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THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AREZOU MANSOURIAN, LAUREN MANCUSO, NANCY NIEN-LI CHIANG, and CHRISTINE WING-SI NG; and all those similarly situated,

Plaintiffs,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants.

CASE NO. CIV. S-03-2591 FCD/EFB

DEFENDANTS' TRIAL BRIEF

Trial Date: **May 23, 2011**
Time: **1:30 p.m.**
Ctrm: **2**

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I.

INTRODUCTION

During the course of this trial the Court will have the opportunity to meet a number of people who have dedicated much, if not all, of their professional lives working for the benefit of student-athletes. Through their efforts, the women's athletic program at U.C. Davis has developed and expanded to the point that it is recognized nationwide as an example of what a fair and equitable athletic program for women should be. The U.C. Davis women's athletic program has produced three NCAA Woman of the Year award winners, a record tied by only one other university in the United States. It was twice honored as the best NCAA Division II school for women by Sports Illustrated for Women. The championship accomplishments of its female student athletes speak loudly to the fact that women at U.C. Davis who have the skill and abilities to compete at the intercollegiate level thrive and excel in their sport.

Why then, one may ask, is the UNIVERSITY OF CALIFORNIA and four of its employees under attack for alleged violation of Title IX and the Equal Protection Clause of the United States Constitution? The evidence will show that Plaintiffs' claims are the result of a misunderstanding (at best) or a deliberate effort to mislead (at worst) by the former head coach of the men's wrestling team, and a sense of entitlement on the part of Plaintiffs to a guarantee that they would have a spot on the wrestling team roster throughout their college career-something that no student athlete, male or female, receives.

Between 1995 and 2006, 4,086 female student-athletes participated in intercollegiate athletics at U.C. Davis. Consistent with the basic tenets of intercollegiate sports, those women competed for a place on the team roster, attended practices, competed against opponents from other schools in regularly scheduled competition in their sport, and often went on to compete in post-season championship bouts. This lawsuit is brought by two women who had "unofficial status" on the men's wrestling team and never competed in interscholastic competition at the collegiate level, and one who was cut from the team because she (as well as several males) did not have the skills necessary to earn a spot on the team roster.

In addition to suing the UNIVERSITY, Plaintiffs have accused four long-term U.C. Davis

employees of intentionally discriminating against them on the basis of gender. They make this claim notwithstanding the fact that they never even met some of the individual Defendants prior to filing this suit. Perhaps the greatest irony is that Plaintiffs have sued former Senior Associate Athletic Director PAM GILL-FISHER. Years before Plaintiffs were born, GILL-FISHER was advocating for equal treatment for female student athletes and coaches, a quest she continued throughout her long career as a multi-sport athlete, a coach, and an administrator. Plaintiffs have also sued GREG WARZECKA, the Athletic Director at U.C. Davis who oversaw the athletic program during its greatest period of expansion for women's sports; ROBERT FRANKS, a former Associate Vice Chancellor who worked tirelessly to find a way to develop funding to add more sports at a time the State of California decimated state funding for UNIVERSITY athletics; and LARRY VANDERHOEF, the former Chancellor of U.C. Davis who led the campus from a NCAA Division II program to a Division I program that provides top level competitive opportunities for male and female athletes.

This suit has diminished significantly in scope since it was filed in 2003. All but two of the original claims for relief have been eliminated. One of the Plaintiffs dropped out, and Plaintiffs dismissed their claims against a former Associate Athletic Director. They voluntarily dismissed their class action claims, and with that their claims for injunctive relief. The Court has ruled that the core discrete events that form the heart of Plaintiffs' claims are barred by the statute of limitations because they did not file their suit in a timely manner. The sole claims remaining for trial are for (1) alleged violation of Title IX, against the UNIVERSITY, for ineffective accommodation of athletic interests; and (2) alleged violation of 42 U.S. C. §1983 against the individual Defendants based on the Equal Protection Clause. Plaintiffs are seeking monetary damages, and, of course, attorney's fees.

The Court will also have the opportunity to hear testimony from two of the leading experts in Title IX law on the issue of whether the U.C. Davis campus was in compliance with Title IX under prong two of the three-part test established by the Office for Civil Rights of the Department of Education. Defendants' expert, Dr. Christine Grant, is renowned in Title IX circles for her work in gender equity in athletics. She has testified in many landmark cases in this area (such as *Cohen* and *Barrett*) - always for the student plaintiffs. This case is particularly significant because it is the first time Dr. Grant has agreed to testify on behalf of a school and its employees.

Although being sued is never an enjoyable situation, Defendants welcome the opportunity to have a neutral finder of fact finally listen to the entire story of the events relating to the women wrestlers, free of media spin and other distortions.

II.

STATEMENT OF FACTS

A. U.C. Davis and Women's Intercollegiate Athletics

U.C. Davis is one of ten campuses of the University of California, and one of eight of those campuses that has an intercollegiate (or varsity) athletic program for male and female undergraduates. The women's intercollegiate athletic program started in 1947, with the hiring of Mayra Welch, its first female athletics staff member. Twenty-five years before the passage of Title IX and at a time when many universities would not even consider spending money on women's sports, U.C. Davis stood out from the pack. At the time Title IX passed in 1972, it had seven varsity women's sports. Varsity gymnastics for women was added by 1974. Women's cross-country was upgraded to a varsity sport in 1978, and began competing in the fall of 1979, to the best recollection of the former coach of that sport.[1] The campus was a founding member of the Association of Intercollegiate Athletics for Women. It became a member of the NCAA for purposes of women's athletics in 1981, which is the first year that organization sponsored championships for women's athletics.

By the time the first Plaintiff (NG) entered U.C. Davis in the fall of 1998, the women's athletic program was far more developed and far more expansive than it was in the early years after the passage of Title IX. This was largely due to the actions of GILL-FISHER, FRANKS, and several other U. C. Davis employees who urged the campus to continue its efforts in regard to gender equity in athletics. GILL-FISHER was tasked early in her administrative career with reporting on Title IX compliance issues. Though she never had the power or authority herself to implement changes, she tirelessly identified areas for improvement and spoke out about them at a time when those who did so were not always well received by their peers. This situation was not unique to U.C. Davis-Title IX has always been viewed by some with suspicion. However, in contrast to universities that simply refused to

[1] Due to the passage of time, retirement, and aging of those who were at U.C. Davis in the early years after the passage of Title IX, there is some degree of lack of certainty as to the specific dates when new sports were added. However, the former cross-country coach is fairly confident about the accuracy of these dates.

acknowledge its passage, after the passage of the law, U.C. Davis continued a course of improving athletics for its female students.

In 1992, when Plaintiffs were still in grade school, Keith Williams took over as the acting Athletic Director at U.C. Davis. During his three-year tenure, he faced the twin challenges of dealing with unprecedented budget cuts, including removal of all state funding for intercollegiate athletics, and the need to provide equitable participation opportunities. In the spring of 1993, U.C. Davis administrators learned that at the end of the fiscal year (June 30th) the campus would be facing a dire cut in state funding. The situation was so severe that strong consideration was given to eliminating the intercollegiate athletic program entirely. The program was "saved" temporarily by the passage of the Student Services Maintenance Fee referendum in 1993. This would be the first of several votes taken by the student body on a number of issues including the fate of athletics at the intercollegiate, club, and recreational sport level. In essence, the students had to decide whether to do without these programs or impose added expense on themselves in the form of increased fees.

The "temporary save" was not sufficient, as further budget reductions continued to rain down on U.C. campuses. FRANKS worked closely with student leaders to develop another referendum, known as the Student Activities and Support Initiative. In June 1994, U.C. Davis students were given a choice of (1) diminishing the intercollegiate athletics program to the Division II minimum of four women's and four men's teams; (2) reducing the intercollegiate athletic program from 20 sports to 17 sports; or (3) increasing the intercollegiate athletic program to 23 sports by adding three new sports for women. Each option came with a different impact on student fees. The students voted for the 23 sport option. In addition to increasing athletic opportunities for women, the campus continued with gender equity efforts by decreasing opportunities for males. Eventually, all junior varsity teams were eliminated, including the junior varsity football team which had contributed to the imbalance between enrollment and participation ratios.

In early 1995, three and one-half years before the first Plaintiff entered U.C. Davis, Mr. Williams began the selection process for the three new sports. A call was made for proposals. After thorough vetting by committees that included students, coaches, and administrators, the decision was made to add women's lacrosse, crew, and water polo. The three teams were added all at once, tripling

the number of participation opportunities at the outset. This period of aggressive expansion took place two years before NG entered U.C. Davis, four years before MANSOURIAN entered, and five years before MANCUSO entered.

WARZECKA became the U.C. Davis Athletic Director in August 1995. Despite being saddled with daunting budget problems, with the assistance of his administration team (including GILL-FISHER) and the coaches, he ensured that the newly added teams developed into viable, full-fledged intercollegiate competitors. In the 1998/1999 school year, WARZECKA expanded funding for women's indoor track, which allowed the coach of that team to expand competition opportunities for her athletes. He also instituted a roster management program designed to (1) control expenses so that all existing intercollegiate teams could be adequately funded; and (2) control the number of participants on men's intercollegiate teams. As of the time the last Plaintiff graduated in 2006, U.C. Davis sponsored 14 intercollegiate sports for women, far more than the Division II average.

During WARZECKA'S tenure, U.C. Davis produced the three NCAA Woman of the Year award winners referenced above. Only one other school (University of Tennessee) has produced an equal number of female student-athletes who reached that pinnacle of intercollegiate success. Three other female U.C. Davis student athletes were state or national finalists for the Woman of the Year award. In 1999 and 2000, the campus was named as the best Division II[2] school for women athletes by Sports Illustrated for Women.

U.C. Davis women have won championships in tennis, rowing, softball, swimming, and track. Its women's basketball team earned two berths to the Women's National Invitational Tournament, and this year captured the Big West Conference championship, which took the Aggies to the first round of the NCAA championship games. Over the years U.C. Davis female student-athletes have won more than 250 All-American awards. Accomplishments such as these do not occur by happenstance-they are the result of the efforts of talented athletes who have the skills to compete at the intercollegiate level, dedicated coaches, and an administration that strongly supports women's athletics.

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[2] During the time period in issue in this case, U.C. Davis was an NCAA Division II member, with the exception of men's wrestling and women's gymnastics, which competed at the Division I level due to lack of available local competition at the Division II level. In 2003, U.C.Davis started the process of moving to Division I for all sports. It completed a rigorous evaluation process by the NCAA, including a gender equity assessment, and started competing in Division I in all other sports in 2007.

B. Plaintiffs and U.C. Davis

NG entered U.C. Davis in the fall of 1998 and graduated in September 2002. During the three years she participated in wrestling, NG competed in only one match or tournament -- the National Girls Wrestling tournament in Michigan held in the spring of 2000. She did not wear a U.C. Davis uniform while she competed, and she did not place. NG signed up for the Aggie Open wrestling tournament in her freshman and sophomore years, but no one in her weight class showed up to compete. Thus, she did not participate.

NG had no desire to practice or wrestle against men; she was more interested in simply working out than she was in competing. She testified during her deposition that "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 that's why I'm not exactly up for competing." This mindset is in stark contrast to that of other female student-athletes at U.C. Davis who embrace the notion of competition, which is the essence of intercollegiate athletics.

In their Complaint, Plaintiffs alleged that "female wrestlers [at U.C. Davis] had the opportunity to participate in wrestling ... and to improve their skills to such an extent that some became nationally ranked, participated in national women's wrestling tournaments, participated as 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 UC Davis, these nationally and internationally ranked female wrestlers would not likely have achieved such a high level of success on their own." While it is true that one woman wrestler, Afsoon Roshanzamir (now Johnston) achieved that level of success, she did so because of her membership on the USA Women's Wrestling team and her desire to engage in competition. NG has never been a member of the U.S. National Wrestling Team, has never participated in the Pan American Games, and has never participated in the World Wrestling Championships. She also never tried out for the U. S. Olympic team.

NG tried out for the U.C. Davis wrestling team in the fall of 2001. She faced off against MANCUSO and was quickly pinned.

MANSOURIAN entered U.C. Davis in the fall of 2000 and graduated in June 2004. The only

tournament she competed in was the Aggie Open in January 2001. MANSOURIAN wrestled against two women in the tournament and lost to both. She has never wrestled in a national wrestling tournament, has never participated in the Pan American games, never tried out for the U.S. Olympic team, and never held any national or international rankings as a wrestler.

In the fall of 2001, MANSOURIAN sent an e-mail to the wrestling team coach (Lennie Zalesky, who was hired in the summer of that year) and said that she was extremely exhausted because of the demands of her classes and a job, and that she thought intercollegiate wrestling was "too much for me right now." Instead, she expressed an interest in wrestling at the club sport level, and filled out the necessary paperwork for doing so. The Court will have an opportunity to assess MANSOURIAN's credibility, as she now claims that she really did want to wrestle at the intercollegiate level and thus was not truthful in what she wrote in the e-mail.

MANCUSO entered U.C. Davis in the fall of 2001. She did not meet the criteria for admission based on her grades and test scores, but was able to gain admission by being sponsored by the coach of the women's soccer team. (MANCUSO participated in wrestling and soccer during high school). She accepted the offer of sponsorship, which came with the understanding that she would make a good faith effort to try out for a place on the women's intercollegiate soccer team. MANCUSO performed in a lackluster manner during soccer try-outs and was eventually cut. MANCUSO tried out for the U.C. Davis wrestling team in the fall of 2001. She wrestled-off against NG and pinned her, then went on to wrestle-off against a male in her weight class, who in turn pinned MANCUSO. NG, MANCUSO, and several males were cut from the team at the end of the try-out period.

Defendants do not deny that Plaintiffs wrestled to various extents in high school, or that they were interested in wrestling while they attended U.C. Davis. They take issue with Plaintiffs' position that they were entitled to a guaranteed spot on the men's wrestling team, or in the alternative, the creation of a separate intercollegiate women's wrestling team. By their very nature, intercollegiate athletics involve demonstrations of the highest level of athletic skill. Not everyone can be a varsity athlete. That is why U.C. Davis has such a broad array of sports options for its students.

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C. The Participation of Women on the Men's Wrestling Team at U.C. Davis

Men's wrestling U.C. Davis started as an intercollegiate sport in the 1980's. In the mid 1990's it was headed for elimination (along with other sports) because of budget cuts but ultimately was saved because of passage of the student referenda. Unfortunately, in the spring of 2010 the budget cuts took their toll and wrestling was eliminated along with three other sports. Prior to that time, the team competed in the PAC-10 conference.

In the early 1990's a few women worked out with the men's wrestling team. This continued after Michael Burch was hired as the head wrestling coach in 1995. Contrary to assertions later made by Burch and by the Plaintiffs, the Athletic Department administration had no objection to this. It is the prerogative of the head coach to determine how to conduct practices, and to select members of his/her team, so long as the coach complies with U.C. Davis and NCAA eligibility rules.

Although women practiced with the men's wrestling team and were included on the roster for a few years during Burch's tenure, there was never a separate women's wrestling team. The schedule of competition set up by Burch included only matches for the male wrestlers, with the exception of the annual "Aggie Open" wrestling tournament, which had a women's division. An open tournament is literally open to anyone, as compared to head to head competition within a conference or in post-season championship play. The media guides for wrestling for 1996 through 2000 describe women's wrestling as having "unofficial" status, something that was never challenged or questioned by NG, MANSOURIAN, or Burch.[3]

At most, there were four female students at any one time who expressed an interest in wrestling. They sparred with each other during practices, using freestyle wrestling techniques rather than the collegiate style wrestling used by the males. They did not wrestle on behalf of U.C. Davis at any NCAA wrestling meets. Women's wrestling is not an NCAA sponsored sport, or even an NCAA emerging sport.

As the trier of fact, the Court will have to make conclusions about the credibility of witnesses. Burch's credibility is placed squarely in issue on a number of points. He claims that GILL-FISHER

[3] MANCUSO did not enter U.C. Davis until the fall of 2001. By that time Lennie Zalesky was the head coach of the men's wrestling team.

told him he could not recruit women or sponsor them for admission. This is untrue. Neither GILL-FISHER, WARZECKA, or any other administrator ever restricted any coach from recruiting or sponsoring a student-athlete so long as they complied with applicable rules and regulations. Burch also claims that GILL-FISHER was hostile to the concept of women's wrestling. This too is untrue. As will be established by the evidence, GILL-FISHER has advocated for equality for girls and women in sports since her grade school years.

As noted above, WARZECKA instituted a roster management program. The presence of a few women at wrestling team practices prior to the enforcement of the roster management program did not impact the manner in which Burch ran the team. There was no real limit on the number of athletes he placed on the roster. Since Burch did not schedule any separate competition for the women, or provide them with athletic scholarships, their presence did not impact his budget. The situation changed in the fall of 2000. WARZECKA set a maximum roster size for all men's teams and held the coaches strictly to it. The initial maximum for the wrestling team was 30. Burch pleaded with WARZECKA to extend this to 34 so that he could accommodate all of the male wrestlers whom he believed had the talent to compete at the Division I level. WARZECKA acceded to this request.

Burch's credibility will be tested in another area. He claims that WARZECKA and GILL-FISHER prohibited him from awarding any of his limited roster spots to women. This is yet another lie. The head coach of intercollegiate teams at U.C. Davis has the sole discretion to select members of the team. WARZECKA and GILL-FISHER have never told a coach who they may, or may not, select for their teams. It did not matter to WARZECKA who was on the roster for the wrestling team so long as Burch did not exceed his assigned limit. During the course of a discussion about Burch's choice to award all of his roster spots to men, WARZECKA asked him what he planned to do with the few women who practiced with the team. Burch responded that they were not competitive and that he "didn't give a damn" about them. WARZECKA suggested that Burch speak to the women about forming a wrestling club team so they could continue participating in their sport. U.C. Davis has a robust club sport program, that includes levels of competition ranging from the equivalent of junior varsity teams to a more recreational approach. Many of the sports that have evolved to intercollegiate status at Davis over the years started at the club sport level.

Burch did not tell the women about the roster limit or that he had not allotted any of the roster spots to them. Instead, he lied again and told them that the Athletic Department administration ordered him to remove them from the team. He allowed them to continue to work out with the team nonetheless. The women were apparently content with the situation, as they did not make any complaint to WARZECKA, GILL-FISHER, FRANKS, VANDERHOEF, any other administrator, or the Office for Civil Rights despite being told that they had allegedly been "ordered off the team."

It is important to note that despite the fact that Burch never scheduled regular competition for the women wrestlers with other women, and never thought to offer them athletic scholarships until shortly before his appointment ended, Plaintiffs view him as their hero. They do not accuse him of discriminating against them on the basis of their gender. They have no complaints about the "unofficial status" of women's wrestling during his tenure. Based on the false statements made by Burch that members of the Athletic Department administration "forced him" to remove the women from the team, Plaintiffs accuse only the individual Defendants of violating their civil rights.

In January 2001, MANSOURIAN suffered an injury during a practice. This came to the attention of GILL-FISHER because Plaintiff sought services from the trainers, who noticed that she was not on the team roster. Since GILL-FISHER was out of town WARZECKA met with MANSOURIAN and NG in order to find out why they were practicing with the wrestling team when Burch had not put them on the roster. Based on his suggestion to Burch the previous fall that Burch urge the women to develop a club sport team, WARZECKA thought that was the course that had been taken. The Court will also have to make another credibility decision in regard to this meeting. WARZECKA will testify that the meeting was cordial in nature, and that the women seemed confused about their status on the team which, in hindsight, was understandable because Burch had misled them on that point. He told them they were not on the roster and thus were not covered by the insurance provided to intercollegiate athletics. Notwithstanding their status, WARZECKA told them they could continue to receive ice and taping services from the intercollegiate athletics trainers, and urged them to speak to the Director of Club sports about developing a women's wrestling club sport team. Plaintiffs claim that WARZECKA "yelled and screamed" at them during this meeting, and said something along the lines of "Newsflash! You were never on the team." This is untrue-WARZECKA has never spoken

to a student in that manner. It is interesting to note that despite Plaintiffs' claimed version of this meeting, they did not file any complaint of alleged gender discrimination at that time. That did not occur until several months later, when Burch suspected that his appointment as the wrestling coach would not be renewed.

D. The Events in the Spring, Summer, and Fall of 2001

1. Plaintiffs' OCR Complaint is Made and Quickly Addressed

On April 24, 2001, months after Burch falsely told the women that WARZECKA and GILL-FISHER had ordered him to remove them from the team roster, NG and MANSOURIAN filed a complaint with the Office for Civil Rights, claiming they were subjected to gender discrimination in regard to their participation on the wrestling team. On May 1 or 2, 2001 they delivered a memo to GILL-FISHER, WARZECKA, FRANKS and others in which they stated that they had been subjected to "sexual discrimination" in the form of being removed from the wrestling team roster, and hoped to be reinstated soon. Of note is the fact that neither this complaint, nor any of the others filed subsequently by Plaintiffs, accused U.C. Davis of having a women's athletic program that did not provide equal opportunities for women as a whole. That accusation was not raised until years later, when Plaintiffs filed this suit.

U.C. Davis has had a Title IX Compliance Officer since the early 1980's. Dennis Shimek occupied that role from its inception through the time in issue in this case. The campus took immediate action in response to Plaintiffs' notice. Based on the confusion caused by Burch's misrepresentations, the decision was made to place the women on the roster for the rest of the 2000/2001 season.[4] On May 9, 2001 WARZECKA sent a memo to Burch instructing him to reinstate the women. He refused, claiming that he was not responsible for them not being on the roster in the first place. FRANKS sent an e-mail to the women the following day, advising them that they were on the team roster and offering to meet with them. NG and MANSOURIAN wrote back, thanking him for his concern, but said they could not accept the reinstatement they sought until they spoke with their attorney. Shimek advised OCR of the action that had been taken, and that agency responded that it considered the matter closed.

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[4] Plaintiffs claim this offer was illusory because the regular wrestling season was over. That fact would not impact them at all because they did not compete in any of the contests that the rest of the team participated in. Members of intercollegiate sport teams can and do continue to practice after the end of their regular season.

Thereafter began a series of demands by Plaintiffs that they be afforded preferential treatment. They insisted that since Burch did not require them to compete for a spot on the team prior to the imposition of roster management, that they were entitled to ongoing membership on the team under that same condition. FRANKS met with MANSOURIAN and NG on May 16, 2001. Plaintiffs asked if the campus would consider having two roster caps for the wrestling team -- one for men and one for women. He passed on their inquiry to GILL-FISHER, WARZECKA and Shimek. They consulted with others, including legal counsel, to determine whether such a suggestion was feasible. The conclusion was that it was not, for a variety of reasons. Of those reasons the foremost was that as a practical matter, not all students who are interested in participating in varsity athletics have the skill necessary to earn a spot on the team and not all students who want to be a member of a varsity team can be accommodated. Each year the Athletic Department receives eligibility forms from many more students who want to participate in intercollegiate sports than can actually be accommodated on the varsity teams. There was an upper limit to the total number of student athletes who could be on the wrestling team, which was the roster cap assigned by the Athletic Director. FRANKS communicated this to Plaintiffs in an e-mail. Plaintiffs then asked whether the campus would waive the minimum requirement of ten students for creation of a club sport team, because they did not know if they could come up with that many female students who were interested in wrestling.

2. Protests, Press, and Politicians

Fueled by Burch's false statement that the Athletic Department administration forced him to remove the women from the team roster, Plaintiffs NG and MANSOURIAN, along with some of the male members of the wrestling team, embarked on a series of protests and demonstrations. They snuck into the Aggie Auction, which is the largest annual fundraiser for intercollegiate athletics and disrupted it by stripping off their clothes and handing out leaflets while dressed in wrestling singlets. They held some demonstrations outside Mrak Hall, where the Chancellor's office is housed. Plaintiffs contend that the individual Defendants were deliberately indifferent because they did not immediately accede to Plaintiffs' demands in the face of these protests. As the Court is no doubt aware, the University of California was the birthplace of the free speech movement-protests on campus about a wide variety of issues are a regular occurrence. The wrestlers were afforded the same free speech rights as all other

groups who engaged in that activity.

NG, MANSOURIAN and Burch engaged the assistance of the Chief of Staff of a local Assembly Member. The Chief, Craig Reynolds, was a former wrestler and one of Burch's friends. The Assembly Member (Helen Thomson) sent a letter to Chancellor VANDERHOEF on May 3, 2001 accusing the campus of discriminating against women wrestlers. In what was to become a pattern, Thomson and her staff did not contact WARZECKA or any member of the Athletic Department to hear the other side of the story before sending out accusatory letters or press releases. VANDERHOEF was out of the state at the time the letter was sent. When Thomson did not receive a response in a manner that she deemed timely, she asked the Chair of the Assembly Budget Committee to withhold funding for a new building on the campus. (When she was deposed years later Thomson described this move as nothing more than an "attention-getter.") Reynolds would not permit WARZECKA or GILL-FISHER to have access to Thomson. He did allow the Chancellor and FRANKS to meet with him and Thomson. During the course of the meeting, Reynolds presented them with a list of demands that included establishing a separate women's intercollegiate wrestling team; hiring a full-time head wrestling coach[5]; and building a dedicated wrestling facility. VANDERHOEF and FRANKS attempted to explain to Reynolds and Thomson why their demands ran afoul of fair treatment for all student athletes, including those on established club sport teams who were seeking intercollegiate status.

A number of the long-term, highly experienced coaches of women's intercollegiate sports at U.C. Davis became very upset over what they perceived was one-sided press releases by Thomson and media coverage, which included accusing WARZECKA and GILL-FISHER of being biased against female athletes. These coaches understood that a school does not create an intercollegiate sport team simply because three or four students want to participate. There must be sufficient local competition at the intercollegiate level and sufficient interest in order to field a viable team. They also understood that Plaintiffs' demands that they be guaranteed a spot on the men's wrestling team without having to earn that spot via a demonstration of skill ran afoul of the very nature of intercollegiate athletics, and was unfair to the members of the female members of the club sports that were seeking intercollegiate status

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[5] Burch was one of several part-time head coaches at U.C. Davis. He had been pushing for many months for full-time status, and became very upset when he was told that due to Title IX requirements, the part-time coach of a women's team would be made full-time before his status would change.

as well as to males who wanted to be on the varsity team but did not have the requisite skills. Sue Williams and Sandy Simpson, the coaches of the cross-country and women's basketball teams, drafted a letter setting forth the coaches' position. Through repeated efforts, Williams was finally able to get Thomson to agree to meet with her and GILL-FISHER to listen to what they had to say. The meeting took place on June 8, 2001. During the course of the meeting Williams mentioned the letter, the fact that it was signed by a number of influential head coaches of women's sports, and that they intended to release it to the media that day. Per her request, Thomson was provided with a copy of the letter. Thereafter she immediately issued a press release stating that the matters relating to the women wrestlers had "been resolved." This ended her involvement until March 2002, when (ironically) she named GILL-FISHER as her Assembly District's "Woman of the Year" for all of GILL-FISHER's accomplishments in the area of women's athletics.

3. **A Change in Coaches and Try-Outs in the Fall of 2001**

Burch's appointment as head coach was not renewed, and his term ended on June 30, 2001.[6] Zalesky was hired as his replacement.

NG and MANSOURIAN filed several more complaints with OCR during the late spring and summer of 2001. OCR investigators came to campus and conducted an investigation. It did not find any violation of Title IX in regard to the women wrestlers (as noted above, Plaintiffs' complaints focuses solely on themselves-they never alleged that the athletic program as a whole failed to provide equal participation opportunities for women). In order to clear up any confusion that may have existed about the manner in which members of the wrestling team are selected, the campus entered into a Voluntary Resolution Plan (VRP) with OCR that outlined that process. This includes having the head coach select those student-athletes who are the most skilled in their weight class. The VRP also provided that the campus would support the formation of a wrestling club team for those students (male and female) who do not have the skills necessary to make the intercollegiate team.

As noted above, MANSOURIAN did not try out for the team in 2001. NG and MANCUSO did try out, but were not selected, along with several males. Plaintiffs insisted that they should not have to

[6] Plaintiffs asserted in claims filed with OCR and in this lawsuit that the non-renewal was an act of retaliation against them. The Court has dismissed that claim.

try out for the men's wrestling team by competing against males, and that they should be allowed to use freestyle wrestling rules and techniques rather than the collegiate rules used by male wrestlers. Coach Zalesky conducted the try-outs in a manner consistent with the VRP, and held all students to the same standards.

Plaintiffs did not try out for the team in any subsequent years, nor did they participate at the club sport level. They also did not join any local wrestling clubs.

III.

ADMISSIONS AND STIPULATIONS

All pertinent admissions and stipulations are stated in the Final Pretrial Conference Order, as amended on May 4, 2011 [Docket item 549]

IV.

POINTS OF LAW

There are two claims for relief remaining for trial: (a) the first claim for relief alleging failure to provide equal athletic opportunity, in violation of Title IX; and (b) the fourth claim for relief alleged violation of the Equal Protection Clause, under 42 U.S.C. § 1983. The Title IX claim is asserted by all Plaintiffs against Defendant REGENTS OF THE UNIVERSITY OF CALIFORNIA. The § 1983 claim is asserted by all Plaintiffs against Defendants VANDERHOEF, FRANKS, WARZECKA, and GILL-FISHER.[7]

A. Title IX Claim

There are two aspects to a Title IX athletics claim: effective accommodation of athletic interests and equal treatment of male and female athletes in regard to athletic opportunities. (*Mansourian v. Regents of the University of California,* 602 F. 3d 957, 964-965 (9th Cir. 2010).) Plaintiffs base their first claim for relief on the assertion that the UNIVERSITY intentionally discriminated against female students by: (1) choosing to make fewer participation opportunities in intercollegiate athletics available to women; (2) providing male students, but not female students, with the opportunity to participate in

[7] Former Defendant LARRY SWANSON was voluntarily dismissed on November 8, 2010. [Docket item 465]

intercollegiate wrestling and by issuing the "No Females Directive;[8]" and (3) having failed to comply with any aspect of the three-part test for compliance with Title IX in regard to participation opportunities. (Complaint, ¶¶ 129-131) This Court has previously ruled that Plaintiffs' equal treatment claim, including their claim that they were denied equal treatment in regard to financial assistance[9], is barred by the applicable statute of limitations. [Memorandum and Order on Defendants' Motion for Judgment on the Pleadings, Docket item 226, p. 18-21; Memorandum and Order on Defendants' Motion for Summary Judgment, Docket item 509, p. 17-22] This ruling extends to Plaintiffs' claim about the issuance of the "No Females Directive," a failure to reinstate an alleged female wrestling program in June 2001, and requiring females to compete for membership on the U.C. Davis wrestling team in the fall of 2001 under the same terms and conditions applied to male students. [See Docket item 226, p. 9-10 and section V below] The sole issue remaining for trial under Title IX is whether, during the time period in issue, there was a systemic failure by U.C. Davis to effectively accommodate the athletic interests of its female undergraduate students.

Title IX of the Educational Amendments of 1972 holds that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program receiving federal financial assistance. (20 U.S.C. § 1681(a), Exhibit 1 to Joint Request for Judicial Notice filed concurrently with the parties' trial briefs) The Regulation implementing Title IX as it relates to athletics is found at 34 C.F.R. §106.41: "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funding] and no recipient shall provide any such athletics separately on such basis." (Exhibit 2 to Joint Request for Judicial Notice, p. 1.) Subsection (C)(1) requires that an institution which operates or sponsors interscholastic, intercollegiate, club or intramural athletics do so in a manner that provides equal athletic opportunity to members of both sexes. In determining whether equal opportunities are available, the Director (of the Office for Civil

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[8] This is a term used by Plaintiffs to describe their allegation that the individual Defendants "terminated all wrestling participation opportunities for female students but not for male students." (Complaint, ¶60)

[9] This ruling effectively eliminated the second claim for relief asserted in the Complaint.

Rights, which is primarily charged with investigating and making findings on Title IX allegations) will consider, among other factors, "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." (*Id.* at p. 2.) This regulation became effective on July 21, 1975. Of importance to this case is that the regulation states "where a recipient [of federal funds] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have been previously limited, **members of the excluded sex must be allowed to try-out for the team** offered unless the sport involved is a contact sport.[10]" (Exhibit 2 to Joint Request for Judicial Notice, p. 10 [emphasis added].) As early as 1975, OCR acknowledged that (1) a school need not operate identical teams in all sports for males and females; and (2) that the "right" involved is one to try out and to compete for a place on the team; there is no "right" or "entitlement" to a roster spot on a specific team if a student does not meet the qualifications in the opinion of the coach. One court succinctly summed this up in the context of a equal protection argument arising from a girl's desire to try out for a boys' middle school football team: "Nichole Force obviously has no legal entitlement to a starting position on the Pierce City Junior High School eighth grade football team, since the extent to which she plays must be governed solely by her abilities, as judged by those who coach her. But she seeks no such entitlement here. Instead she seeks simply a chance, like her male counterparts, to display those abilities. She asks, in short, only the right to try." (*Force v. Pierce City R-VI School Dist.*, 570 F.Supp.1020, 1031(W.D. Mo. 1983).)

In 1979 the Department of Health, Education and Welfare issued a Policy Interpretation on the Title IX regulation. *See* 44 Fed. Reg. 71,413. (Exhibit 3 to Joint Request for Judicial Notice.) The Policy Interpretation established what is known as the three-part test for compliance:

> "A university's athletic program is Title IX-compliant if it satisfies one of the following conditions [prongs] : (1) intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments, or (2) where the members of one sex have been and are underrepresented among intercollegiate athletes, ... the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex, or (3) where the members of one sex are

[10] The regulation defines contact sports to include wrestling. However, U.C. Davis has never restricted women from trying out for the men's wrestling team because of that.

> 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).)

The 1979 Policy Interpretation also addressed the issue of contact sports:

> "Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex **under the following circumstances**:
> (1) The opportunities for members of the excluded sex have historically been limited; and
> (2) **There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.**"

(Exh. 3 to Joint Request for Judicial Notice, p. 10, emphasis added.)

The three-part test has been universally accepted by the Courts of Appeals (see e.g. *Cohen v. Brown University [Cohen IV],* 101 F. 3d 155 (1st Cir.1996)) and they have given substantial deference to the Department's interpretation of its own regulations. (*Roberts v. Colorado State Bd. Of Agriculture,* 998 F.2d 824, 828 (10th Cir. 1993).) Equally accepted by the courts is the authority of the Department of Education and its Office for Civil Rights to issue Clarifications on the implementing regulation. These Clarifications, as well as OCR's 1990 "Title IX Athletics Investigator's Manual," have been used by courts as sources of guidance for OCR investigators and for courts that are faced with making a determination on whether an institution is in compliance with Title IX regarding a claim of ineffective accommodation. (*Cohen v. Brown University [Cohen I],* 809 F.Supp. 978, 983-84 (D. R.I. 1992).)

Educational institutions had little guidance on how to comply with Title IX in regard to intercollegiate athletics until years after it was originally passed in 1972. It took the government three years to issue the implementing regulation. The regulation provided little in the way of specifics-it simply stated that an institution needed to provide equal opportunities for both sexes via the selection of sport and the level of competition provided. In 1979, the year the oldest of the Plaintiffs (NG) was born, athletic administrators such as GILL-FISHER were working on understanding the newly delineated three-part test. In 1984, the U.S. Supreme Court issued its opinion in *Grove City College v. Bell,* 465 U.S. 555 (1984), which effectively suspended enforcement of Title IX as it applies to athletics, until the passage of the Civil Rights Restoration Act of 1988. The evidence will show that

during this period of time, when many universities shut down any gender equity efforts, U.C. Davis continued to work in that area.

Notwithstanding the issuance of the 1979 Policy Interpretation, more than twenty years after the passage of Title IX, OCR felt it was necessary to issue a clarification of its interpretation. The 1996 "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" is helpful in that it provides usable, concrete examples of how OCR interprets the three-part test. (Exhibit 4 to Joint Request for Judicial Notice.) WARZECKA and other administrators relied on this Clarification, as expected by the federal government, in assessing whether U.C. Davis was in compliance under prong two.

In what is commonly referred to as the "Dear Colleague" letter from Norma Cantu, Assistant Secretary for Civil Rights, which accompanied the Clarification, Cantu noted the Clarification confirms that a school need only comply with one of the three prongs, and that prong two involves "an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution." (Exhibit 4 to Joint Request for Judicial Notice, pp. 1-2.) For purposes of the Title IX claim made against it in this case, the REGENTS stipulates that during the time period in issue, the ratio of male to female undergraduate enrollment was not always "substantially proportionate" to the ratio of male to female intercollegiate athletic participation (prong one). The REGENTS is defending the Title IX claim on the basis that it complied with prong two (history and practice of program expansion for women). "[A]n institution is in compliance if it meets any one of the three prongs of the test." (*McCormick v. Sch. Dist. of Mamaronec,* 370 F.3d 275, 300 (2nd Cir. 2004).) This concept is so important that OCR emphasized it again in its 2003 "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance": "Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX. … each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. (Exhibit 5 to Joint Request for Judicial Notice, pp. 1-2.)

1. Application of Prong Two to This Case

In its 1996 Clarification, OCR stated "the Clarification does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case-and fact-specific. Such an

effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law." (Exhibit 4, p. 2.) It also provided this guidance in regard to prong two:

> **There are no fixed intervals of time within which an institution must have added participation opportunities.** Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to the developing interests and abilities of the underrepresented sex.
>
> OCR will consider the following factors, among others, as evidence that may indicate a **history** of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex: [1] an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex; [2] in institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and [3] an institution's affirmative response to requests by students or others for addition or elevation of sports.
>
> OCR will consider the following factors, among others, as evidence that may indicate a continuing **practice** of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex: [1] an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and [2] an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

(Exhibit 4 to Joint Request for Judicial Notice, pp. 5-6, emphasis added.)

In essence, "part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." (*Id.* at p. 5.) The Clarification states that "OCR will review the entire history of the athletic program" in making a prong two assessment. However, the examples it included in the Clarification make it clear that early periods of less than optimal expansion will not result in a finding that prong two does not apply so long as the school can show a history and effort of program expansion that is responsive to developing interests (see below). This Court has ruled that it will look at the entire history of women's athletics at U.C. Davis in deciding this claim. However, it also noted that "a shorter, more current period of aggressive remedial efforts may be highly relevant to establishing compliance with prong two… ." (Docket item 545, p. 5]

Two of the illustrations provided by OCR in the 1996 Clarification are directly relevant to this case. The first involves a school that did not expand its women's program for 17 years after the passage of Title IX, but then started taking action in the late 1980's:

> "Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. **Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities."**

(Exhibit 4 to Joint Request for Judicial Notice, p. 7, [emphasis added].)

Another example detailed an institution that complied with prong two based on adding three teams at six-year intervals:

> "At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities."

(Exhibit 4 to Joint Request for Judicial Notice, p. 6.)

The few courts that have addressed the issue of compliance under prong two were faced with women's intercollegiate athletic programs that bear no resemblance to program at U.C. Davis. The seminal case of *Cohen v. Brown* is illustrative. Brown University downgraded two longstanding women's varsity teams (gymnastics and volleyball) to club status in 1991. Almost all women's varsity teams at Brown were created between 1971 and 1977. The only women's team created after that period was winter track in 1982. (*Cohen I, supra*, at p. 981.) When the District Court first ruled on the request for a preliminary injunction in 1992, it found that Brown did not meet the criteria for prong-two

compliance. The Court of Appeal did not disturb that finding. (991 F.2d at p. 903.) U.C. Davis has not downgraded any women's intercollegiate teams to club status. Rather, it has upgraded three club sports to intercollegiate status. In *Roberts v. Colorado State Bd. of Agriculture, supra*, suit was filed in June 1992 after the university discontinued its women's fast pitch softball team and did not replace it with another sport. The District Court issued an injunction reinstating the team. Both the District Court and the Court of Appeal found that the university could not claim compliance under prong two because, apart from creating a women's sports program in the 1970's consisting of eleven sports and then adding women's golf in 1977, it had done nothing more to expand the program. To the contrary, Colorado had dropped three women's sports and its overall opportunities for women had decreased by 34%. In contrast, U.C. Davis added soccer at the same time it discontinued field hockey in 1983[11], then added more participation opportunities by the addition of new sports and in less than one decade, it increased participation by female student athletes from 32% to 50%.

Louisiana State University was sued for ineffective accommodation in 1994. (*Pederson v. Louisiana State University,* 912 F.Supp. 892 (M.D. La. 1996).) Women's intercollegiate athletics started at LSU in 1977. Fast pitch softball was added in 1979, but was dropped following the 1982/83 season "with no credible reason given." No additional women's sports were added until 1993 when the decision was made to add fast-pitch softball and soccer in the 1995 season. By the time the District Court ruled in 1996, the softball and soccer teams had been established but, per an agreement with the Southeastern Conference schools, actual competition had been delayed. LSU's prong one numbers were staggeringly disproportionate: 51% of the student body was male and 49% female, but male athletes constituted 71% of total athletes at the school. In addressing prong two and finding that LSU was not in compliance under that test, the Court stated "this Court finds that historically LSU has demonstrated a practice *not* to expand women's athletics at the university before it became absolutely necessary to do so." (*Id.* at p. 916.) Finally, in *Barrett v. West Chester University,* 2003 U.S. Dist. LEXIS 21095 (E.D. Pa. 2003), the school announced in 2003 that it was dropping women's gymnastics and men's lacrosse. Several members of the gymnastics team sued for an injunction mandating the reinstatement of the team. The university made the decision to drop gymnastics notwithstanding a

[11] In the opinion of the athletic administrators at the time, there was a decline in interest and available competition in field hockey. At this same time, interest in soccer at the high school and collegiate level was exploding.

strong recommendation against doing so by the campus Sports Equity Committee which oversees Title IX issues. This was one of the factors considered by the District Court in coming to the conclusion that the school did not meet prong two. The school had last added a new women's sport (soccer) in 1992. Prior to that, its last addition of a women's sport was in 1979.

In contrast to Brown University, LSU, Colorado State and West Chester University, the evidence will show that U.C. Davis has demonstrated both a history and practice of program expansion for women. It had an established women's sports program prior to the passage of Title IX and was a founding member of national governing body for women's intercollegiate athletics before the NCAA. Prior to the passage of Title IX the campus established a philosophy known as "The Davis View" that included the importance of gender equity in athletics. (Joint Trial Exhibit 14.) Following the passage of Title IX, several more sports were added.

The Court will hear evidence that during the late 1980's and early 1990's, the Title IX workgroup and often GILL-FISHER emphasized the need for more expansion of women's athletics or, in the alternative, decreasing male participation opportunities so that the ratio between male and female intercollegiate athletes was more proportionate to their respective enrollment percentages. Some of the memoranda on these issues are strongly worded, and again are primarily authored by GILL-FISHER. The Vice Chancellor for Student Affairs heeded her urgings, as did Interim Athletic Director Williams and FRANKS when he took on responsibility for overseeing intercollegiate athletics and other issues relating to student life.

As noted in section II. A. above, despite unprecedented budget cuts that threatened the existence of the entire intercollegiate athletic program, U.C. Davis was able to add three sports for women in 1996 as a result of the student referenda. These sports were well established by the time Plaintiffs entered their last year of high school and began considering attending U.C. Davis.

The addition of three sports at one time is a daunting challenge for any institution, particularly one dependant on the uncertainty of whims of legislative funding. U.C. Davis committed to supporting the three new teams and building them into viable, competitive sports competitors, consistent with its long-standing philosophy that each of its intercollegiate teams should be treated equally and strive to became competitive at the highest levels. At the same time this was happening, WARZECKA was

continuing to push down the number of male participation opportunities (in the face of equally unprecedented increases in the number of female undergraduates) and improve the quality of the existing teams for women by upgrading part-time head coaches to full-time status.

The Court will hear testimony from the experts retained by both sides. Plaintiffs' expert, Donna Lopiano, contends that the addition of three sports at once is no different than adding a single sport for that year, for purposes of prong two compliance. She contends that the campus therefore did not show sufficient expansion to invoke compliance under that test. Defendants' expert, Christine Grant, offers a much more reasonable opinion. She will testify that the addition of three sports at once by a school the size of U.C. Davis is almost unheard of, and that the campus should be lauded, not penalized, for choosing to add the teams all at once rather than spread the start dates out over time. If U.C. Davis had done so, women who wanted to participate in the sports that were not started immediately would have forever lost the chance to do so because they would have graduated or have been close to graduating before the next addition. The experts will also offer differing opinions on whether what the few women wrestlers did, in regard to participating on the team as part of the "unofficial status" of women's wrestling, constitutes a true varsity experience. While the 1996 Clarification states that walk-ons and those students who practice but do not compete will be counted as participants on a team so long as they receive the normal institutional support for varsity athletes including coaching, regularly attend practice, and are listed on the team roster, the cover letter from Ms. Cantu also states that "participation opportunities must be real, not illusory". If the Court relies on the expert testimony, it will have to make a decision on which expert opinion is more credible and viable.

WARZECKA also responded to track coach Dee Vochatzer's request that the track program be expanded to include regular competition in indoor events. Vochatzer, who has extensive intercollegiate coaching experience as well as experience as an Olympics coach, realized that the lack of an indoor track program adversely impacted her ability to attract quality athletes to U.C. Davis, particularly since Davis did not begin to offer athletic scholarships until the late 1990's. She made a proposal to Keith Williams when he was the Athletic Director that her student athletes be permitted to compete in indoor track events. He agreed, so as long as the cost of entering such events came out of the outdoor track budget. At the time that was possible because the University of Nevada-Reno had a decent indoor track

facility. By the time WARZECKA took over as Athletic Director the track in that facility had become so run down that it was no longer safe. The only way Vochatzer could continue to provide additional participation opportunities for women in indoor track was to obtain increased funding from WARZECKA so that the athletes could travel to indoor track in venues located in Seattle, Boise and Albuquerque. He agreed to provide that funding for both the men's and women's track team in 1998/1999, which was the same year indoor and outdoor track started to be counted as separate sports on the EADA[12] reports.

When the Ninth Circuit initially issued its opinion in this case, it stated that "the number of participation opportunities is defined by the number of female athletes actually playing intercollegiate sports" and that the addition of indoor track "did nothing to expand the number of female athletes as all the women participating in indoor track also participated in an existing varsity sport." (*Mansourian v. Regents, et. al.* 594 F.3d 1095,1107 (9th Cir. 2010).) The Court erroneously believed that participation opportunities were counted by counting bodies. OCR has made it clear that if one student is a member of two intercollegiate teams, this counts as two participation opportunities. *See Miller v. University of Cincinnatti*, 2008 U.S. Dist. LEXIS 4339, 20-21 (S.D. Ohio, Jan. 22, 2008):

> "Plaintiffs assert that the University also incorrectly reports the number of male and female athletes by counting indoor track and field, outdoor track and field, and cross-country as separate sports. The Department of Education has established this format, however. … The current Department of Education reporting of "All Track Combined," http://ope.ed.gov/athletics/InstDetail.asp, does not change that approach. Thus, it is proper for the University to count an athlete who competes on the cross-country team, indoor track team and outdoor track team as competing on three separate teams."

After the REGENTS filed a petition for rehearing based on the erroneous conclusions about counting indoor track opportunities, the Ninth Circuit issued an amended opinion that omitted that statement. (*See Mansouirian v. Regents,* 602 F.3d 957, (9th Cir. 2010).) WARZECKA's agreement to provide

[12] This refers to the Equity in Athletics Disclosure Act, which requires institutions to submit an annual report delineating information pertaining to intercollegiate participation numbers and other related issues.

additional funding so that female indoor track athletes could continue to compete constitutes further evidence of a commitment to expanding opportunities.[13]

In 2003, another call was made for proposals to consider adding a new women's varsity sport. This was done according to the same process used in 1995, which included specific criteria used for selection. Those criteria include (1) the overall impact on gender equity; (2) interest level; (3) sport sponsorship and available competition; and (4) facilities. Proposals were submitted on behalf of five women's sports: bowling, field hockey, golf, horse polo and rugby. There was no proposal submitted on behalf of women's wrestling, just as there had been no proposal for that sport in 1995. GILL-FISHER chaired a committee consisting of a representative of Athletic Administration Advisory Committee, a representative of the Student Athlete Advisory Committee, and a representative of the Sports Club Council. The committee met with a representative of each sport that submitted a proposal, reviewed the written proposals, and then summarized the information. This information was passed on to WARZECKA who reviewed it and made the recommendation that women's golf be added as a varsity sport. The reasons he recommended golf over the other sports proposed are: (1) golf is a championship sport in the Big West Conference and per Conference rules, U.C. Davis was required to add sports that are already part of that conference before adding non-conference sports; (2) women's golf was offered by 451 universities nationally, which reflects the interest level in the sport; (3) the NCAA has a golf championship in all three divisions; (4) U.C. Davis received many inquiries from female high school students who were interested in golf; and (5) the local community had indicated a strong support of golf, including use of the El Macero Country Club in Davis. The Vice Chancellor for Student Affairs agreed with WARZECKA's recommendation.

Plaintiffs attack the selection of golf, and the fact that WARZECKA gave its newly appointed coach, Kathy DeYoung, a year to set up a program and recruit a team that could be competitive at the Division I level. DeYoung, a very seasoned coach, will testify about the realities of establishing a team in a new intercollegiate sport and why that cannot be done overnight. Her instincts were good-within a few years the women's golf team was competing at the championship level.

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[13] Unlike schools that have been in the newspaper and under court scrutiny lately for very questionable practices regarding counting of athletic participation opportunities, U.C. Davis has never forced its track and field athletes to run cross-country in order to participate in the former sport, and it has always had separate coaches for those two sports.

Plaintiffs contend prong two cannot be used when a school has eliminated a team. This is not correct. Per the 1996 Clarification, "in the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test." (Exhibit 4 to Joint Request for Judicial Notice, p. 6) One of the hypothetical examples of prong two compliance in that Clarification includes a school that eliminates a team for a valid reason. (Exhibit 4 to Joint Request for Judicial Notice, p. 6 [Institution D example].) U.C. Davis eliminated women's field hockey because of a lack of competition and a lack of interest in the sport at that time. Field hockey was replaced by soccer, which was much more popular with students. The fact that UC Davis dropped varsity field hockey and replaced it with women's varsity soccer is not indicative of a failure to demonstrate program expansion.

In a prong-two analysis, another issue that must be considered is whether (notwithstanding a history of program expansion) there has been a decrease in the number of participation opportunities. The presence of a decrease does not preclude reliance on prong two; rather, the reason for the decrease must be examined and a valid explanation will be accepted. (Exhibit 4 to Joint Request for Judicial Notice, p. 6.) Dr. Grant will testify that the reason for the fluctuation at U.C. Davis was the legitimate elimination of "B" or junior varsity water polo and lacrosse teams because of lack of available competition. She has considerable experience as an Athletic Director, and is well aware of the problem of lack of available competition for intercollegiate junior varsity teams. Dr. Grant was surprised to find that U.C. Davis maintained its JV teams for as long as it did.

It is unclear whether the question of prong two compliance is one of law or one of fact. Most decisions on that issue have been made either by OCR in the absence of litigation, or by a court in the context of an application for a temporary restraining order or a motion for summary judgment. In either event, the question is well suited for this case as the Court will make combined findings of fact and law.

Defendant REGENTS believes the evidence will show that it had both a history and practice of program expansion for women, including an intense period of expansion during a time period that actually has some relevance to the Plaintiffs. While it is true new sports were not added as frequently prior to 1996, the law does not require an institution to "leap to gender parity in a single bound."

(*Cohen v. Brown University [Cohen II]* 991 F.2d. 888, 898(1st Cir. 1993).) It is difficult to conceive how a lack of adequate expansion in the early 1970's (before Plaintiffs were born), or the 1980's (when they were toddlers and children), or even the first few years of the 90's (when they were in grade school and junior high) could have any impact on Plaintiffs.

B. Section 1983 (Equal Protection) Claim

1. Introduction

At the Final Pretrial Conference the Court asked whether a stipulation entered into by Defendant REGENTS had any impact on the Equal Protection Clause claim asserted against the individual Defendants. (The Equal Protection Claim is not asserted against the REGENTS.) The stipulation is the one set forth in Defendants' points of law section of the Joint Final Pretrial Statement, specifically that during the time period relevant to the Title IX claim asserted against the REGENTS, the ratio of male and female participants in intercollegiate athletics was not always substantially proportionate to the ratio of male and female undergraduate enrollment at U.S. Davis.

The answer to the Court's inquiry is that "substantial proportionality" is a concept that exists only in the realm of a Title IX claim. It is the first prong of the three part test for effective accommodation of the athletic interests of the underrepresented sex. The fact that athletic participation opportunities may not have been substantially proportionate to undergraduate enrollment ratios during the time period in issue does not *ipso facto* mean that the individuals sued in this case engaged in intentional discrimination against Plaintiffs on the basis of gender. The regulations pertaining to Title IX, the Interpretation and Clarification issued by the Office for Civil Rights, and case law all make it very clear that (1) an educational institution has the full discretion to select which of the three prongs it chooses to ensure that athletic interests are effectively accommodated; and (2) that compliance under prong one (substantial proportionality) is *not* required so long as the school demonstrates compliance under prong two or prong three. It is inconceivable that an individual who is employed by a university could be held liable for violating the Equal Protection Clause because the school's athletic administration as a whole chose to comply with Title IX by expanding opportunities for women rather than cutting opportunities for men in order to make the participation numbers more proportional.

The regulations, Interpretation, Clarification, and case law also make it clear that a school (and thus the employees of a school) does not have an obligation to establish identical teams for both genders:

> "As noted above, there is not provision for the requirement of identical programs for men and women, and no such requirement will be made by the Department. … In addition, the sport specific concept overlooks two key elements of the Title IX regulation. First, the regulation states that the selection of sports is to be representative of student interests and abilities. [citation]. A requirement that sports for the members of one sex be available or developed solely on the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge. Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities. [citation] As implied above, Title IX protects the individual as a student-athlete, not as a basketball player or swimmer."

(1979 Policy Interpretation, Exhibit 3 to Joint Request for Judicial Notice, p. 17, comments section; accord *Bryant v. Colgate University*, 196 U.S. Dist. LEXIS 8392 * 32 (June 11, 1996).)

It is equally inconceivable that employees of a university could be held liable for violating the Equal Protection Clause because the school chooses not to add a women's intercollegiate wrestling team simply because a handful of students ask for that. Title IX makes it clear that there must be a sufficient level of interest field a viable varsity team, and there must be intercollegiate competition available in the geographic region where the school usually competes. These factors did not exist in regard to women's wrestling. Neither the Equal Protection Clause nor case law under §1983 hold employees of an educational institution to a higher standard effective accommodation of athletic interests than the institution itself is held to.

2. **The Scope of the Equal Protection Claim to be Tried**

The §1983 claim is asserted against VANDERHOEF, FRANKS, WARZECKA, GILL-FISHER. Earlier in the case, this Court dismissed the §1983 claim against these individuals on the grounds that it was subsumed by a concomitant Title IX claim. [Docket item 226, pp. 33-38] While this case was on appeal to the Ninth Circuit the Supreme Court issued its opinion in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), holding that a §1983 claim for gender discrimination in a school setting can be maintained concurrently with a Title IX claim. Accordingly,

when the Ninth Circuit remanded this case back to this court for trial, the individual Defendants were brought back into the suit.

The Court has defined the § 1983 claim as "the assertion that defendants violated the Equal Protection Clause by maintaining an athletics program that discriminates on the basis of gender." [Docket item 509, p. 35] Although the focus of this claim is on alleged discriminatory conduct towards the Plaintiffs,[14] it involves an assessment of the athletic program for women as a whole.

3. **Equal Protection and Intercollegiate Athletics**

In order to prevail on a § 1983 claim a plaintiff must prove that an individual defendant acted under color of state law, and that his/her acts deprived the plaintiff of a right guaranteed under the laws of the United States. For § 1983 claims based on a theory of violation of the Equal Protection clause, Plaintiffs must prove that the individual Defendants acted with the intent or purpose to discriminate against them because of their gender, or with deliberate indifference to a known and established violation of equal treatment. (*Lee v. City of Los Angeles* 250 F.3d 668, 687(9th Cir. 2001); *Flores v. Morgan Hill Unified Sch. Distr.* 324 F.3d 1130, 1135(9th Cir. 2003).) Discriminatory intent is shown when a decision maker selects or affirms a course of action "because of", not merely "in spite of" the actions adverse effects on an identifiable group. (*Personnel Adm'r v. Feeney* 442 U.S. 256, 279 (1979); *Ashcroft v. Ikbal* 129 S. Ct. 1937, 1948 (2009).) Stated otherwise, Plaintiffs must prove that each Defendant took action, or failed to take action, not for a neutral purpose but instead to discriminate against them because of their gender. (*Id.*)

This case presents a novel athletics equal protection claim. The overwhelming majority of cases applying the Equal Protection clause to athletic opportunities do so in the context of a girl seeking to play on a specific team for boys (or vice versa) and challenges to the constitutionality of "separate but equal" teams for males and females. (*See* Barbara L. Pryor, *Equal Protection Scrutiny of High School Athletics*, 72 Ky. L.J. 935, 935-36.) Ninth Circuit case law considering equal protection in relation to athletic opportunities falls into the above categories. (*Clark v. Interscholastic*

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[14] In their Points of Law portion of the Joint Final Pretrial Statement, Plaintiffs defined the issue as whether the individual Defendants "discriminated against Plaintiffs **and women** at U.C. Davis in the provision of intercollegiate athletic opportunities." (emphasis added). This case is not a class action. Plaintiffs voluntarily dismissed their class claims in 2007 along with their claims for injunctive relief. [Docket item 195]

Association 695 F.2d 1126 (9th Cir. 1982) [boy claimed equal protection violation based on not being allowed to participate on girls volleyball team].)[15] The claim in this case is that there were inequitable participation opportunities at U.C. Davis on a program-wide basis, which in turn resulted in gender discrimination by the individual Defendants against the Plaintiffs.

In its ruling on the recent motions for summary judgment filed by the individual Defendants in this case, the Court referred *Haffer v. Temple University,* 678 F.Supp. 517 (E.D. Penn. 1987) for the proposition that "where a University decides to 'sponsor intercollegiate athletics as part of its educational offerings, this program 'must be made available to all on equal terms'." [Docket item 509, p. 25] The Court used this as part of its discussion on the legal standards applicable a §1983 claim against an individual (not an educational institution). *Haffer* is an anomaly. The plaintiffs in that case initially based their claims entirely on Title IX. (*Id.* at p. 522, fn. 2.) However, after their suit was filed the Supreme Court decided *Grove City College v. Bell, supra* which (temporarily) ended the application of Title IX to intercollegiate athletics. (*See* Diana Heckman, *Article: Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 Seton Hall J. Sports L. 391, 403-404 (2008) [*Grove City* "effectively nullified Title IX in the area of athletics"].) The district court in *Haffer* ordered the plaintiffs to strike most of their Title IX claim including the portions raising claims about the deficiencies and participation opportunities. (678 F.Supp. at p. 522, fn. 2.) At the same time they were given the opportunity to amend their complaint to add federal constitutional claims. (*Id.*)

The *Haffer* court recognized the unique aspect of the case: "This appears to be the first case to challenge the operation of an intercollegiate athletic program on federal equal protection grounds." (*Id.* at p. 522.) However, it did no more than summarily adjudicate some claims and find that a triable issue of material fact existed on others. The merits of the case were never reviewed by an appellate

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[15] There is one other Ninth Circuit case mentioning an equal protection claim challenging the equity of participation opportunities on a program-wide basis. (*Ridgeway v. Montana High School Association,* 858 F.2d 579 (9th Cir. 1988).) That class action case came to the Ninth Circuit following a settlement reached via the use of a "facilitator" in lieu of litigation. (*Id.* at p. 580-81.) The Court of Appeals declined to address the legal merits of the equal protection claim because of the posture in which the case reached that court. (*Id.* at p. 589.)

court-it settled via a consent decree. (See Defendants' Request for Judicial Notice in Support of Trial Brief.)

Following the passage of the passage of the Civil Rights Restoration Act (20 U.S.C. § 1688) in 1988 which legislatively overruled *Grove City College v. Bell,* most claims relating to equitable participation opportunities in athletics have been litigated under Title IX. *See, e.g. Cohen v. Brown University*, (*Cohen I*), *supra*; *Pederson v. Lousiana State University, supra*; *Boucher v. Syracuse University,* 164 F.3d 113 (2d. Cir. 1998); *Barrett v. West Chester University*, 2003 U.S. Dist. LEXIS 21095 (E.D. Pa. November 12, 2003). In doing so, courts have applied the three-part test set forth in the 1979 Policy Interpretation. These cases do not address the standard to be applied to a constitutional claim of unequal athletic participation opportunities asserted against a person who is employed by a college or university, as opposed to the institution itself. Rather, the Policy Interpretation applies to the Title IX implementing regulation, which in turn applies only to institutions that receive federal funds. (34 C.F.R. §106.41.)

The *Haffer* court looked at Temple University's athletic program (not the acts of any individual defendants) and conducted an analysis that looked very much like a prong one analysis used in a Title IX case.[16] In sum, the most important takeaway point in the *Haffer* case for purposes of the trial in this case is its citation to *Washington v. Davis*, 426 U.S. 229 (1976) and the requirement that a plaintiff suing under the Equal Protection Clause prove both an invidious intent to discriminate on the basis of gender and that a state action had an adverse impact on her. (*Haffer, supra* at p. 524.)

Clark v. Interscholastic Association, *supra*, addressed the issue of whether a "policy of precluding boys from playing on girls' interscholastic volleyball teams in Arizona high schools violates the equal protection clause." (*Id.* at p. 1127) It did not address Title IX issues at all, most likely because boys in the Arizona high school system would not be considered the underrepresented sex in regard to athletic opportunity. The court did make reference to overall equality of athletic opportunity and noted that "while a lack of overall equality of athletic opportunity certainly raises its own problems, the presence of such equality cannot by itself justify specific inequality of opportunity

[16] The court also went through an analysis of money spent by Temple on items such as recruiting, coaching, and uniforms. In Title IX parlance, this is known as the "laundry list." Plaintiffs have only an effective accommodation of interests claim, not a "laundry list" claim.

in any given sport. The question, then, is whether denying boys the particular opportunity to compete on a girls' volleyball team, even when boys' overall opportunity is not inferior to girls', can be justified as substantially related to an important governmental interest." (*Clark,* 695 F.2d at pp. 1130-31) The court did not address the issue of how an overall ineffective accommodation claim under §1983 may or must be squared with an effective accommodation claim under Title IX.

4. **The Individual Defendants Cannot be Held to a Higher Standard Than the Institutional Defendant in Regard to Provision of Equal Athletic Opportunities**

WARZECKA and GILL-FISHER spent their entire careers in the area of intercollegiate athletics. In the course of doing so they reasonably relied on Title IX regulations, interpretations, and clarifications, and their application to the women's intercollegiate sport program at U.C. Davis. Similarly, albeit on a more macro level, FRANKS and VANDERHOEF also relied on those authorities. In determining whether Plaintiffs have met their burden of proving a violation of §1983 by these individuals, the Court must take Title IX requirements into account even though there are differences between it and §1983 as identified in *Fitzgerald v. Barnstable*. To do otherwise would completely undermine the specific dictates of the Department of Education and its Office for Civil Rights. Further, holding an individual liable based on a more demanding standard than established by Title IX law will have a severe chilling effect on the desire of any person to work in the field of intercollegiate athletics. As the Court will hear during trial, none of the individual Defendants alone, perhaps with the exception of VANDERHOEF, had the authority to "order" U.C. Davis to comply under a particular prong or to add more opportunities for women. While VANDERHOEF may have theoretically had such authority, he would never exercise it alone in the absence of guidance from others who have expertise in the many aspects of intercollegiate athletics.

The Ninth Circuit has held (albeit in a different factual context) that complying with Title IX and the 1979 Policy Interpretation does not violate the Equal Protection clause. (*Neal, supra*, at p. 772 [stating that the constitutional analysis in other cases "persuasively disposes of any serious constitutional concerns that might be raised in relation to the OCR Policy Interpretation"].) Other circuits have also recognized that compliance with Title IX-- and attempts to comply with it-- do not violate equal

protection requirements. *Miami University Wrestling Club v. Miami University* 302 F.3d 608 (6th Cir. 2002) is a compelling example of the congruence of Title IX and Equal Protection clause law:

> "In the case before us today, it is evident that Miami took the challenged actions in an attempt to comply with the requirements of Title IX, and, as we explain below, Miami was successful in that attempt. Only if Title IX, its regulations or the Policy Interpretation are unconstitutional-- an issue not before us in this lawsuit-- could we hold that Miami's compliance with the law and the regulations is unconstitutional."

(*Id.* at p. 614.)

Kelley v. Board of Trustees, 35 F.3d 265(7th Cir. 1994) is another good example

> "Plaintiffs' final argument is that the defendants' decision to eliminate the men's swimming program while retaining the women's program denied them equal protection of law as guaranteed by the Fourteenth Amendment. We do not agree. First, the record makes clear that the University considered gender solely to ensure that its actions did not violate federal law. And insofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible."

(*Id.* at p. 272.)

This Court has ruled that Plaintiffs' claims based on discrete events that occurred during the 2000/2001 school year are time-barred (see section V, *infra*). Thus, they are precluded by the statute of limitations from claiming that the individual Defendants violated the Equal Protection Clause by allegedly removing them from the wrestling team roster or requiring that all persons trying out for the wrestling team compete on the same terms. [Docket item 509, p. 22] Conversely, Plaintiffs cannot argue that Defendants had an obligation under the Equal Protection clause to establish a separate intercollegiate wrestling team for women or set up a separate roster cap for females only.

The evidence will show that former Chancellor VANDERHOEF by necessity delegated the day to day operations of the intercollegiate athletic program to the Athletic Director. He became involved in the issue pertaining to the women wrestlers only because Assembly Member Thomson injected herself into it at the request of her chief of staff. Indeed, Thomson and Reynolds would not agree to speak with anyone other than the Chancellor himself until Sue Williams prevailed upon Thomson to listen to what the coaches and GILL-FISHER had to say. Plaintiffs' contention that the head of a campus as large as U.C. Davis should have personally handled their demand to be given a spot on an athletic team shows a lack of understanding about nature of running a large organization.

The authority for overseeing intercollegiate athletics was delegated by VANDERHOEF to the Vice Chancellor for Student Affairs, who in turn delegated it to FRANKS. After recovering from the shock of receiving the memo from Plaintiffs regarding their claim of "sexual discrimination," FRANKS immediately contacted the Title IX compliance officer and started the process of addressing the allegations of mistreatment. One week later, he notified the women that their request for reinstatement on the team was granted. He met with them, even after they declined the reinstatement offer until they could consult with their attorney. Plaintiffs asked FRANKS about the establishment of a separate roster caps for women; he asked others to look into that, including consulting with experts in the field, and got back to Plaintiffs quickly with the response. FRANKS also offered to reduce the minimum number of students necessary to form a club team in wrestling. His actions were consistent with the commitment to Title IX and gender equity issues he demonstrated from the time he first assumed responsibility for intercollegiate athletics, including but not limited to the efforts he put into the student referenda that saved varsity athletics for all students. It must be remembered that FRANKS owed a duty of fairness and equality to all students-not just Plaintiffs. He could not agree to give them preferential treatment at the expense of other students.

WARZECKA's actions towards gender equity speak for themselves. He picked up the ball on expanding opportunities for women in 1996 and hasn't stopped running with it yet. WARZECKA accomplished significant improvements in gender equity under severe financial limitations. Under his watch, women's intercollegiate athletics expanded at a rate unsurpassed in campus history. He is the victim of untrue accusations made by a disgruntled former coach, which were blindly adopted by NG and MANSOURIAN, and later MANCUSO. WARZECKA was involved in crafting a resolution to the women wrestler's complaint that was fair and equitable to all students.

Finally, it is almost inconceivable that Plaintiffs have accused GILL-FISHER of intentionally discriminating against female students. They will have the opportunity during this trial to learn facts about the woman they have sued for punitive damages. They will learn about her experiences as an athlete in the 1960's, and how events that occurred back then shaped her attitude towards athletics and her passion to improve conditions for female athletes. They will learn about the many hours she spent volunteering her time with organizations and committees dedicated to women's athletics. They will

learn that although enforcing compliance with Title IX was never her responsiblity, she was asked early on to research and report on gender equity issues and did so even in the face of resistance from some of her peers. They will learn that when she had a discussion with two other women wrestlers in the spring of 2000, who were in her office because they had not filled out the paperwork required to participate in wrestling team practices, GILL-FISHER did not express distain for women wrestlers (as Plaintiffs believe) but rather discussed ways in which they could develop the sport of women's wrestling to include competition with other teams rather than just practicing with each other. GILL-FISHER and all of the other seasoned intercollegiate coaches knew one of the best ways to develop a nascent sport is via the club sport program. Finally, they will learn how hurt and upset GILL-FISHER was to read and hear false statements made by Plaintiffs and Burch that she had ordered the women removed from the wrestling team roster. The evidence will show that Burch was the person who made the roster decision, but did not have the courage to tell Plaintiffs he did so.

In sum, Defendants believe the evidence will show that their actions were consistent with Title IX and did not violate the Equal Protection Clause.

V.

STATUTE OF LIMITATIONS

The Court and the Ninth Circuit have made a series of rulings regarding the statute of limitations. These rulings have resulted in the holding that discrete events connected to Plaintiff's participation (or lack thereof) on the wrestling team are barred as untimely for purposes of both the § 1983 claim and the Title IX claim. The relevant rulings are:

- May 5, 2004, Order on motion to dismiss: This Court denied Defendants' motion to dismiss based on the statute of limitations but indicated the argument should be addressed in a future motion. [Docket #25, pp. 9-16]
- October 18, 2007, Order on motion for judgment on the pleadings: This Court ruled that Plaintiffs' Title IX unequal treatment claim was time-barred. [Docket #226, p. 21] It defined that claim as arising out of discrete events related to the wrestling team. [*Id.* at pp. 9-10] The Court did not address the application of the statute of limitations to the Title IX ineffective accommodation claim that challenged the equity of participation opportunities

for female students as compared to males. [*Id.* at p. 21, fn. 9 & pp. 23-30] It also did not address the bar of the statute of limitations as applied to the § 1983 claim against the individual Defendants because it dismissed that claim on other grounds. [*Id.* at pp. 33-38]

- April 23, 2008, Order on UNIVERSITY's motion for summary judgment: This Court granted the UNIVERSITY's motion for summary judgment on the ground that Plaintiffs failed to provide it with notice before filing their Title IX claim. [Docket #368]
- April 20, 2010: the Ninth Circuit issued its amended opinion reversing the grant of summary judgment on the Title IX claim and reinstating the § 1983 claim against the individual Defendants (*Mansourian v. Regents, supra).* The Court of Appeals did not address the application of the statute of limitations to the Title IX claim. In response to Defendants/Appellees' argument that reinstatement of the § 1983 claim would be an empty exercise because of the lower court's ruling that the concomitant unequal treatment claim under Title IX was time barred, the Ninth Circuit overlooked this Court's ruling on the motion for judgment on the pleadings and instead just referred to the earlier motion to dismiss. "In fact, the district court considered and rejected the statute of limitations defense as to both the Title IX effective accommodation and § 1983 equal protection claims in response to UCD's original motion to dismiss." (602 F.3d at p. 973.)
- December 8, 2010, Order on Individual Defendants' motions for summary judgment: This Court ruled that the § 1983 claim is time-barred to the extent it arises "from (1) the alleged purposeful removal of plaintiffs from the varsity wrestling program based on gender; and (2) the imposition of permanent barriers to the participation of plaintiffs in the varsity wrestling program through application of the wrestle-off policy." [Docket #509, p. 22] The Court further ruled that the § 1983 claim is timely regarding the allegation of violation of "the Equal Protection Clause by maintaining an athletics program that discriminates on the basis of gender." *[Id.* at p. 35] It recognized that the Ninth Circuit had failed to address all of its relevant statute of limitations rulings. *[Id.* at p. 18, fn. 15]

Plaintiffs have very recently filed a motion for reconsideration of this Court's December 8, 2010 ruling on the statute of limitations as it applies to the § 1983 claim. Defendants will address that motion in their opposition to it.

The effect of the Court's December 8, 2010 ruling on the remaining claim is somewhat confusing. In footnote 17 of that order, the Court stated that while the alleged removal of the women from the team roster and the purported erection of barriers to participation on the team due to the requirement that Plaintiffs try out just like other students are time-barred events, they "may still be used as evidence in support of Plaintiffs' timely claims of intentional, systemic discrimination." This is not a class action. Plaintiffs were not interested in participating in any sport other than wrestling. They did not enter U.C. Davis until 1998 at the earliest, and were gone by 2006. The time-barred events that took place during the 2000/2001 school year form the core of their claims. Without those events, it is difficult to understand what is left that actually pertains to them.

VI.

CONCLUSION

This Court is faced with deciding several novel issues that will likely set precedent for colleges and universities, as well as athletic administration personnel, throughout the nation. Defendants believe the evidence will show that they, along with many other dedicated University employees, have furthered the laudable goal of gender equity in intercollegiate athletics.

Respectfully submitted,

Dated: May 5, 2011

PORTER SCOTT
A PROFESSIONAL CORPORATION

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