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PRELIMINARY STATEMENT

Quinnipiac demonstrated at the hearing that it now complies with the obligation to fully and effectively accommodate the interests and abilities of its female student athletes under Title IX. The July 2010 injunction, therefore, should be lifted.

First, Quinnipiac provides substantially proportionate athletic participation opportunities for females under Prong I of the Three-Part Test, through the addition of women's varsity golf and rugby teams, and the continued support of the acrobatics and tumbling team (formerly "competitive cheer"). Golf, an NCAA championship sport, and rugby, an NCAA emerging sport, both unquestionably count as sports within the meaning of OCR's 2008 Dear Colleague Letter. Acrobatics and tumbling also counts as a sport, as it now meets all the factors in that letter that the Court found lacking in its 2010 decision.

Second, Plaintiffs' general attack on Quinnipiac's carefully maintained roster management program is unsupported by any evidence. There is similarly no basis for their questioning of Quinnipiac's methodology for counting participants.

Third, both rugby and acrobatic and tumbling athletes competed against high level opponents that were fully equal to their abilities. Quinnipiac's addition of these two new and emerging sports for women is consistent with the so-called "Competition Test" as it has been applied historically by OCR. Furthermore, that test needs to be interpreted and applied in light of OCR's stated intention to encourage schools to add new sports for women, which often compete out of necessity below the Division I championship level.

Fourth, Quinnipiac was not obligated to assess the interests and abilities of its students before deciding what new sports to offer, contrary to the discredited testimony of Dr. Donna Lopiano.

ARGUMENT

I. QUINNIPIAC SATISFIES PRONG I OF THE THREE-PART TEST

A. The Acrobatics and Tumbling Team Counts

In its July 2010 Decision, this Court recognized that it must determine whether an activity counts as a sport based on the factors set out in OCR's 2008 Dear Colleague Letter. *Biediger v. Quinnipiac University*, 728 F. Supp. 2d 62, 94-95 (D. Conn. 2010). The Court set out four factors the acrobatics and tumbling team then lacked – (1) off campus recruiting; (2) consistent rules governing team's competitions; (3) consistent types of opponents during the regular season, and (4) adequate post-season competition. *Id.* at 99-100. The undisputed evidence is that Quinnipiac's acrobatics and tumbling team now meets every one of these factors.

First, with respect to off campus recruiting, Coach Mary Ann Powers testified that she conducted off campus recruiting beginning in the summer of 2010. (Tr. 315-16) Coach Powers recruited through various methods, including, among other things, contacting high school and club coaches and athletes in gymnastics and all-star cheer, hosting clinics, attending all-star and high school competitions, attending a gymnastics showcase, hosting official visits, visiting gyms, and reviewing videos submitted by prospective recruits. (Tr. 316-30)

Second, the evidence also established that Quinnipiac's acrobatics and tumbling team and all of its opponents compete under detailed and uniform rules set by the National Collegiate Acrobatics and Tumbling Association ("NCATA"). (Tr. 221-34, 242-49, 252-59, 261-67, 279, 330-32, 338-42; Exs. IA, IB, IC, IF, IG.)

Third, Quinnipiac's team competed exclusively against other collegiate varsity teams that were members of the NCATA. In the 2011-12 season, the NCATA had four NCAA Division I members (Quinnipiac, Oregon, Baylor, and Maryland), one NCAA Division II member

(Fairmont State) and one NAIA member (Azusa Pacific, which is transitioning to NCAA Division II). (Tr. 284-85)

Fourth, the Quinnipiac acrobatics and tumbling team competed in the national championship sponsored by the NCATA in 2010-11 and 2011-12. (Tr. 222, 349, 390) The national championship uses a bracket tournament format in which the teams are seeded according to their regular season results and compete in three rounds of single-elimination competition using the same meet format as in the regular season. (Tr. 249-51, 296-97) The NCATA also sponsors event finals in each of the component events in which the top four teams, based on regular season scores, compete. (Tr. 250)

Plaintiffs do not even argue that the team fails to meet any of the factors in the 2008 Letter or those set forth by the Court in its Decision. Indeed, Plaintiffs' expert witness, Dr. Lopiano, acknowledged in her book manuscript that acrobatics and tumbling (like cheerleading-based Stunt) satisfies the OCR requirements of a competition structure under a uniform set of rules and a national championship.¹ (Tr. 953; Ex. KM) Instead, Plaintiffs assert that the team does not count because it is not formally recognized by the NCAA or OCR. There is no such requirement. Although NCAA sponsored sports are entitled to a presumption that they count under Title IX, the very purpose of the 2008 Letter was to create a rubric for assessing whether an activity that is not recognized by the NCAA or NAIA qualifies as a sport under Title IX. As OCR made clear in its amicus brief in 2010, furthermore, it is up to this Court to apply the factors and make a determination. Contrary to Plaintiffs' suggestion, OCR does not provide advisory opinions as to whether an activity counts as a sport. (Tr. 130, 269) Thus, the

¹ Dr. Lopiano admitted that she had no knowledge as to whether Quinnipiac met the other factors identified in the Court's 2010 decision. (Tr. 950-51)

lack of express approval by the NCAA or OCR does not alter the Court's role in determining whether acrobatics and tumbling counts as a sport.

B. The Rugby Team Counts

There can be no dispute that rugby counts as a sport for purposes of assessing proportionality under Prong I of the Three-Part Test. Rugby is recognized by the NCAA as an emerging sport and thus enjoys a presumption under the 2008 OCR Dear Colleague Letter that it counts as a sport for purposes of Title IX. Plaintiffs do not appear to dispute that Quinnipiac's rugby team is a sport. Indeed, Plaintiffs' expert, Dr. Lopiano, conceded that rugby is a sport within the meaning of the 2008 Letter. (Tr. 859, 930)²

Plaintiffs' principal argument concerning rugby is that the team competed against six collegiate club teams in 2011-12 in addition to four matches against varsity teams. This argument appears to be addressed solely to Quinnipiac's compliance with the separate "Competition Test," which is discussed below. Even if considered in connection with the definition of a sport under the 2008 OCR Letter, however, for the reasons discussed below, this mix of varsity and collegiate club competition would not be sufficient to overcome the presumption that rugby is a sport.

C. Quinnipiac's Count of Participants Is Correct

There is no merit to Plaintiffs' broad challenge of Lamar Daniel's participant count as unreliable, or their specific dispute as to the counting of two rugby athletes and 13 members of the indoor and/or outdoor track and field teams.

² Dr. Lopiano admitted that her assertion that the rugby team was a club team was based solely on the fact that it competed against club teams, and that the team was treated as a varsity team in all other respects. (Tr. 930)

1. *Plaintiffs' Unsupported Generalized Attacks Are Meritless*

Plaintiffs make generalized claims about Quinnipiac's record keeping and roster management, asserting that the Court should appoint an auditor to oversee the University's practices. Plaintiffs offer absolutely no support for their claims and cannot point to any evidence of roster manipulation from the 2009-10 academic year to the present. (Ct. Ex. 1 ¶¶ 1-3; Tr. 908-09) All of the evidence demonstrates that Quinnipiac has continued its careful process of roster management overseen by Dr. Mark Thompson. (Tr. 25-33; Exs. HA, HB, HC, HD, HE, HF, HG, HH, HI)

In an effort to raise some question about Quinnipiac's counting of athletes who practiced, but may not have competed, Dr. Lopiano claimed for the first time when she testified (on the last day of trial) that the University violated an NCAA rule by not maintaining individualized practice logs that reflect each student who practiced on each day. (Tr. 840) There was no evidence, however, of any athlete being counted as a participant who did not regularly practice with a team, despite Plaintiffs' having deposed the head coach of every team, and reviewed complete records of squad lists, roster management forms, and all related email correspondence.³

Dr. Lopiano also questioned at trial the counting methodology used by Mr. Daniel – for example, including as participants a number of acrobatic and tumbling athletes who were receiving athletic financial aid but left the team before the first day of competition. Dr. Lopiano, however, did not question counting these same athletes in her expert report and specifically agreed at her deposition that Mr. Daniel's count of the acrobatic and tumbling team was correct.

³ The rule Dr. Lopiano cited does not necessarily require such individual records. It is designed to prevent athletes from practicing more than the maximum time allotted – thus, coaches make individualized records when an athlete receives personal or group coaching *in addition* to the team's regular practices, but coaches are not required to take attendance at regular team practices. Notably, Plaintiffs failed to ask compliance officer Tracey Flynn anything about this rule when she testified about the practice logs that Quinnipiac's coaches do maintain. (Tr. 728-29)

(Tr. 903-05) Further, Mr. Daniel testified that he applied the same criteria for counting participants to both men's and women's teams, and followed the same methodology and rules he applied during his 20 years in performing Title IX investigations at OCR and some 15 years as a private consultant. (Tr. 200)

2. *Plaintiffs' Challenges to Specific Rugby and Track and Field Athletes*

(a) Rugby

Plaintiffs question Mr. Daniel's counting of two rugby athletes – Molly Mahoney and Jaren Johnson– as participants. Following tryouts, these athletes were added to the roster in September 2011 and practiced with the team throughout the season. (Ex. HR; Tr. 621-23) They were cleared for competition by the NCAA before the team's match against Stony Brook on October 23, 2011. (Tr. 621-23; Ex. JP) Coach Rebecca Carlson explained why she decided to hold both of them out of the competition for the final three matches of the season. (Tr. 621-23) OCR's 1996 Clarification makes clear that athletes "who practice but may not compete" count as participants. Athletes who are added to a team after the first day of competition, who practice with the team and receive varsity benefits during the traditional season are properly counted as participants, regardless of whether they compete, as this Court held and Dr. Lopiano herself recognized in 2010. (Ex. 201-D (Lopiano Supplemental Report at 3, ¶ 6); *see also Biediger*, 728 F. Supp. 2d at 70, 111 (finding that men's ice hockey player who rejoined the team during the season and practiced but did not compete should have counted))

(b) Track and Field Athletes

Plaintiffs challenge 13 track and field athletes who were counted by Mr. Daniel as participants although they did not compete in the indoor and/or outdoor track seasons. As shown in the summary chart attached as Exhibit A, ten of these athletes did not compete due to injury or

because they were healthy red-shirted for strategic reasons. Each of them participated in team practices, attended team meetings, travelled to meets and otherwise fully participated in team activities while rehabilitating. (Tr. 536-54) All but one of the injured or red-shirted athletes competed on the track team in prior seasons (Exs. JK, LI (Exs. AE, AJ, AR)) (and the one who did not was a freshman in 2011-12), demonstrating that they were bona fide members of those teams who would have competed but for injury or the coach's decision to red-shirt them. Indeed one of the athletes challenged by Plaintiffs, Hannah Donadio, was the captain of the indoor and outdoor track teams. (Tr. 540) The evidence established that there was no requirement that any of these athletes remain on the teams. (Tr. 22-23, 710-11, 716, 792-93; Exs. HK, HM) Every athlete who was a member of the indoor or outdoor track and field teams chose to join those teams. (Tr. 793)

Plaintiffs' claim that injured track and field athletes do not receive benefits beyond those that they would have received as off-season cross-country athletes is simply inaccurate. An off-season cross-country athlete could not practice with the indoor or outdoor track team, travel to team meets, attend team meetings, and otherwise participate as a member of the track team, without being on the indoor or outdoor track team roster. (Tr. 532-33, 557-58) As is common among schools that sponsor all three running sports, Quinnipiac does not hold practices for its women's running teams after the championship season is over in each respective sport. Moreover, Plaintiffs' argument is inapplicable to five injured or red-shirted athletes whom Plaintiffs seek to exclude and who were not even on the cross-country team. (*See Exhibit A*)

The other three track and field athletes challenged by Plaintiffs were on the indoor track team as of the first day of competition and practiced with the team throughout the fall semester, but left the team thereafter. Two of the athletes (Martha Alvarez and Paige Pallotto) had been

members of the track team and competed in 2010-11, but decided to leave the team for personal reasons following the winter break in January 2012. (Tr. 536-37, 545-46; Ex. JK) The other athlete (Taylor Strode) left the team in January when it was determined that the NCAA would not clear her eligibility. (Tr. 552-53; Ex. HR) They clearly meet the OCR definition of participant, as Dr. Lopiano recognized in her 2010 report. (Ex. 201-D (Lopiano Supplemental Report at 2, ¶ 4))

II. QUINNIPIAC SATISFIES THE COMPETITION TEST

Because Plaintiffs are unable to point to any evidence that Quinnipiac fails the Three-Part Test that was the sole focus of the June 2010 trial, they turn their attention to a new claim based on the Two-Part Competition Test. That test looks to whether the competitive schedules for men's and women's teams, on a program-wide basis, offer proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities. Quinnipiac meets that test, as it has been historically applied by OCR, and as it must be understood today in the context of OCR's present goal of encouraging schools to add new and emerging sports.

A. Language and Background of the Competition Test

In explaining the obligation to effectively accommodate the interests and abilities of male and female athletes, the 1979 Policy Interpretation states that "institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities."

(Emphasis added) After describing the familiar Three-Part participation test, the Policy Interpretation states that compliance will also be assessed by examining:

- (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

- (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

The Policy Interpretation goes on to state that OCR will look at the following factors when determining compliance:

- a. Whether the policies of an institution are discriminatory in language or effect; or
- b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or
- c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

(1979 Policy Interpretation at VII.C.6.) (Emphasis added) The second factor expressly looks to whether any disparities are both substantial and unjustified.

As Mr. Daniel explained, the Competition Test was developed by OCR at a time when there was no uniformity in the competitive opportunities for men's and women's teams. (Tr. 123, 185, 216; Ex. HZ at 5) Thus, the Competition Test was designed to prevent schools from providing NCAA Division I level competition for men's teams while relegating women's teams to less than the highest available competitive level. (Tr. 123, 185, 216; Ex. HZ at 5) The Competition Test has become virtually irrelevant in recent years as the type of intentional discrimination it was designed to address has largely disappeared due to NCAA rules requiring that both men's and women's teams compete at the same division level, where such competition is available. (Tr. 122-23; Ex. HZ at 5) Even when that test came into play, however, it was considered secondary to the Three-Part participation test. (Tr. 202)

B. OCR's Application of the Competition Test

OCR – the same agency that wrote the Competition Test as part of the 1979 Policy Interpretation – later explained how it measures compliance with this test. In OCR's 1990 Investigator's Manual, the agency directs investigators to count the number of competitions each team plays outside of its declared division and compare the total percentage of such competitions for women's teams to the percentage for men's teams. The Manual then provides that investigators should determine whether there are non-discriminatory reasons that explain any discrepancy.

Mr. Daniel, who was a co-author of the 1990 Investigator's Manual, explained that differences of up to five percentage points were generally considered not substantial. (Tr. 93, 126; Ex. HZ at 5) This practice is confirmed by the explanation of the Competition Test by Valerie Bonnette, the other co-author of the 1990 Investigator's Manual, contained in the original NCAA Gender Equity Guide published in 1994 – a publication intended to inform all member schools of their obligations under Title IX and how to comply with this law. (Tr. 93, 125-26, 458; Ex. KB) OCR's second step of looking to whether there are non-discriminatory reasons for any discrepancy in the relative percentage of competitive schedules is called for by the Policy Interpretation's text, which explicitly requires consideration of whether there are justifications for any substantial disparity. As Ms. Bonnette explained in her authoritative treatise on Title IX, competition against lesser division opponents would be justified, for example, where there are no teams at the higher level in a school's normal competitive region. (Tr. 124-25; Ex. HZ at 5 & Ex. B).

The 1990 Investigator's Manual was published by OCR, distributed to OCR investigators, and approved by the acting Assistant Secretary for Civil Rights. (Tr. 93-94, 147)

This Court recognized in the July 2010 decision that “I am bound to defer to OCR’s interpretation of Title IX.” 728 F. Supp. 2d at 92. In particular, the Court recognized that OCR’s 2000 and 2008 Letters deserved deference because “they represent OCR’s interpretation of its own regulations,” and “[a]s a general proposition, courts are to defer to an agency’s interpretation of its own regulation.” *Id.* at 93. Certainly, if OCR’s Dear Colleague letters deserve deference, the 1990 Investigator’s Manual, an official document approved by the agency and distributed to its investigators is entitled to deference.

Numerous other courts have stated that the 1990 Investigator’s Manual is entitled to deference. *See Beasley v. Alabama State University*, 3 F. Supp. 2d 1325, 1335 n.8 (M.D. Ala. 1998) (noting that “courts have repeatedly turned to the instructions provided by the OCR in its Investigator’s Manual” and that “some measure of deference should be accorded to the Investigator’s Manual, which reflects OCR’s interpretation of its own regulations”); *Deli v. University of Minnesota*, 863 F. Supp. 958, 962 (D. Minn. 1994) (“Courts are to accord the . . . Investigator’s Manual substantial deference in determining the appropriate application of Title IX.”); *Cohen v. Brown University*, 809 F. Supp. 978, 988 (D.R.I. 1992) (noting the Investigator’s Manual is an “important guide[] in unraveling the requirements of the athletic regulation”); *see also McCormick v. School District of Mamaroneck*, 370 F.3d 275, 293 n.14 (2d Cir. 2004) (citing to Investigator’s Manual in analyzing application of Title IX); *Cohen v. Brown University*, 101 F.3d 155, 180 (1st Cir. 1996) (same); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 830 (10th Cir. 1993) (same); *Brust v. Regents of University of Cal.*, No. 2:07-CV-1488, 2007 WL 4365521, at *3 (E.D. Cal. Dec. 12, 2007) (same).

While, as the Court observed during the trial, it is possible to read the Competition Test differently based solely on the literal language of that provision, there is no reason to depart from

OCR's long-standing and settled interpretation of that test as contained in the 1990 Investigator's Manual.

C. Application of the Competition Test

As Mr. Daniel explained, Quinnipiac passes the Competition Test, when applied in accordance with the 1990 Investigator's Manual. (Ex. HZ at 5-10; Tr. 123-24) First, the difference between men's and women's competition outside of Division I is not substantial, as it is under five percent. (Ex. HZ at 7; Tr. 122) Even if that difference were considered significant, it is justified by non-discriminatory reasons. (Ex. HZ at 7-9; Tr. 123-24) Quinnipiac decided to expand opportunities for women in athletics by providing new and emerging sports – just as the OCR and NCAA encourage schools to do—and afforded the athletes interested in those sports with the most competitive opportunities available to meet their abilities.⁴

As the Court observed during the trial, the language of the Competition Test literally calls for a comparison of the number of male and female athletes who are afforded similarly advanced competitive opportunities, rather than the number of competitive events for each sex at each competitive level. (Tr. 188) Even if the Court were to look at an analysis comparing the number of male and female athletes competing at various levels of competition, however, the difference remains small. (This analysis is attached as Exhibit B.)⁵ Moreover, even under this alternative

⁴ The second prong of the Competition Test has become largely obsolete. As discussed above, when the Test was included in the 1979 Policy Interpretation, schools frequently provided competition for men's and women's teams at completely different levels. Today, the NCAA requires that a school's male and female teams compete at the same division level so that most schools are no longer in the process of increasing the level of competitive opportunities for women.

⁵ Ms. Bonnette explained in her Title IX treatise that OCR chose not to apply the test in this manner, as the method adopted is "sufficiently accurate for compliance determinations." (Ex. HZ at Ex. B) Furthermore, an analysis that looks *exclusively* at the number of participants on teams that compete against teams outside of Division I – without accounting for the number of competitions against non-Division I teams – would be unworkable. Such an analysis would mean a team that played one or two games against Division II schools (as is permitted, for example, in

analysis, it is still necessary to apply the second step of the test of inquiring whether there are any non-discriminatory justifications that explain the discrepancy. As explained above, there is a non-discriminatory reason for the competitions with non-Division I teams in this case – this competition is typical and necessary for many new and emerging sports.

Furthermore, any application of the Competition Test today should be in a manner consistent with more recent OCR guidance regarding appropriate competition in compliance with Title IX. The 2008 Dear Colleague Letter was intended to provide “clarifying information to help institutions determine which intercollegiate . . . athletic activities can be counted for the purpose of Title IX compliance.” (Emphasis added.) The letter does not limit itself to guidance regarding compliance with the Three-Part Test. Its purpose is to give guidance as to whether or not a sport can be counted for Title IX compliance, which includes compliance with the effective accommodation regulation overall. Indeed, OCR’s 2008 Dear Colleague Letter expressly endorses new sports, explaining its goal of providing schools with information “to include new sports in their athletics programs, such as those athletic activities not yet recognized by governing athletic organizations” and that “[e]xpanding interscholastic and intercollegiate competitive athletic opportunities through new sports can benefit students by creating and stimulating student interest in athletics”

Given the stated purpose of the letter, it makes no sense that a sport could count for purposes of the 2008 Letter and then cause the University to fail the rarely applied Competition Test. A review of the factors in the 2008 Letter relating to competition as applied to Quinnipiac’s acrobatics and tumbling team and rugby team make clear that the competition

basketball) would be treated the same as another team that played its entire schedule at a lesser competitive level.

afforded to those teams is consistent with OCR's guidance and demonstrates Title IX compliance.

The 2008 Letter addresses a number of factors with respect to team preparation and competition, including:

Whether the regular season competitive opportunities differ quantitatively or qualitatively from established varsity sports; whether the team competes against intercollegiate... varsity opponents in a manner consistent with established varsity sports;

In assessing this factor, the Letter identifies the following sub-factors to be considered:

- (1) Whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions;
- (2) Whether the competitive schedule reflects the abilities of the team; and
- (3) Whether the activity has a defined season; whether the season is determined by a governing athletics organization, an athletic conference, or a consortium.

It is important to note that, although the 1990 Investigator's Manual interprets the Competition Test to require an assessment of division level, the 2008 Letter makes no reference to division level. The only consideration of the quality of the competition is whether the competitive schedule reflects the abilities of the team. The 1979 Policy Interpretation itself similarly notes that its goal is for athletes of each sex "to have competitive team schedules which equally reflect their abilities."

There can be no question that Quinnipiac's acrobatics and tumbling team met the first and third factor in that the sport was governed by the NCATA with numerous specific rules relating to number of competitions, length of play and defined season. (Tr. 229-34, 242-49, 252-53, 279, 330-32, 338-42; Exs. IB, IF, IG) Acrobatics and tumbling further met the second factor in that it competed solely against other varsity teams, including three top-tier NCAA Division I schools (Maryland, Oregon and Baylor), one NCAA Division II school (Fairmont State) and an

NAIA school in the process of transitioning to NCAA Division II (Azusa Pacific). This level of competition is fully equivalent to that of numerous NCAA Collegiate Championship sports, which compete on an inter-divisional basis. (Tr. 489-92) For example, NEC conference competition in bowling – a sport which Plaintiffs suggest that Quinnipiac could have added – included Division II and III teams such as New Jersey City, Adelphi and Kutztown. (Tr. 491-92; Ex. LD)

With respect to rugby, the first and third elements are plainly satisfied as the NCAA determines both the minimum and maximum number of contests and defines the competitive season for rugby. (Ex. JX at 17.1, 17.16) With respect to the competitive schedule, the rugby team competed in four varsity matches and six matches against collegiate club teams as part of the Metro New York division of USA Rugby. Competition against club teams is permitted by NCAA rules and is a hallmark of almost all new and emerging sports. (Ex. JX at 20.9.4.3.6; Tr. 123-24, 179-80, 475-76, 478-79; Ex. LI (Deposition of Dr. Athena Yiamouyiannis at 180)) The evidence showed, furthermore, that the collegiate club teams against which Quinnipiac competed are sanctioned by a national governing body, USA Rugby, with detailed rules for eligibility of competitors and certification of coaches and that the teams compete in an organized Metro New York Region conference. (Tr. 587-91; Ex. JO)⁶

⁶ To the extent that Plaintiffs make an issue about the availability of a post-season championship in rugby, the coach and players chose not to participate in the Metro New York post-season playoff in 2011 so that they could compete in additional varsity matches instead. (Tr. 604-05, 691) The 2008 Dear Colleague Letter is clear, however, that post-season competition is not required for an activity to be a sport; the letter asks only if post-season competition exists for the activity, whether it provides an opportunity for post-season competition in a manner consistent with established varsity sports, for example with state, national and conference championship competition. (2008 Dear Colleague Letter at p. 4) USA Rugby, in fact, provides regional and national collegiate championship competition, which are available to Quinnipiac again next year, should it choose to participate. (Tr. 604, 606, 625)

Plaintiffs' expert, Judith Sweet, acknowledged that club competition varies and that in determining a team's level of competition, it is important to examine the nature of the club competition, looking at such factors as the teams against which the club teams are competing, the number of competitions, whether there is a governing body for the sport, whether there is a progressive national championship, quality of coaching, and level of institutional support. (Tr. 484-85, 487) Dr. Lopiano also agreed that competition against collegiate club teams may be scheduled "if such competition is required to meet high quality opponents." (Tr. 955; Ex. KL)

Although acrobatics and tumbling and rugby provide some competition outside of the Division I level, evidence at the hearing showed without any real dispute that athletes on both teams enjoyed advanced competitive opportunities that reflected their abilities. Because the purpose of the Competition Test is to prevent discrimination against women, furthermore, it is important to consider the views of both coaches and athletes as to the quality of competition in determining whether that Test has been satisfied. (Tr. 125-26, Ex. KB at 10)

Rugby Head Coach Rebecca Carlson testified that she chose the competitive schedule based on who would provide the "best competition", and that the competition "absolutely" met the abilities of her team. (Tr. 589, 675) Jacqueline MacLearie, a member of the rugby team, testified that the level of competition "definitely" met the team's abilities. (Tr. 683) The rugby team's record for 2011-12 was three wins, six losses, and one tie. (Ex. JP)

Similarly, Acrobatics and Tumbling Head Coach Mary Ann Powers testified that the level of competition met the abilities of her team members, and indeed, that she "hope[s her team] keep[s] on getting better." (Tr. 347) Athlete Erin Trotman agreed and further testified that "[e]very single team in the NCATA provided . . . a challenge" (Tr. 392) Indeed, despite

success in some individual events, the acrobatics and tumbling team had no wins this past season. (Tr. 347)

D. The Competition Test Should Not Be Used to Thwart the Growth of Women's Sports

By definition, NCAA-recognized emerging sports do not have NCAA championships, and schools sponsoring varsity teams in emerging sports often need to compete against club teams until there are enough varsity teams for a complete schedule of varsity competitions.

(Tr. 123-24, 475-76, 478-79; Ex. LI (Deposition of Dr. Athena Yiamouyiannis at 180))

Similarly, non-NCAA sports may compete against a variety of opponents from different NCAA divisions or other athletic organizations such as the NAIA. For schools that have existing men's and women's championship teams all competing at the same Division I level, therefore, adding a new or emerging sport for women necessarily provides women with some competition that is below the Division I championship level of men's teams. Applying the Competition Test to prevent schools from adding new or emerging sports in these circumstances would thwart the very goal of encouraging these sports. It would ironically convert the Competition Test from a weapon against intentional discrimination into a barrier against expansion of women's athletic opportunities, by forcing schools to add only existing championship sports.⁷

Indeed, Plaintiffs' expert Judith Sweet agreed that if a school could only add NCAA championship sports, that could limit the school's ability to increase opportunities for female athletes. (Tr. 469) Ms. Sweet recognized that in choosing to sponsor a sport, schools would want to sponsor a sport that counts for purposes of Title IX. (Tr. 469-70) She also agreed that

⁷ It is no answer to say that schools can simply add similar competition opportunities for men, since there are no emerging sports for men. Moreover, it would serve as an equal impediment to adding emerging sports for women if a school had to add a varsity men's team that competed against non-Division I or club opponents in order to add a new or emerging sport for women.

“it would be very difficult for schools to sponsor a new sport if teams in that sport [] were permitted to compete only against varsity teams” and that “limiting teams in emerging sports to competition against varsity teams would make it more difficult to expand opportunities for women to participate in those emerging sports.” (Tr. 476-77)

A school that offers a sport and then intentionally fails to allow the women on that team to compete against available opponents that are at a level that is equal to their abilities, while providing such opportunities for men, violates both the letter and intent of the Competition Test. In contrast, a school that provides competition opportunities for women in new and/or emerging sports that meet the abilities of the school’s athletes at an appropriately advanced competition level should be seen as complying with the test. In this way, the underlying purpose of Competition Test can be harmonized with OCR’s goal of encouraging new and emerging sports.

Notably, if Quinnipiac had just added rugby or acrobatics and tumbling – but not both – the University would still have been in compliance with Prong I of the Three-Part Test, and any disparity in levels of competition afforded would have been even less than the relatively small difference that the two teams combined create. This is particularly true with respect to acrobatics and tumbling, which competed against only two non-Division I opponents, both of which were varsity programs. It would be a perversion of Title IX to find that Quinnipiac fails to meet its Title IX requirements because it provided more opportunities for women than required under the Three-Part Test.

Plaintiffs’ argument that Quinnipiac should not be permitted to replace volleyball with rugby or acrobatics and tumbling is misplaced. Quinnipiac added golf, which is a Division I NCAA championship sport. If any sport can be characterized as replacing volleyball, it should

be golf. Accordingly, acrobatics and tumbling and rugby must be viewed as new and expanded opportunities for female athletes, not as a downgrade of opportunities.

Finally, the tiering analysis proposed by Dr. Lopiano has no basis in the 1979 Policy Interpretation or the 1990 Investigator's Manual. It looks to the support provided to teams in areas such as scholarships, recruiting, facilities and coaching – rather than the competition schedule of the teams and their competitive opponents. Dr. Lopiano acknowledged that she had never performed this type of analysis before and that there is no basis for her approach in any OCR guidance or general publication on Title IX. (Tr. 885-86, 892) Dr. Lopiano's analysis is completely irrelevant to the question of whether Quinnipiac satisfies the Competition Test.

III. THERE ARE NO ADDITIONAL TESTS UNDER THE EFFECTIVE ACCOMMODATION REQUIREMENT

OCR has explained in its Policy Interpretation that a school complies with the regulation requiring effective accommodation of athletes' interests and abilities by satisfying the Three-Part Test and the Two-Part Competition Test. As Mr. Daniel testified, there is no need for any additional analysis of how a school chooses which sports to offer. (Tr. 116) Although Dr. Lopiano testified that schools are required to conduct an analysis of the interests and abilities of students before adding a sport, she had previously testified in two other Title IX cases to precisely the opposite. (Tr. 870-75) In addition, Dr. Lopiano conceded that the ability of current students to compete in a sport is not relevant, as most large institutions simply "determine the sports they want to compete in and they recruit interested students from prospective high schools and community populations." (Tr. 875-77; Ex. KK) Furthermore, it is self-evident that Quinnipiac students were interested in competing in both acrobatics and tumbling and rugby. As Dr. Lopiano acknowledged, "the fact that over 30 students showed up for rugby tryouts in 2010 did indicate student interest in the rugby team." (Tr. 877) The coaches of the rugby and

acrobatics and tumbling teams also testified about the interest in these teams. (Tr. 320-22, 329, 574) Moreover, the testimony of athletes Erin Trotman and Jacqueline MacLearie reflect the genuine interests of these students (and their teammates) in acrobatics and tumbling and rugby, respectively. (Tr. 387-90, 677, 679, 683-84) Thus, there is no basis for finding that Quinnipiac was deficient in any respect in how it chose to add new sports.

CONCLUSION

The evidence established that Quinnipiac has taken its obligation to effectively accommodate the interests and abilities of its female athletes seriously, and the purpose of the injunction has been achieved. Indeed, the proportion of opportunities is now overweighted to women. Equitable considerations, therefore, require that the injunction be lifted and that the University be permitted to eliminate the volleyball team.

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PROSKAUER ROSE LLP

By: /s/ Edward A. Brill
Edward A. Brill
Federal Bar No. phv015747
Susan D. Friedfel
Federal Bar No. phv03585
Rebecca Berkebile
Federal Bar No. phv03972
Andrew E. Rice
Federal Bar No. phv05322
Eleven Times Square
New York, NY 10036
Tel: 212.969.3000
Fax: 212.969.2900
ebrill@proskauer.com
sfriedfel@proskauer.com

Attorneys for Defendant

EXHIBIT A

2011-12 TRACK AND FIELD ATHLETES QUESTIONED BY PLAINTIFFS

RUNNERS	CROSS COUNTRY			INDOOR TRACK			OUTDOOR TRACK		
	Competed in 2011-12	Competed in Previous Years	Competed in 2011-12	Competed in Previous Years	Competed in 2011-12	Competed in Previous Years	Competed in 2011-12	Competed in Previous Years	
Alvarez, Martha	-	NA	No	Yes	No	Yes	-	Yes	
Donadio, Hannah	No	Yes	No	Yes	No	Yes	No	Yes	
Donnelly, Christine	Yes	Yes	Yes	No	No	No	No	Yes	
Harvey, Grace	-	NA	No	Yes	No	Yes	No	Yes	
Humphreys, Jillian	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	
Pallotto, Paige	Yes	Yes	No	Yes	No	Yes	-	Yes	
Santandreu, Martha	Yes	Yes	No	Yes	No	Yes	Yes	Yes	
Seitz, Alexandra	-	NA	No	Yes	No	Yes	-	Yes	
Sims, Kayla	-	NA	Yes	NA	Yes	NA	No	NA	
Smith, Rebecca	-	NA	Yes	Yes	Yes	Yes	No	Yes	
Sorrell, Kelly	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	
Strode, Taylor	-	NA	No	NA	No	NA	-	NA	
Szarkowicz, Andrea	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	

LEGEND	
	Healthy Red Shirt
	Injured
	Left Team After First Date of Competition
-	Not Counted in '11-12

Sources: Exs. JK, JL, LI (Exs. AE, AJ, AR); Tr. 536-54.

EXHIBIT B

COMPETITION TEST -- ALTERNATIVE APPLICATION

<u>Women's Team</u>	<u># of Participants</u>	<u>Division I Competitions</u>	<u>Division I Participant Opportunities</u>	<u>Non-Division I Competitions</u>	<u>Non-Division I Participant Opportunities</u>
Acrobatics & Tumbling	36	6	216	4	144
Basketball	15	29	435	0	0
Cross Country	24	7	168	0	0
Field Hockey	22	18	396	0	0
Golf	11	10	110	0	0
Ice Hockey	27	33	891	0	0
Lacrosse	30	15	450	0	0
Rugby	28	3	84	7	196
Soccer	26	17	442	0	0
Softball	16	53	848	0	0
Tennis	11	24	264	0	0
Indoor Track	32	7	224	0	0
Outdoor Track	29	7	203	0	0
Volleyball	14	25	350	0	0
Total (Number)			5081		340
Percent of Total			93.73%		6.27%

5421
100%