UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Claudia Wilken, Judge

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION This Document Relates to: ALL ACTIONS	)	No. 14MD02541-CW
MARTIN JENKINS, et al., Plaintiffs, vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	)	No. C 14-02758-CW

Oakland, California
Tuesday, August 2, 2016

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 2:49 - 3:42 = 53 MINUTES

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Thursday, June 30, 2016 2:49 p.m.

P-R-O-C-E-E-D-I-N-G-S

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THE CLERK: Calling civil case numbers 14-02541, In re NCAA Antitrust Litigation, and 14-02758, Jenkins, et al. versus NCAA, et al.

MR. BERMAN: Good afternoon, your Honor. Steve Berman on behalf of the plaintiffs.

MR. KESSLER: Good afternoon, your Honor. Jeffrey Kessler on behalf of the plaintiffs.

MR. SIMON: Good afternoon, your Honor. Bruce Simon on behalf of plaintiffs as well.

MR. MISHKIN: Good afternoon, your Honor. Jeffrey Mishkin, Skadden, Arps, Slate, Meagher and Flom, for the NCAA in both cases.

MR. COOPER: Good afternoon, your Honor. Scott Cooper on behalf of the Pac-12 in both cases.

MS. LENT: Good afternoon, your Honor. Karen Lent also for defendant NCAA.

MR. FULLER: Good afternoon, your Honor. Robert Fuller for the defendant Southeastern Conference in both cases.

MS. MILLER: Good afternoon, your Honor. Britt Miller on behalf of the Big Ten Conference, Inc. in both cases.

MR. CUNNINGHAM: Good afternoon. Mark Cunningham appearing on behalf of the Sun Belt Conference. We are named as a defendant only in the Grant-in-Aid case.

MR. HEYL: Jon Heyl appearing for defendant Atlanta Coast Conference in both cases.

MR. SIEFERT: Good afternoon, your Honor. Mark Siefert on behalf of Southeastern Conference in both cases.

THE COURT: And do the people on the phone want to state appearances, or do you just want to listen?

Either you don't want to state appearances or no one is on the phone, even though a lot of people asked to be on the phone. Is anybody there?

MS. CAPPS (Telephonic): Yes, this is Leane Capps appearing on behalf of the Big 12 Conference, Inc. and Conference USA, Inc.

MR. BLOCK (Telephonic): Good afternoon, your Honor. This is Benjamin Block from Covington and Burling on behalf of American Athletic Conference, a defendant in the Grant-in-Aid litigation only.

THE COURT: Now when you say "Grant-in-Aid litigation" -- I'm calling them Jenkins or the consolidated complaint. So which one are you referring to?

MR. BLOCK: Excuse me, your Honor. The consolidated only.

THE COURT: And is that what the other person who

said that meant?

MR. CUNNINGHAM: Yes, ma'am.

THE COURT: Okay. Go ahead. Anybody else on the phone that wants to state their appearance?

MS. CAPPS: And, your Honor, this is Leane Capps. I apologize. As for Conference USA, I'm only making an appearance in the Grant-in-Aid litigation for that party.

MR. RYCHENER (Telephonic): Good afternoon, your Honor. Brent Rychener here for Mountain West Conference in the consolidated complaint.

THE COURT: Is that it?

MR. SCHENACKY (Telephonic): Good afternoon, your Honor.

MR. CURTNER (Telephonic): Good afternoon, your Honor. I'm Greg Curtner. I'm listening only.

THE COURT: Do it in alphabetical order. Sorry.

MR. SCHENACKY: Good afternoon, your Honor. Ben Schenacky on behalf of the Mid-American Conference on the consolidated complaint only.

THE COURT: Is that it?

MR. THAYER (Telephonic): Your Honor, it's David Thayer on behalf of plaintiffs, listening only.

THE COURT: Okay. So we have defendants' motion to dismiss. I guess you can start since it's your motion.

MR. MISHKIN: Thank you very much. Again, Jeffrey

Mishkin speaking for the NCAA.

Scott Cooper is going to follow me. We're both going to try to be very brief. But he'll speak on behalf of at least certain of the conferences.

Your Honor, the sole claim in the Jenkins case -- and one of only two claims in the consolidated action -- is the assertion that the rule of reason requires the NCAA to permit its member schools to pay student athletes more than the cost of attendance.

In our view, as you know from our papers, we believe that claim has been resolved as a matter of law.

THE COURT: Actually, I guess what I really have is more questions for the plaintiffs than for you. The first question is that one.

MR. MISHKIN: All right. Okay.

THE COURT: And that is, is that really what you're asking for or are you not asking for more than that? I mean I think we could say it's pretty clear that, at least in the Ninth Circuit, money untethered to educational expenses paid on top of cost of attendance can't be required.

But it was my impression that you were asking for a lot of other things to be invalidated besides just the current cost of attendance. And defendants' brief refers only to that.

I guess my first question is what -- are you asking for other things besides that that haven't been addressed perhaps by the Ninth Circuit.

MR. BERMAN: Your Honor, Mr. Kessler and I have divided this argument and he's going to address the issue of what other relief we're seeking.

MR. KESSLER: So, your Honor, we are seeking, as I think you know from the class certification motion, an injunction that would enjoin the current rules and allow the conferences and the schools to adopt a whole host of less restrictive alternatives that could be tethered to education.

And so the issue is, in the Ninth Circuit, they considered two less restrictive alternatives, neither one of which are the ones we're going to be advocating in the record here could be adopted by the schools. And we believe all the ones we're going to advocate which fit within the Ninth Circuit's definition --

THE COURT: Well --

MR. KESSLER: -- of what could be done.

THE COURT: -- but step back a step earlier, which is what are the NCAA rules that you say are anti-competitive and constitute antitrust violations other than the rule that you can't pay more money than the current cost of attendance?

MR. KESSLER: There are a host of rules identified in our complaint, okay, which cover various aspects.

I think the most important answer to your question is that the defendants said there is an old rule claim which was the cost of attendance claim decided in O'Bannon and there's a new rule claim which are the rules in existence today.

We are going after in the injunction the rules in existence today.

THE COURT: Can you give me some examples of things that aren't money untethered to educational expenses?

MR. KESSLER: Yes, your Honor.

THE COURT: Okay.

MR. KESSLER: They would prohibit, for example -- and now I'm going to refer to some of the things.

They would prohibit, for example, having a benefit for athletes to go to graduate school afterwards, which was an educational expense that we think would be permitted.

In fact, in discovery in this case, Oliver Luck, who is the new NCAA director of regulation, said he believes this is something that the rules prohibit which could be allowed tethered to educational expenses. That's one.

Another would be --

THE COURT: That isn't even money.

MR. KESSLER: Yes. But you see, we believe the

Ninth Circuit did not -- what it ruled on --

THE COURT: Right. I'm agreeing with you.

MR. KESSLER: -- was money untethered to it.

THE COURT: Well, and money. Free tuition isn't money --

MR. KESSLER: Right.

THE COURT: -- one might argue.

MR. KESSLER: That's correct. And so we think it could be for graduate school. It could be for work study. It could be for health care while you're at the school or afterwards. It could be for insurance. It could be for a whole host of benefits that in fact since O'Bannon -- and this is important.

Since O'Bannon happened, there's a whole new history of what the model now means because the Power 5 Conferences have come in and said we think there should be a host of new benefits that are consistent with educational objectives and amateurism, but the NCAA currently doesn't allow those.

So our case is to free the conferences to do all this panoply of items.

To give you an example of it --

THE COURT: Well, that was --

MR. KESSLER: Okay. That's sufficient? Thank you.

THE COURT: That's what I wanted to hear you speak

to.

MR. MISHKIN: Sure, your Honor.

THE COURT: It's not just the current ceiling. It's a lot of other hypothetical things that may not be payment untethered to educational expenses.

MR. MISHKIN: Right. The complaint that's before you, at least in the Jenkins case, does not go into anything other than the limitations on payments.

THE COURT: It does. It says something and benefits.

MR. MISHKIN: It does say and benefits, your Honor.

THE COURT: It alludes to various other things, as does the consolidated amended complaint.

MR. MISHKIN: Right, your Honor, but the benefits that I think we've just heard about would be -- additional things like post-graduate, those have to be within the flexibility that -- the Ninth Circuit said this is not about micro-managing.

I understand the -- the only time you're going to get above cost of attendance, it seems to me, and anything that's above cost of attendance that's material is going to be in direct contradiction of the holding that we're permitted to have a rule, that caps it at the cost of attendance.

The only less restrictive alternatives that could be possible were those -- you have to first show that the cost of attendance limit, in the words of the circuit, is patently and inexplicably stricter than is necessary.

Otherwise, you're simply micro-managing in an area where the Ninth Circuit -- apart from the Supreme Court but the Ninth Circuit as well, adopting that part of the Supreme Court's analysis, in Board of Regents said we have to have some flexibility here. This isn't about small issues of what is or is not an appropriate educational expense to be consistent with amateurism.

And I don't think that anything that they're talking about here -- and I think the complaint -- your Honor, I know they use the word "benefit." You're absolutely right about that, but that is not explained in any way. And the kinds of benefits that Mr. Kessler was able to talk about -- which was I think one school that -- a graduate program that is permitted for people who no longer have athletic eligibility. It's only for one semester.

These are small incremental issues that I think clearly are not for an antitrust court. This would require you to get into the most detailed micro-management of how the NCAA goes about -- and the NCAA, the kind of organization it is, it's not easy with all these schools to make these changes.

But an antitrust court, your Honor, should not be

considering and the Ninth Circuit said you should not be considering the kinds of changes that Mr. Kessler has just described and that I don't think are spelled out in any kind of detail in his complaint other than that one word "benefits," which as I said, you're right, that's in there.

THE COURT: Did you want to address any of the other points of your motion briefly before I turn to the plaintiffs?

MR. MISHKIN: I do, your Honor. Just -- yeah, I'll be very quick, but it may be that I should -- the main issue that we've understood is that they say that this is a different case than O'Bannon. I think the clarity of what the Ninth Circuit held really eliminates that.

Yes, of course the O'Bannon case was about name, image and likeness rights. This case is about pay for play. But the restraints at issue are the same.

So the fact that one case was about an NIL and one case is about compensation for athletic performance is a distinction of course but without an antitrust difference, because the antitrust cases are identical. The claims are exactly the same.

With that, your Honor, let me let Mr. Cooper say a few words, and I'll come back if there's anything that I need to address.

Thank you very much.

THE COURT: Okay.

MR. COOPER: Good afternoon, your Honor.

If I understand the Court's statement --

THE COURT: Remind me again who you're representing.

MR. COOPER: The Pac-12 and I'm speaking on behalf of what people refer to as the five conferences, colloquially the Power conferences, the Pac-12.

THE COURT: And is that all of them? Are you speaking for everybody else?

MR. COOPER: I'm speaking for the Pac-12, the SEC, the Big Ten, the Big 12 and the ACC.

THE COURT: And are there other people here who aren't one of those and who are going to be wanting to speak as well?

MR. COOPER: I think Mr. Mishkin is representing the other conferences in the NCAA.

THE COURT: Okay.

MR. COOPER: So I believe between the two of us that we will have covered everyone.

THE COURT: Okay.

MR. COOPER: So my initial point was just to address the issue that Mr. Kessler addressed, and that is this question of whether remuneration is the primary injunctive relief being sought by the complaint.

The Court is correct of course that the words "and benefits" appear in the prayer for relief.

THE COURT: And there's reference to other bylaws and things in both of the complaints, as I recall.

MR. COOPER: That's what I wanted to address.

The bylaws themselves are limits on the potential payments to student athletes. The kinds of things --

THE COURT: There are limits on other things besides potential payments. There are limits on a lot of different things.

MR. COOPER: They all fall under the -- so the way they're structured, the rules are structured to put a cap on the form of compensation or payments, and everything else is an articulation of how those rules are interpreted.

THE COURT: I don't think so. There's more to it than payments. One is playing with a professional team even if you don't get paid. There are things in there that aren't payment of money.

MR. COOPER: Although I don't believe that those are even arguably within the gravamen of the complaints. I believe that --

THE COURT: Well, I think that's how I read it.

MR. COOPER: The complaints refer very specifically and the prayer for relief and in the active portions of the causes of action primarily about

remuneration.

If the Court's ruling on our 12(c) motion is going to be that remuneration and the rules directed to remuneration --

THE COURT: Let's call it cash payments, because I don't know what remuneration exactly means but if you're talking about payment --

MR. COOPER: Well, I was using --

THE COURT: -- of cash money, I would agree with you but --

MR. COOPER: I using the term used in the complaint.

THE COURT: I'm sorry?

MR. COOPER: "Remuneration" is the term used in the complaint.

THE COURT: Okay.

MR. COOPER: So I was making reference to that. But if what we are talking about is any form of payment to the student athletes that is not tethered to the educational expense and if that is no longer part of this case as far as the injunctive relief portion of the case is concerned, then I would submit that an amended complaint directed to whatever else they're claiming would be an appropriate next step in the case for the simple reason that we would no longer know what their focus is.

Just as an example. The rule Mr. Kessler was referring to with respect to the potential of a school for paying for graduate school, just as an example, that does involve, in the instances to which I believe he refers -- to payments. In other words, they are allowed money that goes to graduate school.

THE COURT: No, I would understand it to be free tuition to graduate school once you didn't make it in the NFL or --

MR. COOPER: Not necessarily in the school they're attending.

THE COURT: -- you got injured or whatever, you can go back to Stanford and get your law degree.

MR. COOPER: That's one way.

THE COURT: Tuition free.

MR. COOPER: Another way is they get money toward that so that there are different proposals, right?

THE COURT: That one would be a problem. That one would be a problem. The free tuition perhaps not.

MR. COOPER: And hence my suggestion that an articulation of exactly what it is they're complaining about and how they think that fits within the Ninth Circuit decision would be helpful to us all so that we know the difference between those two.

The one that goes to the question of whether Stanford

can allow tuition-free graduate school is already permitted under the rules. So that -- with respect to that, we're not sure what the challenge would be.

Again, an articulation of exactly what their claims would be if being able to pay student athletes to play sports is off the table because of the Ninth Circuit decision would make a sea change in the litigation. And therefore, we'd like to understand what would be left of their claims.

We think that would be the logical next step. Whether that would be subject to challenge as a matter of fact and law would depend exactly on how they articulate those claims.

We don't think that that's fairly articulated in this complaint because it is directed very specifically at the ability to be able to compensate student athletes for playing their sports, which we believe the Ninth Circuit decision in O'Bannon eliminated as a matter of claim.

THE COURT: Okay. Who wants to speak?

MR. BERMAN: I'll speak first, your Honor. Steve Berman.

THE COURT: I mean I have a couple other areas that I'm interested in that aren't really -- that are things that you raised that I didn't totally follow, and I don't know which of you is in charge of the answers but --

UNIDENTIFIED SPEAKER: We'll both be speaking, so whatever your Honor would like to do.

MR. BERMAN: So the gravamen of the motion is that you fully and fairly litigated the issue of the COA in the O'Bannon case. And I want to just tick off some reasons why I think that that's not the case.

First of all, I was reading the closing argument in the O'Bannon case yesterday. And I think that it was illustrative of why the cost of attendance and what could be done above that was not litigated in that case.

You asked at page 3290 of the transcript --

THE COURT: Well, you're sort of getting into the question of whether there's collateral estoppel, is there stare decisis, should we have judgment on the pleadings or something else. And the way I see it is more like we've got some Ninth Circuit authority on a certain point, and does that Ninth Circuit authority, as in any other kind of case, mean that certain questions of law have been decided and we can't say something different now.

Even if they were decided in a case that wasn't tried as you might have tried it, it was tried and it's the law. So I don't' really care whether it's collateral estoppel or stare decisis or a motion for judgment on the pleadings or a motion for partial summary adjudication of certain legal principles.

The fact is, the Ninth Circuit has said that payment above cost of attendance untethered to educational expenses can't be ordered.

MR. BERMAN: Right, and we're not --

THE COURT: So I don't -- that's just kind of the way it is --

MR. BERMAN: We understand that.

THE COURT: -- with the exception of the possible Third Circuit question, which I would like to get to at some point. But at least with respect to this circuit, that's the law.

So the question is, does that leave anything left of your injunctive relief case and I tend to think it does, for the reasons that Mr. Kessler said earlier, but not money untethered to cost of attendance, some other things that you might -- can think of.

MR. BERMAN: We agree with you.

THE COURT: Okay.

MR. BERMAN: As long as you agree that there's no stare decisis and collateral estoppel on what forms of relief.

THE COURT: Well, there's law, like any other kind of law.

MR. BERMAN: That's right.

THE COURT: There's a case out there that's

binding on me and I'll follow it. I have to.

MR. BERMAN: Right.

THE COURT: Unless the Supreme Court weighs in in the meantime.

MR. BERMAN: But eventually you're going to have to decide whether they're correct that there is stare decisis and collateral estoppel and --

THE COURT: No. I just have to decide whether that case applies to the facts of this case. And if you are presenting something that's indistinguishable from that case, then I would call it partial summary adjudication, I would say, as opposed to any of these other terms. But the point is, certain things have been decided in the circuit, and I can't re-hear those things.

MR. BERMAN: I understand that, but if you look at -- a couple of things.

Number one, the defendants previously told the Court that the injunction sought here is markedly different than the injunction sought in O'Bannon. So they have always viewed this case as different.

And, as Mr. Kessler pointed out, there was no issue in the O'Bannon case of what appropriate forms of non-cash to student athletes could be provided that were tethered to education. That simply didn't come up.

And the focus of that case and the reason I brought out

the transcript was you were asking, why did you go with the NIL theory and not --

THE COURT: Oh.

MR. BERMAN: -- should you pay them more? NIL theory. And the lawyer for the plaintiff said this is a different case.

And the point I want to make is, we filed this case before your trial in O'Bannon. And we came in and had a status conference and a fight for lead counsel with Mr. Hausfeld before your trial.

If the defendants really thought that we were litigating the same issues, do you think they would have said: Well, wait a second. Why are we proceeding with the Alston case when we're litigating that issue in the O'Bannon case?

They didn't. They've produced 1.8 million documents to us that were not produced in O'Bannon.

Now, if I was the defense lawyer and I thought the cases were identical and precluded, I would have moved for a protective order eight months ago and saved my clients a lot of money and time. But they haven't done that.

THE COURT: Don't give them ideas. I expect to see one soon.

MR. BERMAN: And there was one final issue that I thought was telling that the litigations are very different

and that is the following. If you recall, we have a settlement with the NCAA in the name and likeness case.

THE COURT: I'm sorry, settlement what?

MR. BERMAN: In the name and likeness case, right?

THE COURT: Oh, the name and likeness case, uh-huh.

MR. BERMAN: And the relief that was awarded was the following. We made payments to those student athletes based on their appearances in the game. So the relief shows that the case that you litigated was really all about images and likenesses.

THE COURT: Well, actually that's one of my questions. You refer to different evidence, a different case that you would put on and that it is a different case. And my question is, what would be the different evidence?

I mean admittedly the first case was ostensibly pegged to name, image and likeness but what it really was was should they be able to offer more money, which is pretty hard for me to distinguish from, as they call it, pay for play.

So how would you distinguish those two? What would the different evidence be? How would those be analytically any different?

MR. BERMAN: Sure, so --

THE COURT: You're giving someone money and saying

"Oh, we're calling this NIL" or giving someone money and saying "We're paying to pay football" or whatever.

MR. BERMAN: So, first of all, to repeat a point that Mr. Kessler made but I think it's worth noting for your Honor. The rule that is at issue, the COA rule, wasn't even enforced during the O'Bannon case. It came into play after we filed our lawsuit challenging it.

THE COURT: You mean the increase to the cost of attendance?

MR. BERMAN: That's right.

THE COURT: Yeah, I know.

MR. BERMAN: So they were not putting on evidence of what could go beyond that. And as Mr. Kessler alluded to, they're producing to us now. So once we filed this case, there was a great deal of conversation in the conferences, "What should we do? Is it fair?"

And we're going to produce evidence and documents to you, as Mr. Kessler alluded to, that they're considering all kinds of remedies that are not just cash money. They're tethered to education.

So we're going to put the documents before you, the testimony before you for very high-powered NCAA and conference officials that talk about how you can fix this system in a way that's just not giving cash money to student athletes.

THE COURT: Can you say anything about any distinction between payment for name, image and likeness and payment for play in an analytical sense? Different evidence that would come out on one or the other, anything of that nature?

MR. BERMAN: Sure. In a name and likeness case, you hear a lot of evidence from the economists about the revenues from the broadcast games, the revenues from the video games, how allowing players to share in that would destroy amateurism and integration and all that kind of stuff.

And I think what we're going to show is the opposite, that we're going to show you evidence that if you give kids, for example, tuition to go to graduate school or you pay their health benefits, there's going to be zero impact on amateurs and integration.

And in fact you're going to see evidence that many of the top officials believe that those kinds of reforms are necessary to take away the criticisms the conferences are getting about how much everyone else is making and the students aren't making anything.

THE COURT: What about any distinction in evidence between women's basketball players and male football and basketball players?

MR. BERMAN: Well, you're giving me an easy one to

hit there because obviously there can't be collateral estoppel or stare decisis for group of people who weren't even in the O'Bannon case.

THE COURT: Well, there's stare decisis in the sense that there's case law that applies to facts. And unless there's some meaningful distinction between women basketball players and men basketball players, that case law would apply to women just as it would to men.

MR. BERMAN: Well, I think the distinction we will show is that in a competitive market but for the restraints these defendants would be offering female basketball players the types of benefits that we've talked about today, benefits that are tethered to education that are currently not being offered because of the restraints at issue.

THE COURT: What do you think about one of the attorneys' ideas that you should file an amended complaint now?

MR. BERMAN: If your Honor thinks that would be easier for you to see exactly what we want, we'd be glad to do that. We've filed an expert report in support of our motion for an injunctive class, which you granted. And I think Dr. Rash's (phonetic) report discusses in some detail some of the types of tethered to education remedies that we're going to be seeking.

So I think it's unnecessary. They know what we're

seeking.

THE COURT: And this isn't really a question, but you talk about wanting an injunction that doesn't say what has to be done, which I find problematic in terms of practicality. It's sort of like whack-a-mole. There's -- something like that. They try this and you sue them. They try that and you sue them. And they try something else and you sue them.

So it seems logical to me to have something in an injunction that would say what had to be done. But even if there weren't, you still would have to present less restrictive alternatives just on the question of liability, even if you aren't asking for any such things to be in the injunction.

MR. BERMAN: Yes, and we will. And Mr. Kessler I think outlined just a few of them that we're going to be presenting.

There's no question that we're going to present lesser restrictive alternatives.

THE COURT: Okay. And I wanted to ask Mr. Kessler for your thoughts on going back to New Jersey.

MR. KESSLER: Your Honor, could I put a pin in that for a second, because I think it's the last point we should address if that's okay.

THE COURT: Okay.

MR. KESSLER: Let me first try to address what your Honor just asked a little bit more.

The big distinction between O'Bannon's payments for names, images and likenesses is that the payments were going to be for names, images and likenesses and therefore it was untethered to education. Clearly, it was designed to be compensation for giving up their intellectual property rights there.

In O'Bannon -- and I agree with your Honor, it's a precedent. We should consider what the precedent means, but the precedent is eminently distinguishable from the issues here.

Let me explain that. I don't think it requires any type of dismissal.

In O'Bannon there were two remedies considered in your injunction as less restrictive alternatives to achieve the fact that there was a violation proven. How would you remedy the violation.

The court said one was tethered to education, which was the cost of attendance and the payments for the names, images and likenesses was not, which they found there was insufficient evidence in O'Bannon to show that that was a less restrictive alternative capable of achieving the objective.

What the court did not consider in O'Bannon at all --

because it wasn't the issue, it wasn't presented -- is that there are a very large number of alternatives which could be tethered to education besides the two that were presented, which would be perfectly consistent with amateurism and which, by the way, they said plaintiff have the burden on less restrictive alternatives.

We will fulfill that burden. That is my commitment to the Court. We will come in and fulfill that burden to show that a whole variety of alternatives could do this.

For liability, we only have to prove one. The legal test is first you show anti-competitive effect, then they have to show offsetting pro-competitive effects, and then you have to prove one less restrictive alternative. And if that's true, there's liability.

We actually believe to avoid any micro-managing that Mr. Mishkin was talking about, the antitrust remedy that's appropriate is you simply would find if we prove it or the jury would find that there was at least one less restrictive alternative available; therefore, this rule is unlawful and then it's up to the defendants to decide what's the next rule.

Your Honor says, gee, that subjects to a lot of uncertainty. But all of antitrust rule of reason is uncertainty. In other words, we don't think it requires the Court to figure out what they should do. They will figure

out what they should do like every other business in America who is confronted with the rule of reason and doing that.

So to give you examples, this was just a list that was compiled by Mr. Cooper's clients, which is the Power Five conferences, as examples of things they wanted to do.

They wanted to have a lifetime scholarship after playing eligibility.

They wanted to have insurance or other financial support to address the health and safety needs of student athletes while they're there in greater amounts.

They wanted support in recruiting to permit families of student athletes to accompany and advise student athletes during their visits as part of the educational mission.

They wanted to have a relaxation of rules for other support to the athletes, to do work study programs, to go overseas and I asked --

THE COURT: I get the picture.

MR. KESSLER: And, your Honor, in the discovery we asked the person who presented this, President Machen of Florida, okay, did he believe this was consistent with the collegiate model of amateurism, he said absolutely, all these proposals were completely consistent with the collegiate model of amateurism.

None of that was presented to the O'Bannon court. The O'Bannon court didn't have a host of other things.

So the point is, in looking at it just as a precedent, you say are we going to be advocating other things? Yes. One alternative might be to give greater incentives to the students to graduate, to stay in school.

And the point is, some of this, your Honor, might involve payments -- I want to be clear about this -- but payments tethered to education.

The Ninth Circuit didn't say payments were illegal. They said payments that were untethered to education were illegal. In fact, in the new cost of attendance, they do things like provide for the travel for the student back and forth to the school. They provide other things in that cost of attendance but they're tethered to being at the school, graduating, advancing, being healthy.

So all of that, if we could produce a record that shows there is at least one of those alternatives, then we are entitled to an injunction against the existing rules.

And, frankly, your Honor, we're not going to ask you to, as Mr. Mishkin suggests, micro-manage and say well, you can do this or do that. Frankly, I don't think the Ninth Circuit wants you to do that.

That's where we're going to come out.

So, your Honor, I really believe as a precedent, this does not require a motion to dismiss and we're not required to re-plead a complaint to start saying we want all these

alternatives. We're simply going to demonstrate that to show the illegality in terms --

THE COURT: I think it's not so much the alternatives they want to hear about; it's what are the rules that you say are anti-competitive.

MR. KESSLER: That we've identified in the complaint.

And it is -- they're right. There's a whole group of rules that limit the schools from giving anything to the athletes other than the GIA and we think there's a whole host of things the athletes could get tethered to education which are prohibited by those rules. They know the rules. There's no dispute about the rules.

So I don't think there's any need to amend the complaint. They say they want to know all the alternatives. They can serve us with an interrogatory and we'll tell them a group of 30 alternatives we think are possible and our experts might explore them. Their experts will explore them.

We don't need to waylay this case in any way in order to do that.

THE COURT: Well, what they're going to ask, I think, is what are the anti-competitive rules besides capping the GIA at the COA.

MR. KESSLER: We'd be happy to list those in

response to an interrogatory as well, and it will be a larger list.

THE COURT: Okay. So let's --

MR. KESSLER: And now, your Honor, to go to the Third Circuit question --

THE COURT: Yes.

MR. KESSLER: -- because I know you asked this. I'm sorry for putting it off. So this --

THE COURT: Well, what I want to say is if I were to rule, as I think I probably have to, that whatever antitrust violation might or might not be found and whatever less restrictive alternatives might or might not be found, that an injunction couldn't include payment of money higher than the cost of attendance untethered to educational expenses.

So if I were to say that, is that dispositive of your case?

MR. KESSLER: Well, first, it is clearly not dispositive of our case because our case is also seeking the ability of the schools to provide payments tethered to education. So as long as you allow for what Andrew Luck -- who works for the NCAA as one of their most senior executives -- said, which is tethered to education encompasses much more, it would not dispose of our case.

THE COURT: So that would mean then that you

would -- once all the discovery was over and all the motions were decided, that would be left of your case and that's what would go back to the Third Circuit.

MR. KESSLER: Well, here's what I would say about that.

THE COURT: At which point, you'd make a motion to reconsider --

MR. KESSLER: Okay.

THE COURT: -- based on Third Circuit non-law.

MR. KESSLER: Here's what I would say about that, your Honor.

First, I would urge you not to rule in this opinion or in any other opinion what O'Bannon means in the abstract in terms of what the future would be. In other words, what I think you have to rule in this motion is have we stated a claim under Rule 12(c). We have clearly --

THE COURT: Well, let's look at it as a motion for partial summary adjudication.

MR. KESSLER: Okay. If it is partial summary judgment and you were going to rule that in this circuit it's not possible to get payments untethered to education in any way -- and I urge you not to rule because I don't think you have to. But if you would -- all you have to rule is that there's playing in O'Bannon we can pursue.

But if you would rule that now, we do believe that at

some point our pursuit of, for example, other claims that are perhaps beyond what's tethered to education is going to have to be tried when we get remanded back to the Third Circuit, so we would need discovery on those claims. And if you're not going to permit the discovery to go forward on those claims --

THE COURT: I would. I would because they have the same claims.

MR. KESSLER: Right. Then there would --

THE COURT: The consolidated amended complaint has the same claims.

MR. KESSLER: Right. In other words, what I would urge you to do is allow all the discovery to go forward.

THE COURT: Right.

MR. KESSLER: And then at the end of the case, that's the time for partial summary judgment or summary judgment. At that point, I would urge send us back if there's going to be a distinction so that we could continue to pursue what the Third Circuit would allow. And I believe that is clearly what is anticipated by the Supreme Court's Lexicon case.

There's actually no case actually on point on this, your Honor, so you're going to be making some new law no matter how you rule on this remand, and I'll explain why.

The cases they cite, which says you apply the law of

the circuit when you have an MDL with a transferee law of the circuit, are cases where someone argued you should apply a stare decisis, the cases from the prior circuit where it was filed.

And in response to that, the courts say: Oh, no, we're now in this circuit. We will give respect to that law, we'll consider that law, but it's not stare decisis in this circuit. We follow our circuit.

And that's understandable. There is no case I'm aware of where a case filed in another circuit that was then transferred into an MDL and they argued there's some case dispositive law that only exists in this circuit so that your case, your claim gets totally vanished in the other circuit, gets applied under some principle, stare decisis.

None of their cases say that. There's not a case that does that. And if you think about what the Supreme Court said, even though it's not directly on point, what they said in Lexicon is that Congress intended to give preference to that venue. We're just here for coordination. Once the claims are going to be denied, then there's no longer anything to coordinate.

THE COURT: Right. But Lexicon is statutory interpretation. Lexicon isn't some sort of constitutional right or jurisdictional policy or anything of the kind.

THE COURT: Of course not. But we're saying in

terms of the basic fairness of the MDL system. What would make sense if you were going to say nobody can pursue payments untethered to education here, that's something broader that at the end of the case you would allow Jenkins -- but I don't think it's now. I think it's at the end of discovery.

When all the coordination is done, you would say there's nothing more to coordinate but rather than grant a partial summary judgment against Jenkins, you say I'm going to let the court which is going to try this case decide whether or not there should be a partial summary judgment.

I'm sure they're going to argue that the Third Circuit should follow, if you would say that interpretation of O'Bannon, but that should be decided by the trial judge at that time when all the coordination is done so that the venue is respected and maybe that judge will follow. Maybe the judge will say the Third Circuit has a different view, you could present those claims.

And then perhaps there will be a split and then the Supreme Court will decide what's the correct view. But it makes no sense to say that it's going to be dismissed entirely --

THE COURT: Well, it wouldn't be.

MR. KESSLER: -- based solely on this.

THE COURT: It wouldn't be. It would be dismissed

in part --

MR. KESSLER: Right.

THE COURT: -- as I stated earlier. That would leave part of the case extant. That would leave discovery and other kinds of pretrial proceedings to be done here, and when they were all done you'd be sent back to New Jersey.

Now, it might only be half a loaf that got sent back to New Jersey, and you might have to do whatever you --

MR. KESSLER: And I guess what I would say is I think the appropriate ruling would be to preserve the loaf and let that be decided by the New Jersey judge at that time. In any event, your Honor --

THE COURT: I don't know of any law on that point. Maybe there's no law the other way either. I'll ask counsel in a minute but --

MR. KESSLER: Yeah, I think the law -- it's the discretion of the transferee judge to decide what furthers the MDL purpose and when, when it's appropriate. And there are a lot of decisions by judges to say I now think it's appropriate to send it back. And generally the MDL panel will defer to the discretion of the transferee judge as to when it's appropriate it's there.

But in this particular case, what I would urge is I think you should deny these motions because they haven't shown a basis to dismiss either complaint, which is the

issue.

THE COURT: But we're not talking about dismissing the complaint. I think I get it.

Let me turn to the other side. Did you want to respond?

MR. KESSLER: Thank you, your Honor.

MR. MISHKIN: Well, we both had very brief things to say, your Honor.

THE COURT: Okay.

MR. MISHKIN: I think that before we get to a laundry list, which I guess I'd like to see in a document we haven't seen yet, but a long laundry list --

THE COURT: Well, I think counsel is right. Just put out an interrogatory. I don't want to start over with complaints and Rule 12 motions and going back to "go" again.

MR. MISHKIN: All right, your Honor, but --

THE COURT: So you can do interrogatories to get that information.

MR. MISHKIN: All right. And I just, again, want to emphasize that I think your Honor has it exactly right whether you call it collateral estoppel, stare decisis, or a statement of law that you've now got from the Ninth Circuit.

We do have a clear statement that the rule of reason does require us to pay up to the cost of attendance. It does not require more. I understand that you understand

that to mean cash payments untethered to education. But in deciding whether or not there is any claim here, I would urge you to re-read the paragraph in the Ninth Circuit that talks about they must show illegality, your Honor.

Our argument here is there is no plausible claim of illegality. The Ninth Circuit has said the cost of attendance -- if you limit it --

THE COURT: That was an antitrust violation. That was upheld by the Ninth Circuit. That's illegal.

MR. MISHKIN: No -- well, the illegality of the cost of attendance cap. I mean I think -- as I understand it -- I think we're on the same page.

THE COURT: Oh, the cost of attendance cap.

MR. MISHKIN: Yeah, the cost of attendance cap --

THE COURT: Right.

MR. MISHKIN: -- is lawful, right, and they say well, we have other ideas for how we can get education-related benefits to students.

And whether we do it with an amended complaint or an interrogatory, we'd be very interested to see what all that is, because that is the business of the NCAA, to consider rules like that all the time. I do not think it's the business of an antitrust court in light of what the Ninth Circuit has said, borrowing from the Supreme Court, that in fulfilling this function of trying to preserve amateurism

with lots of people having lots of different ideas as to what that means or what kinds of payments or benefits can be tolerated and still maintain an enforceable system of amateurism which is the pro-competitive benefit here that the Court is not supposed to be micro-managing.

I know you have the point, your Honor. And I'll let Mr. Cooper say what he has to say. Thank you.

THE COURT: I want to hear somebody who is going to talk about the MDL issue.

MR. MISHKIN: Yes, Mr. --

THE COURT: Is that you or your colleague who is going to address that?

MR. COOPER: I will, your Honor. Thank you.

MR. MISHKIN: The remand to New Jersey.

MR. COOPER: Your Honor, on this question of whether we have a complete motion to dismiss the injunctive relief claims, I believe that there is not a single word in the existing complaint that suggests that they have identified a single NCAA rule that limits the ability to provide any form of benefit that is tethered to the cost of education but is not currently permitted.

The ones that they've identified, the insurance, the health benefits, the graduate school, those kinds of things are currently permitted. I don't believe that they have identified rules that are what Mr. Kessler described,

post-Ninth Circuit decision, that would qualify for a separate claim, that is tethered to cost of education that is educationally related and would be permitted under the Ninth Circuit rule.

So the reason that we believe that the motion should be granted, perhaps with leave to amend, not inconsistent with the Court's ruling, is because I don't believe that that claim is currently stated in the complaints.

They haven't identified any such rules, and they haven't today. They have yet to identify an actual rule that would be illegal under the Ninth Circuit decision that they want an injunction to eliminate.

And I think it's incumbent on them to at least do that, if they believe that there's a claim that survives our motion. I believe they cannot do that, and that's the reason that they haven't done it so far.

Now, with respect to the MDL issue, the Third Circuit question, this Court's responsibility obviously is to pre-try these cases. That's what the order of transfer was about and this is a motion directed to that responsibility.

What Mr. Kessler refers to as the motion for partial summary judgment, if that were to be filed that would also be directed to your Honor. It wouldn't be directed to another court after remand. That would be this Court's responsibility. So this is just a question of when we do

it.

I would submit that your Honor issuing your order consistent with what you've said today about the tremendous limitations that the O'Bannon decision by the Ninth Circuit will place on this case will have an immense impact both on the scope of discovery, the degree to which this case goes forward, how it goes forward. It will be a sea change in the litigation.

And therefore, whether there's anything left to litigate and in what fashion it will be litigated, what direction will be given to the parties and the magistrate judge with respect to the scope of discovery, all of those things will benefit greatly by whatever your Honor articulates as the limitations on the current claim which is in this complaint, which is a pay-for-play case, to be sure, and figure out what is left of the case, if anything.

I submit that there will be nothing left.

THE COURT: Right. Well, the thing I'm interested in though is -- the challenge that Mr. Kessler gave you is, is there any case in which a lawsuit from another circuit was thrown out in a transferee circuit under law of that circuit, which would have not been thrown out necessarily in the prior circuit.

MR. COOPER: To be sure, it happens all the time, your Honor. Every case that is the subject of a motion to

dismiss is going to be directed to the law of the circuit that is the transferee court. We cited the Newton --

THE COURT: Right, but what if the law was different in another circuit and they would have had a claim in another circuit. They get transferred involuntarily to a different circuit with worse law for their case and they lose their case. I mean it strikes me as somewhat problematic. I don't know that there's any law on the point but it's an interesting --

MR. COOPER: There is, your Honor. We cited Newton v. Thomason in our brief, and there are -- the fact is that that's not a distinguishing feature as far as the MDL rules are concerned.

When a case is transferred, the law is perfectly clear -- and Mr. Kessler didn't disagree with this. The law is perfectly clear that the law of the transferee court controls the outcome of dispositive motions in that court and therefore whenever there's a difference in the law of the transferee court from the transferor court, that will always result in a different outcome in the transferee court. That's what happens in MDL cases.

THE COURT: Can you give me an example of one where a plaintiff's case was lost because they got transferred to a circuit where the law was different from the circuit they had come from?

MR. COOPER: We'd be happy to give you a list of cases in which that happens, your Honor. That wasn't an issue that was raised by their papers. We're happy to respond to that issue in a written submission.

I don't think it's going to change anything before you. This motion is before you. We already know that your Honor believes that it is well taken with respect to the core claim in this case, and therefore it should be decided -- it has to be decided on the basis of Ninth Circuit law because that's where we are.

THE COURT: I wonder what would happen if I've ruled as I've indicated and eventually the case went back to New Jersey with the half a loaf and not the full loaf. I wonder what the New Jersey could or would do with it at that point. I guess it's --

MR. COOPER: I predict, your Honor --

THE COURT: -- idle speculation, but --

MR. COOPER: -- this case will go nowhere if you rule as you have said you will.

THE COURT: Okay.

MR. KESSLER: Your Honor, just one last point if I may. If you're going to treat this as a partial summary judgment -- which we of course urge you not to do -- they should have to file new papers. We should be able to make an evidentiary showing if it's going to be on partial

summary judgment in response. We obviously -- we've treated this just based on the allegations of our complaint. It's possible we may need more discovery.

This is all procedural due process reasons why I would urge you not to do any of that until the end of the case and then we can decide where we are.

To give you one example, hypothesize the following alternative that might be studied.

Someone puts money aside to encourage athletes to stay in school and to graduate. We would argue that's tethered to education and have a whole record to show it will not impact amateurism. Something the Ninth Circuit hasn't thought about, never presented to them, no evidence on it, no study.

I'm just concerned that if you start talking about partial summary judgment now without having the benefit of all that evidence, of all the studies that are going to be put in, of all the expert testimony, that you're going to end up cutting off things without giving us the opportunity to show you it is within the Ninth Circuit's rules, no matter how they're interpreted, to allow for that.

So I'd urge you at least to consider that, your Honor.

THE COURT: Okay.

MR. BERMAN: Thank you very much, your Honor.

THE COURT: We'll take it under submission.

What do we have coming up? The motion for certification?

MR. MISHKIN: We have a lengthy calendar. We have a (b)(3) class, which that is still in the case. That is to be argued in October.

THE COURT: And it's not fully briefed at this point?

MR. MISHKIN: No, no.

UNIDENTIFIED SPEAKER: Not fully briefed.

THE COURT: And nothing else is happening besides that?

MR. MISHKIN: The magistrate judge has a discovery issue next week or the week after.

THE COURT: Okay. And had we talked about settlement? Are you all talking about settlement at all or --

MR. MISHKIN: We --

MR. COOPER: We have extensively in the past but not recently.

THE COURT: "Expensively" did you say?

MR. COOPER: Yes, your Honor. Both. Yes.

MR. MISHKIN: That too.

MR. COOPER: To be sure.

MR. MISHKIN: A process is in place.

THE COURT: Extensively.

MR. COOPER: "Extensively" was the word I used.

MR. MISHKIN: A process is in place with a mediator, your Honor, and we're pursuing it.

THE COURT: Okay. Someone settled part of the prior cases. I've forgotten who. Somebody in Boston I think.

MR. BERMAN: Well, Eric Greene is the mediator and he --

THE COURT: Your mediator.

MR. BERMAN: That's our mediator.

THE COURT: And wasn't he the previous mediator as well?

UNIDENTIFIED SPEAKER: No.

MR. BERMAN: No, he was not.

MR. MISHKIN: No, no. That was Judge Infante.

MR. BERMAN: That was Infante on the Rykus (phonetic) case.

THE COURT: Okay. So your --

MR. MISHKIN: Thank you very much.

MR. COOPER: Thank you, your Honor.

UNIDENTIFIED SPEAKER: The hearing date is October 25th, your Honor.

THE COURT: Okay. All right. Thank you.

MR. COOPER: Thank you, your Honor.

MR. KESSLER: Thank you, your Honor.

(Proceedings adjourned at 3:42 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

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Thursday, August 4, 2016