

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

Taylor Anders, et al. v. California State University, Fresno, et al.

No. 1:21-cv-00179 KIM BAM (E.D. Cal. Mar. 7, 2025) · No. No. 1:21-cv-00179 KIM BAM · Decided March
10, 2025

OPINION

Anders v. CSU, Fresno

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 Taylor Anders, et al., No. 1:21-cv-00179 KIM BAM 12 Plaintiffs, ORDER 13 v. 14
California State University, Fresno, et al., 15 Defendants. 16 17 Plaintiffs bring a putative class
action lawsuit against defendants, including Fresno State, 18 | alleging Fresno State violated Title
IX by not effectively accommodating female varsity athletes 19 | and by not giving them equal
treatment. They seek an injunction that requires Fresno State to 20 | abide by Title IX. Two
motions are pending before the court. Fresno State moves to dismiss on 21 | grounds of mootness,
while plaintiffs renew their motion for class certification. As described 22 | more fully below, the
court denies Fresno State's motion to dismiss and grants plaintiffs' motion 23 | for class
certification.

24 | I. BACKGROUND

25 Fresno State decided to eliminate men's wrestling, men's tennis, and women's lacrosse at 26 |
the end of the 2020-2021 academic year. Mem. of Law in Supp. of Pls.' Mot Prelim. Inj. at 6, 27 |
ECF No. 2-1. On December 2, 2020, Taylor Anders, a female lacrosse player, signed a 28 |
representation agreement with Bailey & Glasser, LLP, to represent her in a potential lawsuit 1
against Fresno State under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681– 2
1689 (Title IX). Defs.' Unopposed Mot. for Leave to Supp. Sur-Reply in Opp'n to Pls.' Mot for 3
Cert. of Lacrosse-Only Classes Ex. 1 (Bailey & Glasser Agreement), ECF No. 133-1. The 4
agreement allowed third parties to advance costs and expenses but did not allow third parties 5
control over the litigation. See id. 6 On February 21, 2021, members of Fresno State's women's
lacrosse team, including 7 Anders, filed the original complaint in this action against Fresno State
alleging violations of Title 8 IX. Compl., ECF No. 1. Arthur Bryant of Bailey & Glasser and
Michael Caddell and Cynthia 9 Chapman of Caddell & Chapman filed the complaint on plaintiffs'
behalf. See id. These three 10 lawyers also appear as signatories on other filings in this action. 11
The complaint alleged Fresno State failed to provide female students effective 12 accommodation
by not allowing them an opportunity to equally participate in varsity athletics, 13 failing to

provide female athletes with an equal allocation of financial aid and failing to provide 14 female athletes with the same benefits given to male athletes. See generally Compl. Plaintiffs 15 also moved for a preliminary injunction, asking the district court to stay the elimination of the 16 women's lacrosse team and treat the women's lacrosse team equally with other teams for the 17 academic year 2020–2021. See generally Mem. of Law in Supp. of Pls.' Mot. Prelim. Inj. The 18 judge previously assigned to the case granted that motion in part and denied it in part. See Order 19 (Apr. 21, 2021), ECF No. 35. Specifically, the judge did not block Fresno State from eliminating 20 the women's lacrosse team but did impose a preliminary injunction mandating Fresno State treat 21 the women's lacrosse team equally for the remainder of the 2020–2021 academic year. See *id.* at 22 34. 23 On May 2, 2021, the plaintiffs filed a first amended complaint, adding Courtney 24 Walburger, a women's lacrosse team player and student at Fresno State, as a named plaintiff. See 25 ECF No. 36. Fresno State moved to dismiss. ECF No. 42. The assigned judge denied the motion 26 as to plaintiffs' effective accommodation claim and equal treatment claim but dismissed 27 plaintiffs' financial aid claim without prejudice. See Order (July 22, 2021), ECF No. 57. 28 Plaintiffs filed a second amended complaint—the now operative complaint—on August 12, 2021. 1 See ECF No. 59. Fresno State once again moved to dismiss, and the judge dismissed plaintiffs' 2 financial aid claim, this time with prejudice. See Order (Oct. 29, 2021) ECF No. 73. Plaintiffs' 3 effective accommodation and equal treatment claims remain. 4 On December 17, 2021, the assigned magistrate judge issued a preliminary scheduling 5 order that mandated plaintiffs submit their motion for class certification by February 4, 2022.

6 Order at 2, ECF No. 83. Plaintiffs filed an unopposed motion to continue the deadline until 7 February 25, 2022. ECF No. 86. The magistrate judge granted the motion. See Order (Jan. 27, 8 2022), ECF No. 87. The plaintiffs filed their motion for class certification on February 25, 2022, 9 which Fresno State opposed. Pls.' First Mot. for Class Cert., ECF No. 88; Defs.' Response Pls.' 10 First Mot. for Class Cert., ECF No. 89. 11 In its order on class certification, the court examined the scope of plaintiffs' proposed 12 class at length and ultimately defined two classes for plaintiffs, crafting the definition on its own 13 without adopting the plaintiffs' proposed language: 14 As to the equal treatment claim, the Court will define the class as 15 current and future female Fresno State students who: (i) participate 16 or have participated in women's varsity intercollegiate athletics at 17 Fresno State; and/or (ii) are able and ready to participate in women's 18 varsity intercollegiate athletics at Fresno State but have been deterred 19 from doing so by the treatment received by female varsity 20 intercollegiate student-athletes at Fresno State. And as to the 21 effective accommodation claim, the Court will define the class as 22 current and future female Fresno State students who: (i) have lost 23 membership on a women's varsity intercollegiate athletics team at 24 Fresno State; (ii) have sought but not achieved membership on a 25 women's varsity intercollegiate athletics team at Fresno State; and/or 26 (iii) are able and ready to seek membership on a women's varsity 27 intercollegiate athletics team at Fresno State but have not done so 28 due to a perceived lack of opportunity. 29 Order (Aug. 16, 2022) at 10,

ECF No. 93. Using these class definitions, the court found plaintiffs 30 had met the numerosity, commonality and typicality requirements of Rule 23(a). See *id.* at 10– 31 17. But the court denied class certification without prejudice, ruling plaintiffs had not established 32 the proposed named representatives, Anders and Walburger, were “adequate” because “there are 33 discernible conflicts—reflected in the filings—between the interests of the proposed class 1 representatives as former members of the women’s varsity lacrosse team and other members of 2 Fresno State’s female student population who are not represented in this action as currently 3 configured.” *Id.* at 20. 4 On August 30, 2022, plaintiffs filed a new motion for class certification, ECF No. 94, 5 which the court construed as a motion for reconsideration and denied without prejudice. See 6 Order (Nov. 22, 2022), ECF No. 107. In its denial, the court allowed plaintiffs to seek a class or 7 subclass specific to women’s lacrosse in a future motion for class certification. See *id.* at 18–19. 8 On December 6, 2022, plaintiffs filed a Rule 23(f) petition with the Ninth Circuit Court of 9 Appeals, challenging the district court’s denial of class certification. See ECF No. 109. While 10 the petition was pending, plaintiffs filed another motion for class certification in the district court 11 in January 2023. See ECF No. 117. Fresno State in March 2023 filed a motion to dismiss 12 plaintiffs’ equal treatment claim for lack of standing. ECF No. 121. On April 25, 2023, the 13 district court stayed the case pending the outcome of the appeal, after the Ninth Circuit accepted 14 the 23(f) petition. See ECF No. 136. In the meantime, plaintiffs were departing Fresno State. 15 Walburger had graduated in December 2022, while Anders finished at Fresno State after the 16 spring semester of 2023. See Pls.’ Opp’n Mot. Dismiss (Opp’n) at 7, ECF No. 154. Upon the 17 retirement of the original presiding judge, the case was reassigned to a new district judge. See 18 Order (May 3, 2023), ECF No. 137. 19 The Ninth Circuit issued a memorandum disposition on January 17, 2024, vacating the 20 district court’s denial of class certification, concluding the district court abused its discretion in 21 denying class certification on both plaintiffs’ effective accommodation claim and their individual 22 treatment claim. See *Anders v. Cal. State Univ., Fresno*, No: 23-15265, 2024 WL 177332, at *2– 23 3, (9th Cir. Jan. 17, 2024). The Circuit held the conflict between the named plaintiffs and the rest 24 of the class with respect to the effective accommodation claim was speculative and the district 25 court had not independently analyzed the equal treatment claim. See *id.* The Ninth Circuit 26 remanded for the district court to consider whether a conflict may actually exist under the equal 27 treatment claim between women’s lacrosse players and the remainder of the class and to rule on 28 // 1 the “propriety of the class definitions presented, the adequacy of class counsel, and whether 2 plaintiffs satisfy Rule 23(b) (2).” *Id.* at *2. 3 In the summer of 2024, attorney Arthur Bryant changed law firms from Bailey & Glasser 4 to the Clarkson Law Firm, see Notice of Change of Address, ECF No. 153, and Anders signed an 5 agreement with Clarkson to represent her. Defs.’ Ex. 4 (Clarkson Representation Agreement), 6 ECF No. 167-5. Anders agreed to a fee waiver, but there is an exception: if she independently 7 settles with Fresno State, Anders must pay attorneys’ fees and costs. See *id.* The agreement also 8 contains a provision that allows Clarkson to split fees with other attorneys. See

id. 9 Fresno State moves to dismiss this action, now arguing that because all the named 10 plaintiffs have graduated from Fresno State, their claims have become moot. See Mot. Dismiss 11 on Grounds of Mootness (Defs.' Mot.), ECF No. 151. The motion is fully briefed. See Opp'n, 12 ECF No. 154; Defs.' Reply, ECF No. 159. Plaintiffs have filed a renewed motion for class 13 certification, using the class definitions the district court crafted in its earlier denial of class 14 certification. See Pls.' Mem. P. & A. in Support of Renewed Mot. Class Cert. (Mem.) at 4, ECF 15 No. 165-1. Plaintiffs seek to name Anders and Walburger as class representatives and Clarkson 16 Law Firm and Caddell & Chapman as class counsel. See id. Plaintiffs no longer seek a lacrosse- 17 only class. See Joint Status Rep. at 2, ECF No. 142. The issue is fully briefed. Response, ECF 18 No. 167; Pls.' Reply, ECF No. 169.

19 This action was reassigned to the undersigned on October 11, 2024. See Order, ECF No. 20 162. The court ordered Fresno State's motion to dismiss be submitted without oral argument. 21 Min. Order (Jan. 7, 2025), ECF No. 176. The court heard oral argument on plaintiffs' renewed 22 motion for class certification on January 23, 2025. Arthur Bryant and Carey Alexander appeared 23 for plaintiffs. Mins. Mot. Hr'g (Jan. 23, 2025), ECF No. 177. Scott Eldridge appeared for Fresno 24 State. Id.

25 II. FRESNO STATE'S MOTION TO DISMISS

26 Fresno State argues the court should dismiss plaintiffs' operative complaint as moot 27 because plaintiffs all have graduated from Fresno State. See generally Defs.' Mot. The court 28 declines to dismiss on grounds of mootness. 1 Article III of the Constitution limits this court's jurisdiction to live "Cases" or 2 "Controversies." See U.S. Const. art. III § 2 cl. 1. The controversy must remain live at all stages 3 of the litigation. See *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). However, 4 "[i]n the class action context, a 'controversy may exist . . . between a named defendant and a 5 member of the class represented by the named plaintiff, even though the claim of the named 6 plaintiff has become moot.'" *Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020) (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). Named plaintiffs can, for example, continue to litigate a 8 denial of class certification on appeal even after their individual claims became moot. See U.S. 9 *Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). 10 One well-established application of this principle is when an injury is so inherently 11 transitory it is "capable of repetition yet evading review." See, e.g., *Gerstein v. Pugh*, 420 U.S. 12 103, 110 n.11 (1975). Courts apply this inherently transitory principle even when claims of the 13 named plaintiffs become moot before a court has decided to grant class certification. See *Pitts v. 14 Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011). Courts allow these claims to go 15 forward if "(1) the duration of the challenged action is too short to allow full litigation" before the 16 named plaintiffs' individual claims become moot and "(2) there is a reasonable expectation that 17 the named plaintiffs could themselves suffer repeated harm or it is certain that other persons 18 similarly situated will have the same complaint." *Belgau*, 975 F.3d at 949 (citing *Johnson v. 19*

Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1019 (9th Cir. 2010)). Under the inherently 20 transitory principle, named plaintiffs are party to a live controversy even though their individual 21 case is moot, because they retain a “private attorney general” interest in the litigation. See 22 Geraghty, 445 U.S. at 403–04. In these circumstances, the district court adopts a doctrine of 23 relation back to the original filing of the complaint to “preserve the merits of the case for judicial 24 resolution.” County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991) (citations omitted). 25 The parties agree that, as it pertains to equitable relief, Anders and Walburger’s individual 26 claims are now moot. See. Defs.’ Mot. at 13–15; Opp’n at 15–17. The parties agree, further, that 27 the plaintiffs did not file a motion for class certification until after the named plaintiffs’ individual 28 effective accommodation claims became moot. Defs.’ Mot. at 15; Opp’n at 17–30. Further, 1 Anders and Walburger retained live individual injuries in the equal treatment claim until after 2 plaintiffs filed a motion for class certification in February 2022. See Opp’n at 30–32. 3 The court finds the inherently transitory principle applies to the effective accommodation 4 claim. Plaintiffs filed their initial complaint in February 2021. See Compl. The individual 5 claims of the named plaintiffs expired four months after the filing of the complaint when Fresno 6 State eliminated the women’s lacrosse team. See Defs.’ Mot. at 14. Under this timeline, it would 7 have been difficult if not impossible for a district court to have ruled on a motion for class 8 certification let alone to allow full litigation to have proceeded before the named plaintiffs’ claims 9 became moot. See Belgau, 975 F.3d at 1090. Even if the timeline were slightly longer, it would 10 not be enough to encompass the span of time necessary for this complex litigation, which, as 11 plaintiffs point out, has already involved a motion to dismiss, several motions for class 12 certification, and an appeal to the Ninth Circuit. Opp’n at 6. The case is now almost four years 13 old, and it has been almost three years since plaintiffs filed for class certification yet, as plaintiffs 14 rightfully point out, the case is still in its relative “infancy.” Id. 15 If the court were to dismiss on mootness grounds here, Fresno State would be allowed to 16 continue to harm similarly situated female athletes by eliminating teams or subjecting them to 17 unlawful treatment without facing any possibility of consequences. Recent decisions by district 18 courts in the Ninth Circuit relating to class actions brought by student athletes adopt this view. 19 See Fisk v. Bd. of Trs. of the Cal. State Univ., No. 22-cv-173, 2023 WL 6051381, at *12 (S.D. 20 Cal. Sept. 15, 2023) (“[G]iven the finite duration of a college student’s time as a student- 21 athlete . . . and the pace of this litigation thus far, the Court finds that the inherently transitory 22 exception applies to this putative class action.”); A.B. by C.B. v. Haw. State Dep’t of Educ., 334 23 F.R.D. 600, 605 (D. Haw. 2019), rev’d and remanded on other grounds, 30 F.4th 828 (9th Cir. 24 2022) (“Given the necessarily finite duration of a high school student’s time as a student-athlete, 25 and the potential for repetition of the claims from similarly situated students . . . these claims are 26 inherently transitory.”); In re NCAA Athletic Grant-in-Aid Cap. Antitrust Litig., 311 F.R.D. 532, 27 539 (N.D. Cal. 2015) (finding inherently transitory principle applies to case brought by student 28 // 1 athletes). In sum, the effective accommodation claims alleged by the plaintiffs in this case are 2

capable of repetition yet evading review. See, e.g., *Gerstein*, 420 U.S. at 110 n.11. 3 The court finds plaintiffs’ equal treatment claim is not moot for similar reasons. Because 4 *Walburger and Anders*’ individual claims were not moot when plaintiffs filed their motion for 5 class certification, as a matter of law, they retain an interest in appealing the initial denial of 6 certification and having the court decide the issue. See *Geraghty*, 445 U.S. at 404. Further, the 7 inherently transitory principle applies to plaintiffs’ equal treatment claim as well as this claim 8 became moot less than two and a half years after the filing of this litigation, while it has taken the 9 court nearly three years to resolve plaintiffs’ class certification motion. See *Belgau*, 975 F.3d at 10 1090. 11 *Fresno State* argues first that plaintiffs incorrectly rely on *Belgau*’s holding that the 12 inherently transitory principle applies when litigation cannot conceivably be completed in the 13 time before named plaintiffs’ claims become moot. *Defs.’ Reply* at 9–10. *Fresno State* argues 14 *Pitts* is actually the controlling law of the Circuit and provides the inherently transitory principle 15 applies when courts cannot in any way conceivably decide a class certification motion before 16 named plaintiffs’ claims become moot. See *id.* *Fresno State*’s argument is unconvincing, as the 17 rule in *Belgau* is the established precedent of the Ninth Circuit. See *Johnson*, 623 F.3d at 1019 18 (inherently transitory principle applies when “the duration of the challenged action is too short to 19 allow full litigation before it ceases”); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 20 (9th Cir. 2002) (inherently transitory principle applies when “the duration of the 21 challenged action is too short to allow full litigation before it ceases”) (quoting *Greenpeace Action v. 22 Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1993)). *Pitts* is the outlier. . Even if *Fresno State*’s 23 argument were valid, plaintiffs would still prevail, as the named plaintiffs’ individual claims 24 became moot well before the period it has taken this court to come close to resolving the motion 25 for class certification. The court could not have decided this motion earlier; the court denied 26 plaintiffs’ motion for class certification multiple times, and plaintiffs appealed to the Ninth 27 Circuit, all taking time. See generally *Background*. 28 // 1 *Fresno State* also argues plaintiffs failed to file a timely motion for class certification. 2 *Defs.’ Mot.* at 11–12; *Defs.’ Reply* at 6. This argument also fails. Timeliness is ultimately 3 determined by courts’ local rules and their scheduling orders. See *Pitts*, 653 F.3d at 1093. Under 4 Federal Rule of Civil Procedure Rule 23(c)(1)(A), it is the court—not the plaintiffs—that has a 5 responsibility to determine at an early stage of the litigation “whether to certify the action as a 6 class action.” Further, under the local rules of this district—both at the time this action was filed 7 and now—plaintiffs must file a motion for class certification “[w]ithin such time as the Court 8 may direct pursuant to [an] order issued under Fed. R. Civ. P. 16(d).” E.D. Cal. L.R. 205(1). 9 Here, the magistrate judge issued a scheduling order that mandated submission of a motion for 10 class certification by February 4, 2022. Order (Dec. 17, 2021) at 2. The magistrate judge 11 accepted plaintiffs’ unopposed motion, see ECF No. 86, to move the due date to February 25, 12 2022. See Order (Jan. 27, 2022). Plaintiffs met the new deadline. See *Pls.’ First Mot. for Class 13 Certification*. Plaintiffs’ motion was timely. 14 For these reasons, the court finds the class claims relate back to the original date of

the 15 filing of the complaint and are not moot. See *County of Riverside*, 500 U.S. at 52. The court 16 denies Fresno State's motion to dismiss.

17 III. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

18 Plaintiffs seek to certify two classes. For their effective accommodation claim, plaintiffs 19 seek to certify a class that includes: 20 Current and future female Fresno State students who: (i) have lost 21 membership on a women's varsity intercollegiate athletics team at 22 Fresno State; (ii) have sought but not achieved membership on a 23 women's varsity intercollegiate athletics team at Fresno State; and/or 24 (iii) are able and ready to seek membership on a women's varsity 25 intercollegiate athletics team at Fresno State but have not done so 26 due to a perceived lack of opportunity.

27 Mem. at 8. For their equal treatment claim, plaintiffs seek to certify a class that includes:

28 Current and future female Fresno State students who: (i) participate 29 or have participated in women's varsity intercollegiate athletics at 30 Fresno State; and/or (ii) are able and ready to participate in women's 31 varsity intercollegiate athletics at Fresno State but have been deterred 1 from doing so by the treatment received by female varsity 2 intercollegiate student-athletes at Fresno State. 3 *Id.* These proposed class definitions are identical to the classes proposed by the court in its order 4 denying plaintiffs' first motion for class certification. See Order (Aug. 16, 2022), at 10. Plaintiffs 5 propose Taylor Anders and Courtney Walburger as class representatives and Clarkson Law Firm, 6 P.C., and Caddell & Chapman as class counsel. Mem. at 9. Fresno State opposes the certification 7 of both classes, arguing they are not ascertainable and fail all the requirements of Rule 23(a) and 8 23(b)(2). See generally Response. 9 Plaintiffs must "affirmatively demonstrate" compliance with the Federal Rules that govern 10 class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A proposed class 11 can be certified only if the court is persuaded the class meets the requirements of Rule 23(a) and 12 (b), and then only after a "rigorous analysis." *Id.* at 350–51 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Rule 23(a) sets out four prerequisites for every class: 14 (1) the class is so numerous that joinder of all members is 15 impracticable; 16 (2) there are questions of law or fact common to the class; 17 (3) the claims or defenses of the representative parties are typical of 18 the claims or defenses of the class; and 19 (4) the representative parties will fairly and adequately protect the 20 interests of the class. 21 Fed. R. Civ. P. 23(a). Rule 23(g) requires that a court consider these factors when deciding to 22 appoint class counsel: 23 (1) the work counsel has done in identifying or investigating 24 potential claims in the action; 25 (2) counsel's experience in handling class actions, other complex 26 litigation, and the types of claims asserted in the action; 27 (3) counsel's knowledge of the applicable law; and 28 (4) the resources that counsel will commit to representing the class. 29 Fed. R. Civ. P. 23(g). Rule 23(b), in turn, defines three types of classes the court may certify. 1 Plaintiffs propose a class under Rule 23(b)(2). See Mem. at 19–21. The proponent of Rule 2 23(b)(2) must show "the party opposing the class has acted or refused to act on grounds that apply 3 generally to the class, so that final injunctive relief or corresponding

declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). 5 A. Numerosity, Commonality, Typicality 6 This court previously found, using the same class definitions plaintiffs advance in this 7 renewed motion, that plaintiffs have established the numerosity, commonality, and typicality 8 requirements for both the effective accommodation class and the equal treatment class. See Order 9 (Aug. 16, 2022), at 10–17. At oral argument, the parties confirmed the record remains the same 10 now as it did in 2022 and the court confirms its findings based on that record here. Both of 11 plaintiffs’ proposed classes meet the numerosity, commonality and typicality requirements of 12 Rule 23(a).

13 In their opposition to plaintiffs’ renewed motion for class certification, Fresno State makes 14 identical arguments to those it made in opposition to plaintiffs’ original motion for class 15 certification: that plaintiffs have not adequately proven numerosity, that plaintiffs’ failure to take 16 into account sport-specific decisions at Fresno State shows they cannot establish commonality, 17 and that because the named plaintiffs all played on the now defunct women’s lacrosse team, their 18 claims are not typical of the proposed classes, which include athletes who participate in other 19 sports at Fresno State. Compare Defs.’ Response Pls.’ First Mot. for Class Cert. at 14–18 with

20 Response at 19–22. At oral argument, Fresno State clarified it was making a request for 21 reconsideration under Federal Rules of Civil Procedure 23(c)(1)(C), providing “an order that 22 grants or denies class certification may be altered or amended before final judgment.” 23 The court denies Fresno State’s request. The court finds the prior order carefully 24 explained why plaintiffs meet the numerosity, commonality and typicality requirements and does 25 not find it necessary to revise its findings. See Order (Aug. 16, 2022) at 10–17. Fresno State 26 argues the court should revisit numerosity, commonality and typicality because the court must 27 conduct “a rigorous analysis . . . given the passage of time.” Joint Status Rep. at 4. But Fresno 28 State does not show how the passage of time might impact the court’s analysis of these 1 requirements here. At oral argument, Fresno State admitted it has not provided updated data or 2 any new evidence for the court’s consideration. Instead, Fresno State simply argues that because 3 the named plaintiffs are no longer students at Fresno State, they fail the typicality and 4 commonality tests for the classes they propose to represent. However, because the court has 5 found the inherently transitory principle applies to this case, as discussed above, the named 6 plaintiffs retain their ability to continue in this case; as properly representative of students at 7 Fresno State, they are both common and typical of the classes they seek to represent. 8 B. Adequacy 9 The court previously found plaintiffs’ proposed class representatives were inadequate to 10 represent both classes because the plaintiffs’ affiliation with the women’s lacrosse team favored 11 the women’s lacrosse team and its members over other women’s sports teams and their members. 12 See Order (Aug. 16, 2022) at 20. The Ninth Circuit reversed, finding clear error because the 13 conflict the district court identified was only speculative. *Anders*, 2024 WL 177332, at *2. The 14 Circuit

instructed this court on remand “to specifically assess whether a conflict exists under the 15 equal treatment claim” as well. *Id.* The Circuit also raised the possibility of a further amended 16 complaint and motion practice related to “the justiciability of the equal treatment claim.” *Id.* The 17 Circuit suggested this court “may need to resolve those motions before considering whether a 18 conflict exists under the equal treatment claim.” *Id.* The court therefore turns to this issue first.

19 1. Amendments and Justiciability 20 In their renewed motion for class certification, plaintiffs argue that notwithstanding the 21 Circuit’s decision, they do not need to seek to further amend their complaint; they say “[n]o 22 conflict exists” as plaintiffs “seek an injunction that only requires Fresno State to comply with 23 Title IX.” *Mem.* at 15. Fresno State argues plaintiffs improperly ignored the Ninth Circuit’s 24 suggestion they amend their complaint. *Opp’n* at 23. At oral argument, in an attempt to clarify 25 the relief plaintiffs are seeking in their operative complaint, the court asked the parties if they 26 could submit a stipulation and proposed order identifying the portions of the operative complaint 27 // 1 that can be stricken given the procedural history of the case since it was filed. *Mins. Mot. Hr’g* 2 (Jan. 23, 2025). 3 The parties have submitted declarations from their counsel on their unsuccessful efforts to 4 arrive at a stipulated agreement. See *Bryant Decl.* (Jan. 30, 2025), ECF No. 179; *Schwartz Decl.* 5 (Jan. 30, 2025), ECF No. 180. However, it is telling that plaintiffs, among other proposed edits to 6 the complaint, are willing to strike a reference to the women’s lacrosse team in paragraph C of the 7 prayer for relief. See *Bryant Decl.* (Jan. 30, 2025) Ex. C at 4, ECF No. 179-3. This proposed edit 8 appears to be consistent with the Ninth Circuit panel’s assumption plaintiffs would need to amend 9 their complaint. The only other reference remaining to the women’s lacrosse team is in the prayer 10 for relief, regarding plaintiffs’ desire for equal treatment for women’s lacrosse players for “this 11 academic year”—2021. See *id.* This second request tracks the preliminary injunction the court 12 previously granted in part and denied in part, before plaintiffs filed their operative complaint. See 13 *Order* (Apr. 21, 2021). The remainder of the proposed revised prayer for relief seeks only that 14 Fresno State abide by Title IX. See *Bryant Decl.* Ex. C. 15 Plaintiffs’ most recent proposed revisions to the complaint are consistent with their 16 statements and actions since the court’s denial of plaintiffs’ request to enjoin Fresno State from 17 eliminating the women’s lacrosse team. See *Order* (Apr. 21, 2021). They have been clear they 18 are only seeking an injunction that mandates Fresno State abide by Title IX and are not seeking a 19 reinstatement of the women’s lacrosse team. See *Mem.* at 15–17; *Anders Decl.* (Aug. 30, 2022) 20 ¶ 6, ECF No. 165-9; *Walburger Decl.* (Aug. 30, 2022) ¶ 6, ECF No. 165-11; *Reply to Opp’n* 21 *Renewed Mot. Class Cert. Ex. A*, ECF No. 97-2 (plaintiffs’ attempt to seek stipulation from 22 Fresno State to make similar clarifying edits to operative complaint). Plaintiffs do not need to 23 amend their complaint further and there is no conflict between the named plaintiffs for the 24 effective accommodation claim and the named plaintiffs for the equal treatment claim, as they 25 // 1 both seek to have Fresno State comply with Title IX. The court therefore considers whether 2 plaintiffs have satisfied the adequacy requirements of Rule 23(a)(4). 3 2. Named Representatives’

Adequacy 4 In applying Rule 23(a)(4), courts resolve two questions: “(1) do the named plaintiffs and 5 their counsel have any conflicts of interest with other class members and (2) will the named 6 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Hanlon v. 7 Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), overruled on other grounds by *Wal-Mart*, 8 564 U.S. at 338. Whether the proposed class representatives adequately represent the class is a 9 “question of fact to be determined on the basis of all of the relevant circumstances regarding” the 10 case. *Soc. Servs. Union, Local 535 Serv. Emps. Int’l Union, AFL-CIO v. Santa Clara County*, 11 609 F.2d 944, 947 (9th Cir. 1979). Any conflict must be “actual” and not “speculative.” 12 *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003). 13 The court finds that Anders and Walburger are adequate named representatives for both 14 the effective accommodation class and the equal treatment class. Both named plaintiffs recognize 15 the remedy both classes seek is the enforcement of Title IX at Fresno State for all women athletes 16 and not the reinstatement of the women’s lacrosse team. As Anders testified in her 2022 17 deposition, “the thing that I would like to see most come out of this [case] is just overall the 18 general fair treatment of everybody and . . . for Title IX to be a main priority of the schools.” 19 Bryant Decl. Ex. 2 (Anders Dep.) at 62, ECF No. 165-4. Similarly, Walburger desires “Fresno 20 State [to] become[] [sic] in compliance with Title IX” Bryant Decl. Ex. 3 (Walburger Dep.) 21 at 49, ECF 165-5. Further, both understand the main point of the case is to obtain an order that 22 Fresno State stop discriminating against women athletes and come into compliance with Title IX. 23 See Anders Decl. (Aug. 30, 2022) ¶ 6; Walburger Decl. (Aug. 30, 2022) ¶ 6. Finally, both 24 plaintiffs have shown the capacity to pursue this action vigorously. Anders has stated she is 25 inspired by her mother to “fight for what’s right” and hopes to provide “an environment at Fresno 26 State [where] everyone is going to be treated equally.” Anders Dep. at 61. Walburger, similarly, 27 // 1 wants to ensure that what she alleges happened to her does not happen to any other female 2 athletes at Fresno State. Walburger Dep. at 47. 3 Fresno State argues the named plaintiffs are not adequate representatives because they 4 have “repeatedly testified they have no knowledge whatsoever concerning the treatment and 5 benefits of any other women’s athletic team.” Response at 23. Yet as plaintiffs point out, class 6 representatives are not required to have knowledge of all the facts of the litigation. Pls.’ Reply at 7 12. Instead, “[t]he threshold of knowledge required to qualify a class representative is low; a 8 party must be familiar with the basic elements of her claim . . . , and will be deemed inadequate 9 only if she is startlingly unfamiliar with the case.” *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 10 611 (N.D. Cal. 2004) (internal marks and citations omitted). Here, both Anders and Walburger 11 show an adequate awareness of the claims and proposed remedies in the case. 12 3. Class Counsel 13 As with the adequacy test for named representatives, when determining adequacy of class 14 counsel, courts examine whether counsel have conflicts of interest and if counsel will prosecute 15 the action vigorously on behalf of the class members. See *Sali v. Corona Reg’l Med. Ctr.*, 909 16 F.3d 996, 1007 (9th Cir. 2018). In addition, under Rule 23(g), courts determine whether class 17 counsel are “qualified, experienced, and generally capable to conduct

the litigation[.]” Id. 18 (internal marks and citations omitted). 19 The court finds Clarkson Law Firm and Caddell & Chapman meet the adequacy standard 20 of Rule 23(a)(4) and appoints Clarkson as class counsel and Caddell & Chapman as co-counsel 21 under Rule 23(g). The court finds no conflict that would prevent either law firm from 22 representing the classes of plaintiffs in this case. Moreover, as plaintiffs point out, these class 23 counsel have briefed responses to multiple challenges to the pleadings and have sought class 24 certification multiple times already in this litigation. See Pls.’ Reply at 12–13. They have 25 litigated a Rule 23(f) appeal to the Ninth Circuit and successfully argued for a reversal of a 26 previous denial of class certification. See id. They have an in-depth familiarity with the case. 27 Class counsel is qualified to pursue this litigation. Arthur Bryant, the head of Clarkson’s 28 Title IX practice, has litigated sex discrimination claims since 1983, including a large number of 1 complex Title IX cases in which he has represented female athletes. See Bryant Decl. Ex. 4 2 (Clarkson Firm Resume), ECF No. 165-6. Carey Alexander and Neda Saghafi, who work under 3 Bryant, have both handled complex litigation as well. See id. Michael Caddell and Cynthia 4 Chapman of Caddell & Chapman have significant experience in complex class actions. See

5 Mem. at 18. Bryant, Caddell and Chapman have been with the case from the beginning and, 6 given the time they have spent on the case and their deep familiarity with it, they clearly are 7 willing to expend the resources needed to keep pursuing the action. 8 Fresno State makes a variety of arguments suggesting the proposed class counsel have 9 conflicts that prevent them from adequately serving in this litigation. See Response at 23–27. 10 First, Fresno State argues the proposed counsel has acted to the detriment of the general class of 11 female athletes by also seeking to certify a subclass comprised only of women’s lacrosse players.

12 Id. at 24. As plaintiffs point out, however, this court expressly allowed plaintiffs’ counsel to 13 make such a motion. See Order (Nov. 22, 2022) at 18–19. Further, plaintiffs are not currently 14 seeking to certify a women’s-lacrosse-players-only subclass, so there is no potential for a current 15 conflict in that respect. See Joint Status Rep. at 2. Second, Fresno State argues proposed counsel 16 are more concerned with receiving high fees than with litigating on behalf of the classes. See

17 Response at 24–25. Fresno State asserts the proposed counsel improperly allowed third parties to

18 pay for fees, prevented Anders from obtaining an individual settlement without the approval of 19 counsel and improperly engaged in fee sharing with other attorneys without the consent of the 20 named plaintiffs, all activities that would help drive up the costs of litigation. See id. 21 In response to Fresno State’s ethical objections, plaintiffs have obtained a declaration 22 from an ethics expert, David Parker. See Parker Decl., ECF No. 169-6. At oral argument, Fresno 23 State clarified it does not object to the declaration. Parker has been a member of the Los Angeles 24 County Bar Association Committee on Professional Responsibility and Ethics for the last 25 25 years. Id. ¶ 3. As Parker points out, the earlier agreement between Anders and Bryant, when 26

Bryant was working for Bailey & Glasser, does not allow third parties to pay for fees only to 27 advance costs. See Bailey & Glasser Agreement. There is no ethical violation arising from third 28 parties advancing costs. See Parker Decl. ¶ 15 (noting that neither California Rules of 1 Professional Conduct Rule 1.8.6 nor any other California Rule of Professional Conduct bars third 2 parties from advancing costs). Moreover, the current agreement between Anders and Clarkson 3 makes no reference to third parties. See Clarkson Representation Agreement. Second, Parker 4 notes plaintiffs' counsel are not explicitly preventing Anders from settling. Id. ¶ 16. They did 5 create an exception to the fee waiver, see Clarkson Representation Agreement, but there is 6 nothing unethical about such a waiver in the class action context, see id. ¶ 16. Finally, Parker 7 notes there is nothing unethical about plaintiffs' fee-sharing agreements provided the attorneys 8 disclose the division and obtain consent from the client, and do not increase the overall fees as a 9 consequence. Id. ¶ 17. In any event, Parker notes that fee-sharing provisions are more relevant 10 "in the context of a classwide settlement" than they are in the class certification context, as a "fee 11 sharing agreement merely presupposes a settlement or other recovery." Id. 12 The court finds Parker's declaration compelling and plaintiffs' arguments persuasive. The 13 court expressly finds there are no relevant conflicts. The third-party provision is not in the 14 current contract and, provided counsel fully discloses the nature of the fee arrangement, lawyers 15 can make exceptions to a fee waiver. The court agrees that fee divisions are likely immaterial to 16 the class certification context and, because Fresno State has not cited to any cases that suggest or 17 hold otherwise, the court will not consider fee sharing agreements in determining class counsel 18 adequacy. 19 Finally, Fresno State argues proposed counsel are not adequate because they are unlikely 20 to prosecute the case vigorously. See Response at 26. Fresno State's main argument is that 21 plaintiffs have not been able to progress in the litigation, and it is their lawyers' fault. See id. But 22 for the reasons stated above in the court's dismissal of plaintiffs' motion to dismiss, the court is 23 not persuaded. Plaintiffs have met the court's deadlines and successfully litigated an appeal at the 24 Ninth Circuit. See generally Background. Any lack of progress is not the lawyers' fault. Fresno 25 State also argues the Clarkson firm is inadequate because a district court in the Northern District 26 of California determined the firm was inadequate in an earlier class action, *Kaur v. Things 27 Remembered*. See id. Plaintiffs respond that while an attorney who eventually came to be 28 employed at the firm worked on the Northern District case, he did not start at the firm until after 1 the case was decided. See Pls.' Reply at 15. Clarkson Decl. ¶¶ 3–6, ECF No. 169-2. Even if this 2 attorney had been working at Clarkson, he is not named as counsel for this action. The court is 3 unpersuaded that Kaur has any relevance to this litigation. Finally, Fresno State argues Caddell 4 & Chapman has been inadequate as counsel because lawyers in the firm did not file motions or 5 respond to motions while Arthur Bryant was transitioning to a new firm in the summer of 2024.

6 Response at 27. But here too, the court is unpersuaded. Caddell & Chapman have appeared on 7 all the dispositive motions in this now four-year-old case and generally have demonstrated 8

diligence. See, e.g., Pls.’ Renewed Mot. Class Cert., ECF No. 94. 9 Plaintiffs have therefore satisfied the four prerequisites of Rule 23(a). The court turns 10 next to the requirements of Rule 23(b). 11 C. 23(b)(2) 12 Plaintiffs seek certification under Rule 23(b)(2). To satisfy Rule 23(b)(2), “it is 13 sufficient . . . that class members complain of a pattern or practice that is generally applicable to 14 the class as a whole.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010), abrogated on 15 other grounds as recognized by *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1199 (9th Cir. 2022). 16 “The fact that some class members may have suffered no injury or different injuries from the 17 challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2).” 18 *Id.* There is no “freestanding administrative feasibility prerequisite to class certification,” 19 particularly when plaintiffs seek certification under Rule 23(b)(2). *Briseno v. ConAgra Foods, 20 Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017); see also, e.g., *Campbell v. Facebook Inc.*, 315 F.R.D. 21 250, 259 (N.D. Cal. 2016) (finding “ascertainability” to be irrelevant to Rule 23(b)(2) analysis). 22 The court finds both of plaintiffs’ proposed classes meet the requirements of Rule 23 23(b)(2). Both classes comprise current and future female students at Fresno State who seek to 24 participate in intercollegiate athletics. See Mem. at 8. Both classes seek the same remedy: that 25 Fresno State abide by Title IX. See *Anders Decl.* (Aug. 30, 2022) ¶ 6. Fresno State’s alleged 26 wrongdoing, further, is a pattern or practice that is generally applicable to both classes, as female 27 students who do play or who desire to play sports at Fresno State will be impacted if Fresno State 28 fails to effectively accommodate women’s sports teams and treat women’s teams equally with 1 men’s teams. See generally SAC. Some members of the proposed class—perhaps those who 2 desire to play intercollegiate varsity athletics but would not make the team under any condition— 3 may not be injured or may suffer only slight injuries in comparison to others—those, for example, 4 who are currently playing women’s sports at Fresno State. But disparities such as these do not 5 prevent this court from certifying a class under 23(b)(2). See *Rodriguez*, 591 F.3d at 1125. 6 Fresno State argues in response the two classes fail because they are not ascertainable. It 7 asks this court to address the issue, as, it says, “[t]his court has yet to rule on Fresno State’s 8 arguments concerning the ascertainability of the proposed classes.” Response at 15 n.5. District 9 courts within the Circuit have long refused to apply an “ascertainability” standard in Rule 10 23(b)(2) cases, see, e.g., *Campbell*, 315 F.R.D. at 259, and the Ninth Circuit has held in a binding 11 opinion that “ascertainability” is not a requirement under Rule 23, see *Briseno*, 844 F.3d at 1133. 12 All that is required is that plaintiffs meet the demands of Rule 23(a), 23(g) and Rule 23(b). As 13 noted above, the court finds plaintiffs have met these requirements, and that their two classes and 14 counsel should be certified. 15 The court certifies plaintiffs’ effective accommodation class and its equal treatment class 16 and approves the Clarkson Law Firm and Caddell & Chapman as class counsel.

17 IV. CONCLUSION

18 For the reasons stated above, the court denies Fresno State’s motion to dismiss and grants 19 plaintiffs’ renewed motion for class certification. A status conference is set for April 10, 2025 at

20 2:30 p.m. The parties shall meet and confer and file a joint status report with a proposed 21
schedule for the case moving forward into the merits phase no later than fourteen (14) days before
22 the status conference. 23 This order resolves ECF Nos. 151 and 165. 24 IT IS SO ORDERED.
25 DATED: March 7, 2025.

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