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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	No. 4:14-md-02541 CW No. 4:14-cv-02758 CW **REPLY IN SUPPORT OF MOTION TO DISMISS *JENKINS v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.*, Case No. 14-cv-02758**
THIS DOCUMENT RELATES TO: ALL ACTIONS	Date: June 4, 2019 Time: 2:30 p.m. Judge: Hon. Claudia Wilken

INTRODUCTION

If there previously was any doubt, Plaintiffs' opposition makes clear that they seek continuation of the stay of the entirely duplicative *Jenkins* action for a single, legally improper purpose—to try to relitigate the same claims in another court if Plaintiffs are dissatisfied with the Ninth Circuit's decision on appeal: "[I]f 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." Opp. at 1.

Of course, under bedrock principles of United States law, now that Plaintiffs (either as named litigants or members of the plaintiff classes) had their day in this Court (where they *chose* to try their claims),[1] they cannot retry the same claims in the District of New Jersey, whether or not there is some difference in governing law in that court. None of the authorities on which Plaintiffs rely supports the relief that they seek—all are inapposite and relate either to the application of *collateral estoppel*, or to general stay principles unrelated to post judgment preclusion. Basic principles controlling the finality of judgments in accordance with the doctrine of *res judicata* mandate the dismissal of *Jenkins* now that judgment has been entered on the same claims asserted by the same parties in the Consolidated Action.

Plaintiffs do not dispute that the claims asserted in *Jenkins* are identical to the claims tried in the Consolidated Action, or that the *Jenkins* classes are identical to (though fewer than) the classes whose claims were tried in that action. To the contrary, Plaintiffs heavily rely on the identity of the two actions in arguing for the bulk of the nearly $45 million in attorneys' fees they seek for the Consolidated Action:

> [T]o the extent that Defendants are attempting to draw a distinction between injunctive-relief work done "in" *Jenkins* and "in" the Consolidated Action, it is a distinction without a difference for the purposes of Plaintiffs' fees motion.
>
> As Defendants themselves have conceded: the "claims in [the] *Jenkins*" complaint are "**identical to**" and "subsumed by" those "asserted in the Consolidated Action," "each of the parties in *Jenkins* . . . were parties in the Consolidated Action," and "the Consolidated Action and *Jenkins* presented identical

[1] *See* Dkt. 818 ("Plaintiffs believe that the *Jenkins* case should be stayed pending the trial and decision in the consolidated case.").

> legal claims and theories." . . . [A]ll of the work and rulings in *Jenkins* overlapped with the work in Alston, and were fully applicable to, and utilized in, the trial of the Consolidated Action because the claims of every single *Jenkins* class member were on trial in the Consolidated case.

Joint Statement of Discovery Dispute Regarding Plaintiffs' Motion for Attorneys' Fees, Dkt. 1184 at 8-9. Plaintiffs also "do not dispute that a final judgment has preclusive effect pending appeal." Opp. at 1.

Given these concessions, it is undisputed that there is nothing left of *Jenkins* to litigate. That action should be dismissed. Plaintiffs have cited no case suggesting that this Court does not have the jurisdiction to do so, and it would be extraordinarily wasteful of judicial resources to remand *Jenkins* to the District of New Jersey, which then would have to familiarize itself with the record from this Court before inevitably dismissing the case under controlling law. Leaving the stay in place would put the Court's *imprimatur* on this wasteful and blatantly improper scheme.

ARGUMENT

I. Entry of Judgment in the Consolidated Action Requires Dismissal of *Jenkins*

It is undisputed that *Jenkins* is entirely subsumed by and duplicative of the Consolidated Action, with all claims having been litigated to judgment on the merits. *See* Dkt. 1184 at 9 ("the claims of every single *Jenkins* class member were on trial in the Consolidated case"). As a result, Martin Jenkins' claims, as well as the claims of all other representative plaintiffs and class members in *Jenkins* (all of whom were plaintiffs in the Consolidated Action), already have been resolved. They are unquestionably precluded as a matter of *res judicata* (claim preclusion).

Despite their admissions that (1) the *Jenkins* claims are exactly the same as those already litigated in the Consolidated Action (Dkt. 1184 at 8); and (2) that "a final judgment has preclusive effect pending appeal" (Opp. at 1), Plaintiffs argue that a continued stay is warranted because they should be permitted to reserve the ability to reargue "issues of law" in another court with potentially different controlling authority, citing *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007) (Opp. at 7). This argument is baseless. *Af-Cap* addressed offensive use of *collateral estoppel*, not the application of claim preclusion. The Ninth Circuit in *Af-Cap* did not

relitigate the same claims that had been decided by the Fifth Circuit as the *Jenkins* plaintiffs propose doing here. The claims of the *Jenkins* plaintiffs already have been tried in the Consolidated Action. They are precluded from retrying any of those claims, whether on the basis of issues of law or fact, in any other court. Claims that have already been decided may not be relitigated in *Jenkins* following decision by the Ninth Circuit in the Consolidated Action—regardless of the substance of that decision. **Claim** preclusion (*res judicata*) applies here, not **issue** preclusion (*collateral estoppel*). For obvious reasons, Plaintiffs cite no case holding that where (as here) a duplicative case barred by claim preclusion exists, it should be stayed pending the appeal of an action raising the same claims between the same parties in which judgment has been entered.

Indeed, courts in this Circuit and others routinely dismiss, on *res judicata* grounds, duplicative actions after the first action has proceeded to judgment, even if the first case is pending appeal. *See, e.g.*, *Mir v. Kirchmeyer*, No. 12-CV-2340-GPC-DHB, 2016 WL 2745338, at *9 (S.D. Cal. May 11, 2016) (granting motion to dismiss claims based on res judicata while appeal to the Ninth Circuit was pending), *aff'd sub nom. Mir v. Levine*, 745 F. App'x 726 (9th Cir. 2018); *Singh v. United States Gov't*, No. 115CV1844JAMACPS, 2015 WL 5817791, at *2 (E.D. Cal. Sept. 30, 2015) (recommending dismissal of "[t]he claims that plaintiff brings here [that] have already been litigated in [*Singh I*] . . . [, which] action was dismissed in its entirety, with prejudice, and is now on appeal to the Ninth Circuit"), report and recommendation adopted, No. 215CV1844JAMACPS, 2016 WL 9736168 (E.D. Cal. Mar. 18, 2016), aff'd, 695 F. App'x 252 (9th Cir. 2017); *Robertson v. Bartels*, 148 F. Supp. 2d 443, 448 (D.N.J. 2001) (holding that because the three factors for res judicata were met, the court "must dismiss a claim that was or could have been raised previously as precluded" and the pending appeal of the judgment to the Third Circuit was "not germane to [the court's] *res judicata* analysis"), *aff'd*, 534 U.S. 1110 (2002); *Banks v. Hayward*, No. CIV.A. 06-1572, 2007 WL 120045, at *4 (W.D. Pa. Jan. 10, 2007) (notwithstanding the fact that an appeal of the first-filed action to the Third Circuit was presently pending, the second-filed suit was barred by the doctrine of res judicata and "must be dismissed"); *Davis v. Med. Univ. of S.C. Physicians*, No. CV 2:15-3043-RMG, 2016 WL 4402823, at *2 (D.S.C. Aug. 17, 2016) (adopting recommendation to dismiss duplicative action while judgment entered in prior-filed action was on appeal).

See also Orion Tire Corp. v. Goodyear Tire & Rubber Co., Inc., 268 F.3d 1133, 1135 (9th Cir. 2001) (discussing dismissal of "a duplicative action" filed in N.D. Ohio that was dismissed on the grounds that the "claims were barred by claim preclusion" while the Ninth Circuit appeal was pending).

Contrary to Plaintiffs' argument, no Ninth Circuit precedent counsels for a stay under the present circumstances. *Collins v. D.R. Horton, Inc.* also involved collateral estoppel (issue preclusion), not res judicata (claim preclusion). 505 F.3d 874 (9th Cir. 2007). Moreover, no stay was issued pending appeal in *Collins*. *Contra* Opp. at 7. *Collins* instead reaffirms the basic principle of law that an appeal does not delay the preclusive effect of a judgment and that the benefits of that policy *outweigh* the risks of later reversal. 505 F.3d at 883 (citing *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988)). At no time in *Collins* does the Ninth Circuit opine on the relative benefits of whether a stay or dismissal better serves provision of preclusive effect because that issue was not before the court. The question presented in *Collins*, which was answered in the affirmative, is whether an appealed district court judgment maintains preclusive effect in a pending arbitration *between different parties*. 505 F.3d at 883. Thus, the *Collins* language quoted by Plaintiffs is mere *dicta* in a distinguishable case. In fact, the language that Plaintiffs quote from *Collins* derives from a treatise cited in the District Court's opinion, and that treatise does not "counsel[] in favor of stay" (Opp. at 7) instead of a dismissal of a duplicative action. That treatise recognizes that the "difficulties are sharply reduced if a second action is dismissed in reliance on the claim-preclusion effects of the judgment that is pending on appeal." Wright & Miller at § 4433. Here, no claim, defense or issue presented in *Jenkins* could potentially avoid preclusion by the future decision of the Ninth Circuit in the Consolidated Action because the *Jenkins* claims are subsumed within the claims in the Consolidated Action. Accordingly, there is no reason to stay the trial or pretrial proceedings for a *Jenkins* action that has no valid, separate legal existence after judgment was entered in the Consolidated Action. [2]

[2] The entire premise of Plaintiffs' opposition rests on a notion that they should be spared from "litigating complicated . . . questions of whether and how to vacate a dismissal order" pursuant to Fed. R. Civ. P. 60(b)(5) in the event the Ninth Circuit reverses judgment in the Consolidated Action. *See* Opp. at 8. But this is a false premise. Even if the judgment in the Consolidated Action

The other cases cited by Plaintiffs are inapposite and do not support deferring dismissal and continuing the stay of *Jenkins*. The stay at issue in *Pac. Telesis Grp. v. United States* (cited at Opp. at 7-8) was continued pending decision by the Ninth Circuit on the constitutionality of a statute in a case brought by a different plaintiff. No. C-93-20915-JW, 1994 WL 570634, at *1-2 (N.D. Cal. Oct. 12, 1994). The actions were not identical, *res judicata* was not at issue, and the court had a vested interest in awaiting determination by the Ninth Circuit that could provide "determinative and controlling" guidance in the case at bar. *Id*. at 2. *Pragmatus AV, LLC v. Facebook, Inc.* also did not involve the issue of *res judicata* or identical actions. No. 5:11-CV-2168 EJD, 2012 WL 381214, at *4 (N.D. Cal. Feb. 6, 2012). That matter was only stayed pending a non-final administrative determination of patent validity by the United States Patent and Trademark Office; it does not stand for the proposition that a legally precluded matter should be stayed pending the appeal of a final determination of a lower court. *Id*.

II. This Court Has the Authority to Lift the Stay and Dismiss *Jenkins* After Entry of Judgment in the Consolidated Action

A significant amount of Plaintiffs' brief is devoted to reminding this Court of the numerous times that Defendants have sought to eliminate the entirely duplicative *Jenkins* action from continuing. Whether or not dismissal should have occurred earlier, now that judgment has been entered in the Consolidated Action, *Jenkins* must be dismissed on *res judicata* grounds. None of this Court's pre-trial pronouncements regarding the status of *Jenkins* justifies continuing the stay now that all of the *Jenkins* claims have been adjudicated on the merits. For the same reason, Plaintiffs' citations to run-of-the-mill stay proceedings do not apply.

Plaintiffs also boldly state that they have an "absolute right" (Opp. at 1) to be remanded to the District of New Jersey, but that is flatly incorrect. This Court has full authority to dismiss the *Jenkins* action at any time prior to trial, and no trial has occurred in the *Jenkins* action. *See, e.g.*, *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 699-700 (9th Cir. 2011) (MDL transferee court has

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is vacated and the case remanded, the result will be further litigation in the Consolidated Action in accordance with the decision on appeal, not revival of the duplicative Jenkins Action. Assuming for the sake of argument that were not the case, the fact that compliance with the procedural requirements of Rule 60 might be "complicated" does not justify maintaining a superfluous action.

authority over all proceedings prior to trial, including dispositive motions). Plaintiffs fail to present any authority suggesting that this Court is without jurisdiction to dismiss *Jenkins* or that this motion, which the Court properly invited, is procedurally untimely. March 19 Order (Dkt. 1165). The Court's initial scheduling Order, directing a date by which motions to dismiss were to be made in response to the operative complaint under Rule 12 (Dkt. 76), does not divest this Court of the responsibility to hear this motion to dismiss *Jenkins* now that judgment has been issued in the Consolidated Action. Obviously, a motion to dismiss *Jenkins* on the present *res judicata* grounds could not have been brought earlier. And, as Plaintiffs' own cases demonstrate, "[a] district court has broad power to manage its calendar efficiently." *Pac. Telesis*, 1994 WL 570634, at 1. That includes determination of when it is most efficient to hear dispositive motions such as the one presently pending.

Plaintiffs' argument that this Court should remand to the District Court of New Jersey if the stay is lifted because it should not get to determine the preclusive effect of its own judgment in the Consolidated Action is not supported by any of the cases cited in footnote 29, as none involves two duplicative actions pending before the same court. The authorities Plaintiffs cite stand only for the limited—and inapposite—proposition that a court should not ordinarily rule on the preclusion of a claim not before it.

In short, there is no purpose to be served by the outcome that Plaintiffs press—a continued stay in this Court until some later date at which time *Jenkins* would be remanded to the District of New Jersey. *See* Opp. at 2 ("the Court should continue the stay and, when it is ultimately lifted, remand to New Jersey").

CONCLUSION

For the foregoing reasons, the Court should dismiss *Jenkins v. National Collegiate Athletic Association, et al*, Case No. 4:14-cv-02758 now, with prejudice.

Dated: April 30, 2019

Respectfully submitted,

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