and/or to receive athletic financial
 4 assistance because of their sex.” This proposed definition greatly exceeds the definition set forth in the
 5 Complaint as it includes females who do, or might, have an interest in participating in any sport at U.C.
 6 Davis, not just wrestling. While there are passing references in the Complaint about alleged inequities
 7 in athletic participation opportunities and financial assistance for females as a whole, the clear gist of
 8 the Complaint is directed toward women participating in wrestling at U.C. Davis. The only
 9 declarations submitted in support of the motion for class certification are those of MANSOURIAN and
 10 MANCUSO. Their declarations focus solely on wrestling; there is no reference to any other sport.
 11 Notably missing is even one declaration from a current or prospective female U.C. Davis student who
 12 claims she did not or will not have the opportunity to participate in a sport other than wrestling, or was
 13 denied athletic financial assistance.

14 There is also a disparity between the allegations made in the Complaint about which Plaintiffs
 15 should be class representatives and the proposal regarding representatives made in this motion. In the
 16 Complaint under the heading “Class Action Allegations”, it is alleged that “Plaintiffs MANSOURIAN
 17 and MANCUSO (the “Class Plaintiffs”) bring claims 1, 2, 4, 5, and 6 on behalf of themselves and on
 18 behalf of those similarly situation under Federal Rules of Civil Procedure 23(a) and (b)(2).” (Exhibit
 19 A, ¶ 107) CHIANG is not identified as a “class plaintiff”. In each of the five claims for relief asserted
 20 on behalf of both the Plaintiffs and the putative class, the following allegation is made: “Class Plaintiffs
 21 bring this claim on behalf of themselves and the above-defined class. Plaintiffs CHRISTINE NG and
 22 NANCY CHIANG bring this claim on behalf of themselves only.” (Exhibit A, ¶¶ 126, 137, 162, 171 and
 23 181). Plaintiffs have never moved to amend the Complaint to include CHIANG as a “class plaintiff”
 24 and the time for doing so has long expired. (See Pre-Trial (Scheduling) Order, as amended)

25 For purposes of this motion, Plaintiffs should be bound by the definition of the proposed class
 26 and the identification of proposed class representatives pled in the Complaint.

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VIII.

THE SCOPE OF THE PROPOSED CLASS IS SPECULATIVE AND OVERBROAD

Members of an identifiable class may be determined by reference to objective criteria but not if membership is contingent on the prospective member's state of mind. Elliot v. ITT, supra at p. 574. In Harris v. General Dev. Corp., 127 F.R.D. 655, 659 (D.Ill.1989) the court declined to certify a class consisting of all African Americans who were deterred or discouraged from applying for a job with the defendant because it would have required an inquiry into each putative class member's state of mind. Similarly, in Price v. Wilton Public Sch. District, 1998 U.S. Dist. LEXIS 23139, the Court declined to include "all future female athletes who participate, seek to participate or are deterred from participating in athletics" as part of a proposed class on the ground that including such unknown persons in the class would render it too broad. In this case, the Court would have to engage in speculation on whether any of the girls who are currently wrestling at the high school level have an interest in pursuing the sport at the collegiate level, and if so, whether they are interested in and can obtain admission to U. C. Davis.

As noted above, the requirements for admission to U.C. Davis are very strict. There is no way to meaningfully peer into the mind of these high school girls and determine which, if any, plan to apply to and attend U.C. Davis, and of those, which will be admitted. Even if the Court considered the much broader proposed class of all female athletes, it would still have to engage in speculation as to which members of that class have been "deterred" from enrolling at U.C. Davis because of alleged gender discrimination in athletics.

In addition to being speculative, the class proposed by this motion is over-broad. In Bryant v. Colgate University, supra, several members of the Colgate women's ice hockey sport club brought a Title IX action seeking to have ice hockey elevated to a varsity sport and claiming that Colgate did not provide adequate athletic opportunities for its female students. They sought to have the following class certified: "all present and future Colgate University women students and potential students who participate, seek to participate, and/or are deterred from participating in Colgate's intercollegiate athletics program." The court denied certification, finding that the proposed class included female student athletes whose interests were already being accommodated. Further, it found that the suit was focused on the ice hockey team; there was no evidence to support a finding that would justify

1 declaratory or injunctive relief for any female athletes except those in the ice hockey club. This holding
 2 is directly applicable to the issues before this Court. Notwithstanding the broad reach of the proposed
 3 class, the focus of this litigation is on women wrestlers, not all women athletes at U.C. Davis.

4 This action does not support certification of any proposed class. However, if the Court has any
 5 inclination to certify a class, it should be limited to current or future female students who meet the
 6 criteria for admission to U.C. Davis and who are interested in and able to participate in wrestling at the
 7 collegiate level but are unable to do so because there is not a separate women's varsity wrestling team.
 8 See Bryant v. Colgate University, supra at p. *26-28. Plaintiffs should be required to provide further
 9 evidence of numerosity before such relief is granted. Id.

10 IX.

11 CONCLUSION

12 This case revolves around the experiences of four women who participated in the wrestling
 13 program under criteria not applied to male members of the team or any other student athletes regardless
 14 of gender. They did not have to try out for the team and did not participate in regularly scheduled
 15 competition. After a change in coaches, the women were required to try out like all other hopefuls.
 16 They did not make the team. Rather than choosing to engage in their sport at the club sport level,
 17 increase their skills and then submit a proposal for elevation of women's wrestling to varsity status,
 18 they filed a lawsuit. This suit relates to their unique experiences, not the interests of a purported class
 19 of women athletes.

20 The women's intercollegiate athletics program at U. C. Davis is one of the best in the nation.
 21 No women other than the Plaintiffs have an interest in making this a class action or having any of the
 22 Plaintiffs represent their interests. Defendants respectfully request that the motion be denied in its
 23 entirety.

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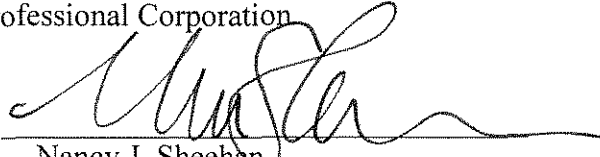
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1 Dated: April 4, 2006

2 PORTER, SCOTT, WEIBERG & DELEHANT
3 A Professional Corporation

4 By


Nancy J. Sheehan

George A. Acero

5 Attorneys for Defendants, REGENTS OF THE
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1 **MANSOURIAN, et al. v. BOARD OF REGENTS, et al.**
2 **U.S. DISTRICT COURT, EASTERN DISTRICT CASE NO. S-03-2591 FCD/PAN**
3 **(JFM)**

4 **PROOF OF SERVICE**

5 I am a citizen of the United States and a resident of the County of Sacramento. I am
6 over the age of eighteen years and not a party to the above-entitled action; my business
7 address is 350 University Avenue, Suite 200, Sacramento, CA 95825.

8 On April 4, 2006, I served the following document(s):

9 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS**
10 **CERTIFICATION**

11 X **BY MAIL.** I caused such envelope with postage thereon fully prepaid to be placed
12 in the United States mail at Sacramento, California.

13 **BY PERSONAL SERVICE.** I caused such document to be delivered by hand to the
14 office of the person(s) listed above.

15 **BY OVERNIGHT DELIVERY.** I caused such document to be delivered by overnight
16 delivery to the office of the person(s) listed above.

17 **BY FACSIMILE.** I caused such document to be faxed to the office of the person(s)
18 listed above with a original or copy of said document placed in the United States mail
19 with postage thereon fully prepaid at Sacramento, California.

20 addressed as follows:

21 Kristen Galles
22 Equity Legal
23 10 Rosecrest Avenue
24 Alexandria, VA 22301

25 I hereby certify that I am employed in the office of a member of the Bar of this Court
26 at whose direction the service was made. I hereby certify under the penalty of perjury that
27 the foregoing is true and correct.

28 Executed on **April 4, 2006**, at Sacramento, California


Keala Carr