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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

Case Nos. 4:14-md-02541-CW
4:14-cv-02758-CW

IN RE: NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION ATHLETIC GRANT-IN-AID
CAP ANTITRUST LITIGATION

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' STATEMENT
REGARDING THE DISPOSITION
OF *JENKINS V. NCAA***

THIS DOCUMENT RELATES TO:
ALL ACTIONS

1 Plaintiffs in the above-referenced actions respectfully submit that dismissal *without* prejudice
2 is the proper disposition for *Jenkins v. National Collegiate Athletic Association*, No. 14-cv-02758
3 (“*Jenkins*”). Defendants claim that *Jenkins* should be dismissed with prejudice on res judicata grounds,
4 yet none of the cases they rely upon in their Statement Regarding the Disposition of *Jenkins*
5 (“Statement”) (Dkt. No. 1297)¹ involves the issue of res judicata at all. As Defendants note, the cases
6 *do* stand for the proposition that to justify a dismissal with prejudice, Defendants must identify “some
7 plain legal prejudice” that they will suffer if *Jenkins* is dismissed without prejudice. Statement at 1
8 (quoting *Maxum Indem. Ins. Co. v. A-1 All Am. Roofing Co.*, 299 F. App’x 664, 665–66 (9th Cir.
9 2008)). Yet Defendants have not identified any “legal prejudice” that would befall them in such a
10 scenario.

11 To the contrary, it is Plaintiffs whose rights would be prejudiced if *Jenkins* is dismissed with
12 prejudice before a final resolution of all appeals in the *Grant-in-Aid Cap Antitrust Litigation*, No. 14-
13 md-02541. Such a dismissal could indeed have res judicata effect because it would constitute a final
14 judgment on the merits. Compare *United States v. Bhatia*, No. CR-05-0334-SBA, 2007 WL 2554402,
15 at *6 (N.D. Cal. Sept. 4, 2007) (when a case is dismissed with prejudice, “such a dismissal is viewed
16 as a final judgment on the merits and thus this element of the res judicata inquiry is satisfied”), with
17 *Cont’l Ins. Co. v. N.A.D., Inc.*, 16 F. App’x 659, 661 (9th Cir. 2001) (“A dismissal without prejudice
18 is not an adjudication on the merits and does not have res judicata effect.”). A dismissal with prejudice
19 could therefore produce an inconsistent judgment with the *Grant-in-Aid* litigation—which Plaintiffs
20 have won—while those claims remain on appeal. In order to avoid that outcome and instead best serve
21 the interests of justice and judicial economy, the Court should dismiss *Jenkins* without prejudice.
22 Alternatively, Plaintiffs request that the Court continue to stay *Jenkins* until final judgment in the
23 *Grant-in-Aid* litigation.

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¹ All docket references are to the MDL docket, Case No. 14-md-02541-CW.

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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
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