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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	**Case No. 4:14-md-2541-CW** **Case No. 4:14-cv-02758-CW** **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS *JENKINS v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION***
THIS DOCUMENT RELATES TO: ALL ACTIONS	Date: June 4, 2019 Time: 2:30 p.m. Judge: Hon. Claudia Wilken

I. INTRODUCTION

The *status quo* in *Jenkins*—a stay—imposes no burden upon any party or the Court. The parties have cross appealed the Court's decision in the Consolidated Action and there are numerous permutations about how the Ninth Circuit could ultimately decide the appeals (including the possibility of remand for additional trial proceedings). At that point, it is possible that legal necessity or the best interests of the *Jenkins* classes will be served by dismissal. It is also possible, however, that following the Ninth Circuit's ruling, the best interests of the *Jenkins* classes will be served by exercising their absolute right, under governing Supreme Court authority, to seek a transfer back to the transferor court in the District of New Jersey, which would then decide any motion in *Jenkins* based on the judgment in the Consolidated Action after the exhaustion of all appeals. Defendants have not advanced any good reason to decide *Jenkins*' fate right now, when the final outcome on appeal in the Consolidated Action is still uncertain.

Defendants' motion to dismiss *Jenkins* should be denied for the following reasons:

First, the same factors that led to the current stay justify the Court maintaining it through at least the Ninth Circuit's decision on appeal. Defendants do not even *try* to identify any harm that they would suffer by preserving the *status quo* and continuing the stay. On the other hand, if the Court were to lift the stay and grant the motion to dismiss, Plaintiffs would lose their right to argue to the court in the District of New Jersey for the application of Third Circuit legal principles that might be in conflict with any potential reversal of the Court's liability finding in the Consolidated Action. *See Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd*, 475 F.3d 1080 (9th Cir. 2007) ("Issue preclusion has never applied to issues of law with the same vigor as to issues of fact.").

Plaintiffs do not dispute that a final judgment has preclusive effect pending appeal. But that is a distinct question from the issue presented by Defendants' motion: does a final judgment that is subject to appeal require dismissal of a second action before that appeal has been concluded?[1] The Ninth Circuit itself has answered that question in the negative. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882-83 (9th Cir. 2007). Courts should avoid the "potential problem[s]" associated with such

[1] ECF No. 1178, Notice of Mot. and Mot. to Dismiss *Jenkins v. National Collegiate Athletic Association*, Case No. 14-cv-02758 at 4.

a dismissal "by delaying further proceedings in the second action pending conclusion of the appeal in the first action." *Id.* In other words, the proper course is to leave the stay in place.

Second, even if the Court were to lift the stay, the next step would be to remand *Jenkins* to the District of New Jersey, not to decide Defendants' premature motion. As the Court previously explained in response to near-identical arguments by Defendants regarding the dismissal of *Jenkins* at the class certification stage, "Under these circumstances, to dismiss a transferred case rather than remanding it would subvert the multidistrict litigation process."[2] Similarly, after Defendants advanced similar arguments following summary judgment, the Court once again stated that "[*Jenkins*] is going to be stayed . . . and sent back to New Jersey."[3] Nothing that occurred at the trial of the Consolidated Action, nor anything in the Court's judgment or injunction, supports a different conclusion now. It is the District of New Jersey that should decide any questions of collateral estoppel and *res judicata* that may arise out of the judgment in the Consolidated Action.

The Court has repeatedly recognized that the *Jenkins* Action should be stayed pending resolution of the Consolidated Action and, thereafter, remanded to the District of New Jersey. There is no reason to change course now: the Court should continue the stay and, when it is ultimately lifted, remand to New Jersey for resolution of any remaining issues in *Jenkins*—to the extent there are any.[4]

II. BACKGROUND

In March 2014, *Jenkins* Plaintiffs filed their antitrust lawsuit against Defendants in the District of New Jersey. Later that year, the United States Judicial Panel on Multidistrict Litigation transferred the *Jenkins* Action to this Court for coordination with what is now known as the Consolidated Action for "pretrial proceedings."[5] From the first case management conference through trial of the

[2] ECF No. 305, Order Granting Mot. for Rule 23(b)(2) Class Certification at 29-30.

[3] May 22, 2018 Pretrial Conference Hr'g Tr. 10:13-14.

[4] Defendants refer to their brief as a "motion to dismiss" in an apparent effort to characterize this eleventh-hour request as an ordinary part of "pretrial proceedings." ECF No. 1178, Defs.' Notice of Mot. and Mot. to Dismiss *Jenkins v. National Collegiate Athletic Association*, Case No. 14-cv-02758 at 8-9. But the deadline to file a motion to dismiss was September 4, 2014, and, as discussed below, given that the Court has already resolved all dismissal motions and the parties' cross-motions for summary judgment, barring a stay, the Court's only remaining duty with respect to *Jenkins* is to suggest remand to the New Jersey District Court.

[5] *See* ECF No. 1, JPML Transfer Order.

Consolidated Action, *Jenkins* Plaintiffs retained their statutory right to be remanded to the District of New Jersey for trial.

For example, at the class certification stage, the Court asked all Plaintiffs to submit a plan regarding the coordination of the Consolidated and *Jenkins* Actions. In a joint brief, lead counsel for Consolidated and *Jenkins* Plaintiffs proposed that they would serve together as co-lead class counsel for the Rule 23(b)(2) injunctive relief classes in both actions, as "[a]ppointing the same co-lead class counsel in both actions will maximize efficiencies for the Court, class members, and Defendants."[6] Plaintiffs also wrote that the cases would continue to proceed "jointly through discovery and all pretrial proceedings pursuant to the Judicial Panel on Multidistrict Litigation's Transfer Order up until they are ready for trial in their respective districts."[7] And to avoid the risk of a "race to *res judicata*," Plaintiffs committed to "seeking a stay of one of the actions before the other is tried."[8] Defendants argued in response that only one class should be certified, based largely upon arguments of *res judicata* and collateral estoppel.[9]

In its Class Certification Order, the Court found that Plaintiffs had alleviated Defendants' concern that certifying classes in both cases would result in "duplicative discovery and duplicative work by counsel." The Court explained that the "Consolidated Plaintiffs and *Jenkins* Plaintiffs [had] alleviate[d] concerns regarding duplication by requesting that lead counsel for each serve as co-lead counsel for all injunctive relief classes, agreeing to serve joint discovery requests and expert reports. . . . Duplication at trial can be mitigated by staying one action while the other proceeds to trial."[10] The Order also made clear that the *Jenkins* matter would ultimately be remanded to the District of New Jersey: "*Jenkins* Plaintiffs repeatedly have asserted their right to a remand to the District of New

[6] ECF No. 291, Consolidated Pls.' and *Jenkins* Pls.' Joint Br. Re Coordination and Impact of Ninth Circuit Ruling at 1. In their motion, Defendants mistakenly write that "Plaintiffs' counsel disclosed that they had reached an agreement that *Jenkins* counsel would act as co-lead counsel in the Consolidated Action" "[a]t the May 22, 2018 trial planning conference," but as the preceding citation demonstrates, this agreement was disclosed and endorsed by the Court back in October 2015.

[7] *Id.*

[8] *Id.* at 2.

[9] ECF No. 300, Defs.' Supplemental Mem. of P. &. A. in Opp'n to Pls.' Am. Joint Mot. for Class Certification.

[10] ECF No. 305, Order Granting Mot. for Rule 23(b)(2) Class Certification at 30.

Jersey for trial. Under these circumstances, to dismiss a transferred case rather than remanding it would subvert the multidistrict litigation process."[11]

The parties later filed cross-motions for summary judgment, which the Court largely resolved in Plaintiffs' favor.[12] In an order scheduling a pretrial case management conference, the Court asked the parties to submit a joint case management statement addressing various trial matters, as well as "a stay of the *Jenkins* case pending the trial of the consolidated case."[13] In the joint statement that followed, Plaintiffs asked the Court to stay the *Jenkins* Action "pending the trial and decision in the consolidated case," while Defendants asked the Court to dismiss or stay *Jenkins*, arguing, once again, that "a trial in the consolidated action undoubtedly will bind the *Jenkins* Plaintiffs under the doctrines of *res judicata* and collateral estoppel."[14] Notwithstanding Defendants' arguments regarding dismissal and claim preclusion, at the subsequent Case Management Conference, the Court stated that *Jenkins* "is going to be stayed, as I take it, and sent back to New Jersey."[15] In a minute order later that day, the Court declined to dismiss the *Jenkins* Action and granted the current stay.[16]

Following a ten-day bench trial and closing statements and arguments, on March 8, 2019, the Court issued its trial judgment in Plaintiffs' favor and issued an injunction.[17] The injunction provided that enforcement would be "stayed pending the issuance of a mandate if a notice of appeal is timely filed."[18] On March 22, 2019, Defendants timely filed their Notice of Appeal, which asks the Ninth Circuit to review the Court's "final judgment, permanent injunction, findings of fact and conclusions of law, order resolving the cross-motions for summary judgment, and all other orders, rulings, and decisions in this litigation."[19] Defendants' appeal is based, at least in part, on the argument that the

[11] *Id.* at 29-30.
[12] ECF No. 804, Order Granting in Part and Denying in Part Cross-Mots. for Summ. J.
[13] ECF No. 816, Order Scheduling Case Management Conference and Hr'g on Mot. to Continue at 1.
[14] ECF No. 818, Joint Case Management Statement at 3. In response to Defendants' suggestion that the Court should dismiss *Jenkins* if it is not stayed, Plaintiffs also wrote, "[Plaintiffs] do not believe there is any basis for dismissal of *Jenkins*, and, in fact, this Court has repeatedly recognized the independent existence of *Jenkins*." *Id.*
[15] May 22, 2018 Pretrial Conference Hr'g Tr. 10:13-14.
[16] ECF No. 829, May 22, 2018 Minute Order.
[17] ECF No. 1162, Findings of Fact and Conclusions of Law; ECF No. 1163, Permanent Injunction.
[18] ECF No. 1163, Permanent Injunction at 4.
[19] ECF No. 1167, Defs.' Notice of Appeal (citations omitted).

Court's decision conflicts with the Ninth Circuit's decision in *O'Bannon* as a matter of law.[20] Two weeks later, Plaintiffs filed a cross-appeal, which is directed at the Court's decision not to enter the broader injunctive relief that Plaintiffs had proposed.[21]

On March 19, 2019, the Court issued an order, instructing the Parties to meet and confer on "how the Court should proceed with respect to *Jenkins*," and then file either a stipulation or briefing on this topic.[22] During the meet and confer process that followed, Plaintiffs explained why they believe *Jenkins* should remain stayed pending resolution of the appeal, Defendants argued that the case should be dismissed, and the parties were ultimately unable to reach an agreement. On April 9, 2019, Defendants filed the instant motion to dismiss, based upon the same arguments of collateral estoppel and *res judicata* that the Court rejected as a basis for dismissing *Jenkins* at both class certification and following summary judgment.[23]

III. ARGUMENT

A. The Court Should Maintain the *Jenkins* Stay Pending the Final Resolution of the Consolidated Action.

The same factors that resulted in the current stay of the *Jenkins* Action equally support maintaining the stay pending resolution of the Consolidated Action appeal. Determining whether to continue a stay mirrors the inquiry into imposing a stay. *See Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979). Courts weigh "competing interests," including "[1] possible damage which may result from the granting of a stay, [2] the hardship or inequity which a party may suffer in being required to go forward, and [3] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *See Pac. States Indus. Inc. v. Am. Zurich Ins. Co.*, No. 18-CV-04064-LHK, 2018 WL

[20] ECF No. 12, Defs.' Mediation Questionnaire, *Shawne Alston, et al. v. NCAA, et al.*, C.A. No. 19-15566 (9th Cir.) ("Defs.' Mediation Questionnaire") at 2.
[21] ECF No. 1175, Pls.' Notice of Cross Appeal; ECF No. 15, Pls.' Mediation Questionnaire, *Shawne Alston, et al. v. NCAA, et al.*, C.A. No. 19-15566 (9th Cir.).
[22] ECF No. 1165, Order Regarding *Jenkins v. National Collegiate Athletic Association*, Case No. 14-cv-02758.
[23] ECF No. 1178, Notice of Mot. and Mot. to Dismiss *Jenkins v. National Collegiate Athletic Association*, Case No. 14-cv-02758.

6106383, at *7 (N.D. Cal. Nov. 21, 2018) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Here, each of these factors favors maintaining the current stay.

First, Defendants have not and cannot plausibly argue that maintaining the stay would cause them any harm. *See Mohebbi v. Khazen*, No. 13-CV-03044-BLF, 2017 WL 1092334, at *2 (N.D. Cal. Mar. 23, 2017) (denying motion to lift stay where movant failed to identify meaningful additional hardship associated with the proposed continuance of the stay). A continued stay would merely keep the *Jenkins* Action on hold, pending final resolution of the overlapping claims in the Consolidated Action. *See Fisher & Paykel Heathcare Ltd. v. Resmed Corp.*, No. 16-CV-2068 DMS (WVG), 2017 WL 3635106, at *2 (S.D. Cal. May 23, 2017) (denying motion to lift stay and noting "mere delay, without more though, does not demonstrate undue prejudice" (alterations and quotation marks omitted)). The stay will not require Defendants to expend further attorneys' fees or other resources.[24] And the Court's injunction from the Consolidated Action is stayed pending appeal.

Depending on how the Ninth Circuit rules, *Jenkins* Plaintiffs might very well stipulate to a voluntary dismissal of the action following the completion of the appeal process. But it is impossible to know that now, and considering the fact that there is not one iota of cognizable harm to Defendants in the interim, there is no reason for the parties—or the Court—to try to plan for or anticipate every possible outcome on appeal. One point, however, is certain: if *Jenkins* remains stayed, Plaintiffs will seek no further action in that matter until after the Ninth Circuit decides the appeal of the Court's trial order in the Consolidated Action.

The second consideration about maintaining the stay—"the hardship or inequity which a party may suffer in being required to go forward"—also weighs squarely in favor of maintaining the stay. Unlike Defendants, who will suffer no harm if the stay is granted, *Jenkins* Plaintiffs face a risk of possible significant harm if the stay is lifted and *Jenkins* is prematurely dismissed. Defendants ask this Court to dismiss *Jenkins* based on this Court's trial judgment, which, according to Defendants, should be reversed based upon, among other things, purported law from the *O'Bannon* decision that

[24] In any event, having to continue to defend a lawsuit is not harm. *Seastrom v. Dep't of Army*, No. C-08-4108 EMC, 2009 WL 585838, at *2 (N.D. Cal. Mar. 4, 2009) ("The mere requirement to defend a suit, without more, does not constitute a clear case of hardship or inequity." (alteration omitted)).

is specific to the Ninth Circuit.[25] And if the Court of Appeals were to reverse the judgment based upon a claimed Ninth Circuit standard of law that is inconsistent with the law of the Third Circuit, *Jenkins* Plaintiffs would retain the right to argue that such a legal ruling should not be followed by the District of New Jersey on remand.

To be clear, Plaintiffs do not dispute that this Court's Findings of Fact at trial (to the extent they are upheld on appeal) will have preclusive effect on the *Jenkins* classes, but "[i]ssue preclusion has never applied to issues of law with the same vigor as to issues of fact." *Af-Cap*, 475 F.3d at 1086. Lifting the stay and dismissing the *Jenkins* Action now would strip Plaintiffs of their ability to argue against the District Court of New Jersey following any adverse Ninth Circuit legal ruling in *Jenkins* that may be inconsistent with Third Circuit precedent.

In such a situation, Ninth Circuit precedent counsels for a stay. Although Defendants briefed many pages about *res judicata* principles, they never once provide a cogent explanation for why a decision that is subject to appeal should be the basis for dismissing another action before that appeal is resolved. Specifically, while Defendants cite *Collins v. D.R. Horton, Inc.* for the proposition that "a final judgment retains its collateral estoppel effect, if any, while pending appeal," *Collins* goes on to counsel courts *against* applying that effect to dismiss a second case based upon a prior judgment that may be altered on appeal. 505 F.3d at 882-83. As the very paragraph Defendants cite goes on to explain:

> ***This rule creates the potential for a collateral estoppel-based judgment based on a prior judgment that is subsequently vacated or reversed on appeal***. Indeed, in some cases, litigants and the courts have collaborated so ineptly that the second judgment has become conclusive even though it rested solely on a prior judgment that was later reversed. In the context of district court litigation, ***this potential problem can be avoided,*** whether ***by delaying further proceedings in the second action pending conclusion of the appeal in the first action***, by a protective appeal in the second action that is held open pending determination of the appeal in the first action, or by a direct action to vacate the second judgment.

Id. (emphasis added) (affirming confirmation of arbitration award where arbitrators declined to give preclusive effect to judgment pending appeal); *see also Pac. Telesis Grp. v. United States*, No. C-93-

[25] *See* Defs.' Mediation Questionnaire ("The issues on appeal include, but are not limited to, whether the district court's decision conflicts with [the Ninth Circuit's] decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).").

20915-JW, 1994 WL 570634, at *2 (N.D. Cal. Oct. 12, 1994) (denying motion to lift stay where resolution of pending appeal "may constitute determinative and controlling precedent applicable to [the] action"). As *Collins* suggests, "delaying further proceedings" by staying the *Jenkins* Action pending resolution of the appeal would "avoid" the "potential problem[s]" associated with dismissing the action based upon a judgment that may be altered. Thus, because of the potential for substantial harm to the party seeking the stay, the second factor that courts in this Circuit consider strongly supports the maintenance of the stay of the *Jenkins* Action.

The third and final consideration relevant to a Court's consideration of a motion to lift a stay—"the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay"—further underscores the propriety of maintaining the *Jenkins* stay pending resolution of the Consolidated Action appeal. On the one hand, maintaining the stay will simplify matters by allowing the parties to wait for the Ninth Circuit's decision and to assess at that point in time what if anything is left to do with the *Jenkins* claims. On the other hand, if the Court were to lift the stay and dismiss the *Jenkins* Action now, the parties may later find themselves litigating complicated (and entirely unnecessary and avoidable) questions of whether and how to vacate a dismissal order, which was based upon the preclusive nature of a trial judgment that was later overturned. *See Pragmatus AV, LLC v. Facebook, Inc.*, No. 5:11-CV-2168 EJD, 2012 WL 381214, at *4 (N.D. Cal. Feb. 6, 2012) (declining to lift stay while patent reexaminations were pending on appeal because decision below could be modified and "result in additional complexities").

In sum, each of the applicable factors support the continuance of the *Jenkins* stay pending resolution of the appeal of the Consolidated Action.

B. When the Stay is Ultimately Lifted—Now or Later—the Court Should Remand *Jenkins* to the District of New Jersey.

Whenever the stay is ultimately lifted, the only step remaining for this Court—assuming that Plaintiffs do not agree that *Jenkins* should be dismissed—will be to suggest that the *Jenkins* Action be remanded to the District of New Jersey. The JPML transferred *Jenkins* to this Court for "pretrial

proceedings."[26] Because "pretrial proceedings have run their course," whenever the stay is lifted, it will be time for *Jenkins* to return to New Jersey to the extent there is a basis or benefit to the Classes of further proceedings in *Jenkins*. *See Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998); *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2017 WL 8676440 (N.D. Cal. Apr. 5, 2017) (granting motion suggesting remand following resolution of summary judgment and *Daubert* motions "since pretrial proceedings are now complete, remand is obligatory"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2014 WL 4729556 (N.D. Cal. Sept. 22, 2014) (entering order suggesting remand following resolution of summary judgment and *Daubert* motions).

This Court has repeatedly confirmed its intent to remand *Jenkins*. At class certification, when presented with the very issues of collateral estoppel and *res judicata* that Defendants repeat in this motion, the Court explained that "*Jenkins* Plaintiffs repeatedly have asserted their right to a remand to the District of New Jersey for trial. Under these circumstances, to dismiss a transferred case rather than remanding it would subvert the multidistrict litigation process."[27] Similarly, following the order on summary judgment, Defendants repeated their arguments regarding collateral estoppel and *res judicata*, and, when discussing the then-upcoming trial at the Case Management Conference that followed, the Court stated, "[*Jenkins*] is going to be stayed, as I take it, and sent back to New Jersey."[28] Nothing about the subsequent trial or judgment supports a deviation from this mandatory procedure.

Further underscoring the importance of remand, the court that controls the second action (*i.e.*, the District Court of New Jersey in *Jenkins*)—not the court that issued the initial order (*i.e.*, the Court's trial decision in the Consolidated Action)—decides questions of collateral estoppel and *res judicata*.[29]

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[26] ECF No. 1, JPML Transfer Order at 3.

[27] ECF No. 305, Order Granting Mot. for Rule 23(b)(2) Class Certification at 29-30.

[28] May 22, 2018 Pretrial Conference Hr'g Tr. 10:13-14; *see also id.* at 41:14-15 ("Just to be clear we are staying the *Jenkins* case pending this trial, not dismissing it.").

[29] *See MK Hillside Partners*, 826 F.3d 1200, 1207 n.7 (9th Cir. 2016) (declining to adopt position that *res judicata* or collateral estoppel would apply to subsequent proceedings or predict the preclusive effect of its holding even though parties agreed that the preclusion doctrines would apply in subsequent proceedings); *see also* 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4405 (2d ed. 2016) ("Ordinarily both issue preclusion and claim preclusion are enforced by awaiting a second action in which they are pleaded and proved by the party asserting them. The first court does not get to dictate to other courts the preclusion consequences of its own judgment . . . .") (citing *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011) ("After all, a court does not usually 'get to dictate to other courts the preclusion consequences of its own judgment. Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court . . . .") (emphasis in original)).

Thus, if and when it is necessary to decide any questions regarding claim preclusion, the District of New Jersey is the court that must make that determination.

The Ninth Circuit case of *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.* is instructive. In *Af-Cap*, a California action had been stayed pending a final decision in parallel litigation in a Texas federal court. The Texas action resulted in a legal conclusion by the Fifth Circuit for which the Northern District of California and, ultimately, the Ninth Circuit declined to apply collateral estoppel. *Af-Cap*, 475 F.3d at 1086. Instead, the court resumed the second action, finding both that the plaintiff "deserve[d] a fresh determination of law" and that issue preclusion should not foreclose the court from "perform[ing] [its] function" of developing the law in the Ninth Circuit:

> Considering whether to grant preclusive effect to a legal determination is constrained in a case like this one where if the rule of issue preclusion is applied we are foreclosed from an opportunity to reconsider the applicable rule, and thus to perform our function of developing the law. This consideration is especially pertinent when as is the case here the issue was determined in an appellate court whose jurisdiction is coordinate with that of our court; and the issue is of general interest and has not been resolved by the United States Supreme Court.

Id. (alterations, citations, and quotation marks omitted) (citing Restatement (Second) of Judgments § 29, Comment i (1982)).[30] Like the Northern District of California and Ninth Circuit in *Af-Cap*, the District of New Jersey and the Third Circuit should have the opportunity to resolve any questions of law and issue preclusion that may be presented following resolution of the appeal of the Consolidated Action. *Cf. Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (Seventh Circuit declines to follow prior ruling of the Northern District of California in favor of Motorola, and reaches different legal conclusion concerning application of the Foreign Trade Antitrust Improvements Act).

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court deny the Motion and maintain the stay of the *Jenkins* Action. In the alternative, if the Court chooses to lift the stay, Plaintiffs respectfully ask the Court to immediately remand the *Jenkins* Action to the District of New Jersey.

[30] *See also GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank*, No. 210CV01 615JHNSHX, 2010 WL 11463182 (C.D. Cal. July 7, 2010), *aff'd sub nom. GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027 (9th Cir. 2012) (articulating similar principles and declining to apply collateral estoppel because it "would have the effect of precluding reargument of questions of law that would be open to challenge by other litigants").

Dated: April 23, 2019

Respectfully submitted,

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatories above.

/s/ Jeffrey L. Kessler
Jeffrey L. Kessler