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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 This Document Relates to: ALL ACTIONS	MDL Docket No. 14-md-02541-CW
MARTIN JENKINS, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	Case No. 14-cv-02758-CW **DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: August 2, 2016 Time: 2:30 p.m. Courtroom: Courtroom 2, 4th Floor Before: Hon. Claudia Wilken

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT at 2:30 p.m. on August 2, 2016, or as soon thereafter as the matter may be heard, defendants the National Collegiate Athletics Association ("NCAA"), the Pac-12 Conference, The Big Ten Conference, The Big-12 Conference, the Southeastern Conference, the Atlantic Coast Conference, the American Athletic Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference and the Western Athletic Conference will, and hereby do, move this Court pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings, dismissing the *Jenkins* action in its entirety and dismissing that portion of the consolidated action that seeks to enjoin the current rules of the NCAA and conference defendants that prohibit Division I member schools from paying student-athletes more than their cost of attendance. This motion is brought on the grounds that the Ninth Circuit's decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), *petition for reh'g en banc denied*, Nos. 14-16601, 14-17068 (9th Cir. Dec. 16, 2015) ("*O'Bannon*"), which had not been decided when defendants initially moved to dismiss the complaints in this matter, compels judgment as a matter of law in defendants' favor on plaintiffs' claims for injunctive relief.

Dated: May 16, 2016

Respectfully submitted,

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Preliminary Statement

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, defendants move this Court for judgment on the pleadings, dismissing the *Jenkins* action in its entirety and dismissing that portion of the consolidated action that seeks to enjoin the current rules of the NCAA and conference defendants that prohibit Division I member schools from paying student-athletes more than their cost of attendance. Defendants respectfully submit that the Ninth Circuit's decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), *petition for reh'g en banc denied*, Nos. 14-16601, 14-17068 (9th Cir. Dec. 16, 2015) ("*O'Bannon*"), which had not been decided when defendants initially moved to dismiss the complaints in this matter, compels judgment as a matter of law in defendants' favor on plaintiffs' claims for injunctive relief.

In relevant part, plaintiffs' claims in these cases are identical to the plaintiffs' claim in *O'Bannon*: all assert that the Sherman Act invalidates Division I rules that prevent member schools from providing cash or benefits to student-athletes in excess of their cost of attendance. (*See Jenkins* Second Amended Complaint ("JAC") ¶ 6; Consolidated Amended Complaint ("CAC") ¶ 15.) In *O'Bannon*, the Ninth Circuit definitively and unequivocally rejected that claim, holding that "[t]he Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more." 802 F.3d at 1079.

That holding is dispositive of all plaintiffs' injunctive relief claims here because, as a matter of *stare decisis*, *O'Bannon* governs all antitrust challenges within this Circuit to the current limit on athletics-based payments to student-athletes.[1] In addition, *O'Bannon* collaterally

[1] Plaintiffs in both actions seek an injunction banning enforcement of the NCAA rules prohibiting member schools from providing any student-athlete more than his or her cost of attendance. They do not seek to recover damages for defendants' prohibition on payments above the cost of attendance and thus this motion is directed only at plaintiffs' claims for prospective injunctive relief. The *Jenkins* plaintiffs do not seek to recover damages of any kind. They seek only injunctive relief, and thus defendants move for judgment on the pleadings as to the *Jenkins* action in its entirety. By contrast, in addition to injunctive relief, the consolidated action plaintiffs seek damages for the difference, if any, between the amount individual student-athletes received under the former rules (which limited athletic scholarships to tuition, room, board, books and fees, and limited total financial aid to the cost of attendance) *(cont'd)*

estops the members of the football and men's basketball player classes here from relitigating whether NCAA rules capping allowable financial aid to student-athletes at their education-related cost of attendance violates the Sherman Act, and thus provides an alternative basis for dismissal of their injunctive relief claims. Accordingly, defendants are entitled to judgment on the pleadings with respect to plaintiffs' claims for an injunction invalidating the current NCAA and conference rules that prohibit payments to student-athletes above their cost of attendance.

The* O'Bannon *Decision

The *O'Bannon* action, like the *Jenkins* and consolidated actions, involved a Sherman Act challenge to the NCAA's rules limiting the payments that member schools may make to student-athletes. In *O'Bannon*, this Court described the challenged rules thus:

> The NCAA imposes strict limits on the amount of compensation that student-athletes may receive from their schools. Most importantly, it prohibits any student-athlete from receiving "financial aid based on athletics ability" that exceeds the value of a full "grant-in-aid." The bylaws define a full "grant-in-aid" as "financial aid that consists of tuition and fees, room and board, and required course-related books." This amount varies from school to school and from year to year. Any student-athlete who receives financial aid in excess of this amount forfeits his athletic eligibility.
>
> In addition to this cap on athletics-based financial aid, the NCAA also imposes a separate cap on the total amount of financial aid that a student-athlete may receive. Specifically, it prohibits any student-athlete from receiving financial aid in excess of his "cost of attendance." Like the term "grant-in-aid," the term "cost of attendance" is a school-specific figure defined in the bylaws. It refers to "an amount calculated by [a school's] financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance" at that school.

O'Bannon v. NCAA, 7 F. Supp. 3d 955, 971 (N.D. Cal. 2014) (citations omitted).

Although the *O'Bannon* case arose in the context of a dispute over payment for student-athletes' names, images, and likenesses ("NIL"), to resolve that dispute, this Court considered and ultimately held unlawful the NCAA's eligibility rules regarding allowable athletics-based financial aid, the precise rules that are also at issue in the *Jenkins* and consolidated actions. This

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and the current rules (which limit both athletic scholarships and total financial aid to the cost of attendance). This motion is not directed at the consolidated action plaintiffs' damages claims.

Court found, in *O'Bannon*, that the NCAA's limits served the procompetitive goals of (i) preserving amateurism as a distinctive feature of intercollegiate athletic rivalry and (ii) "improving the quality of educational opportunities for student-athletes by integrating academics and athletics." *Id.* at 1001, 1003, 1005. Nevertheless, this Court partially enjoined enforcement of the NCAA's Division I rules, holding that, although its injunction would "not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school," the NCAA would "not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws." *Id.* at 1008. This Court further enjoined the NCAA from enforcing any rules that would prohibit schools from paying student-athletes deferred compensation of up to $5,000 per year above the cost of attendance. *Id.*

The Ninth Circuit affirmed this Court's determination that the NCAA's then-existing limits on payments to student-athletes served the procompetitive goals of preserving amateurism and promoting the integration of athletics and academics on college campuses. *O'Bannon*, 802 F.3d at 1059, 1073. But crucially for present purposes, although the Ninth Circuit upheld the portion of this Court's injunction requiring the NCAA to permit member schools to provide student-athletes with their cost of attendance, it vacated the portion of this Court's injunction requiring the NCAA to permit Division I schools to pay student-athletes more than their cost of attendance. Compelling the NCAA to permit payments above the cost of attendance, the Ninth Circuit held, would erode the procompetitive character of the NCAA's intercollegiate sports product by eliminating student-athlete amateurism as its historic and defining attribute:

> [A] rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are [not] both *equally* effective in promoting amateurism and preserving consumer demand. Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*.
>
> * * *
>
> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule

> of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point, the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status.

Id. at 1076, 1078-79.

Accordingly, the Ninth Circuit held that the Sherman Act requires nothing more of the NCAA than that it permit its member schools to provide student-athletes with their full education-related cost of attendance. The Ninth Circuit's words could not be plainer: "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. *It does not require more.*" *Id.* at 1079 (emphasis added). Because current NCAA rules fully comply with the Ninth Circuit's holding, antitrust challenges to those rules are barred as a matter of substantive antitrust law.

Argument

A. Judgment on the Pleadings Is Warranted When the Movant Is Entitled to Judgment as a Matter of Law

Rule 12(c) provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Although [*Ashcroft v. Iqbal*, 556 U.S. 662 (2009),] establishes the standard for deciding a Rule 12(b)(6) motion, we have said that Rule 12(c) is 'functionally identical' to Rule 12(b)(6) and that 'the same standard of review' applies to motions brought under either rule." *United States ex rel. Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (citation omitted). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009); *Tonsing v. City & County of San Francisco*, No. C 09-01446 CW, 2010 WL 334859, at *2 (N.D. Cal. Jan. 22, 2010) (Wilken, J.).

B. The Ninth Circuit's O'Bannon *Decision Compels Judgment on the Pleadings Here on Plaintiffs' Injunctive Relief Claims*

The Ninth Circuit's decision in *O'Bannon* indisputably establishes defendants' entitle-

ment to judgment on the pleadings with respect to plaintiffs' injunctive relief claims. Under the doctrine of *stare decisis*, the *O'Bannon* holding governs this litigation and establishes that the Sherman Act does not require defendants to permit their member schools to pay student-athletes more than their cost of attendance. Separately, under the doctrine of collateral estoppel, or issue preclusion, the FBS football and men's basketball player representative plaintiffs and the Rule 23(b)(2) classes they represent in the *Jenkins* and consolidated actions are precluded from relitigating issues that were already considered and decided in *O'Bannon*, including whether the Sherman Act prohibits the NCAA from enforcing rules that cap athletics-based payments at cost of attendance.

In short, following *O'Bannon*, the substantive rule in this Circuit is that the antitrust laws do not bar defendants from prohibiting their member schools from paying student-athletes above the cost of attendance. The Ninth Circuit's decision in *O'Bannon* may not be relitigated here. Accordingly, defendants are entitled to judgment on the pleadings dismissing the *Jenkins* action in its entirety and the injunctive relief claims asserted in the consolidated action.

1. Under the Doctrine of* Stare Decisis*, This Court and All Class Members Are Bound by the Ninth Circuit's* O'Bannon *Decision

At the outset, *O'Bannon* disposes of this case as a matter of *stare decisis*. It is, of course, fundamental that, "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (footnote omitted). Thus, "[a] district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided." *Id.* at 1175. This rule applies "whether or not the lawyers have done an adequate job of developing and arguing the issue." *Id.*

The Ninth Circuit's decision in *O'Bannon* is a precedential decision that articulates the law in this circuit with respect to the antitrust legality of the NCAA's rules limiting athletics-based payments to the cost of attendance. It *is* the law on this subject, and may not be disregarded or circumvented. Rather, this Court and all members of the Rule 23(b)(2) classes in both the *Jenkins* and the consolidated actions are bound by what the Ninth Circuit decided in *O'Bannon*,

even if they disagree with the rule of law established therein. *See Coalition to Defend Affirmative Action, Integration & Immigrant Rights v. Schwarzenegger*, No. 10-641 SC, 2010 WL 5094278, at *5 (N.D. Cal. Dec. 8, 2010) (granting motion to dismiss with prejudice where "the Ninth Circuit considered the very scenario Plaintiffs now allege"; plaintiffs "make [their] arguments to the wrong court, as this Court is bound by stare decisis"), *aff'd sub nom. Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012).

And what the Ninth Circuit decided in *O'Bannon* is precisely this: the NCAA and its members may lawfully agree to restrict athletics-based payments to educational expenses, and may prohibit schools from providing student-athletes with cash or benefits—whether for the licensing of their NIL rights, their performance on the field, or anything else—in excess of their individual cost of attendance. Specifically, the court confirmed that the challenged NCAA eligibility rules serve the two procompetitive purposes identified by the district court: integrating academics and athletics, and promoting amateurism as a distinctive feature of intercollegiate athletic rivalry. *O'Bannon*, 802 F.3d at 1073. The court decided "that not paying student-athletes is *precisely what makes them amateurs*." *Id.* at 1076 (emphasis in original). Providing student-athletes more than their cost of attendance is not required by any principle of antitrust law because "paying students cash compensation would [not] promote amateurism as effectively as not paying them." *Id*. The court held that, having determined that amateurism is an integral feature of intercollegiate sports, "the district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is 'virtually as effective' . . . as being an amateur." *Id*. "The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor," the court concluded; "it is a quantum leap." *Id*. at 1078. That analysis, which applies equally to payments for NIL rights, for on-field performance, or for any other non-education-related expenses, led to the ultimate holding in *O'Bannon*: "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more." *Id*. at 1079.

The Ninth Circuit's *O'Bannon* decision is the law of this Circuit. Under that decision, the NCAA may legitimately cap athletics-based financial aid at the cost of attendance. The

NCAA's current rules, which permit Division I schools to provide athletics-based financial aid up to the cost of attendance, but prohibit payments above the cost of attendance, are valid under the antitrust laws, and defendants are therefore entitled to judgment on the pleadings dismissing plaintiffs' claims for injunctive relief in both the *Jenkins* and the consolidated actions.[2]

***2. Under the Doctrine of Collateral Estoppel, the FBS Football and Men's Basketball Player Classes Are Bound by, and May Not Relitigate, the Issues Decided in* O'Bannon**

In addition, wholly apart from the dictates of *stare decisis*, principles of issue preclusion bar members of the *O'Bannon* class from relitigating issues resolved in that action. *O'Bannon* was litigated on behalf of a Rule 23(b)(2) class that included all current and former FBS football players and Division I men's basketball players. *O'Bannon*, 802 F.3d 1055-56. Absent members of the *O'Bannon* class included each of the named plaintiffs in *Jenkins*,[3] each of the named male plaintiffs in the consolidated action,[4] and the thousands of male student-athletes who are also absent members of the Rule 23(b)(2) classes in these actions. Under the doctrine of collateral estoppel, all members of the FBS football and men's basketball classes here are bound by

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[2] The *Jenkins* plaintiffs argued previously in the context of another motion that their claims should be governed by Third Circuit law because their action originally was filed there. As defendants pointed out then, the *Jenkins* plaintiffs are wrong as a matter of law. This Court is bound to apply Ninth Circuit law in these multidistrict litigations and may dispose of the actions if legally appropriate in accordance with that law, without regard to where they originally were filed. *See Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) ("when reviewing federal claims, a transferee court in this circuit is bound only by our circuit's precedent"); *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 104 (C.D. Cal. 2007) ("Following the D.C. Circuit's decision [in 1987], circuit and district courts, including the Ninth Circuit, have uniformly applied the law of the transferee circuit in MDL proceedings involving federal law.").

[3] Each of the three named *Jenkins* plaintiffs played FBS football or Division I men's basketball during the time period covered by the class definition in *O'Bannon*: Martin Jenkins (who played FBS football at Clemson University from 2010 until December 2014 (JAC ¶ 14)), Nigel Hayes (who played Division I basketball at the University of Wisconsin, Madison, beginning in 2013 (JAC ¶ 16)), and Alec James (who played FBS football at University of Wisconsin, Madison, beginning in 2013 (JAC ¶ 18)).

[4] Each of the eleven named male plaintiffs in the consolidated actions played FBS football or Division I men's basketball during the time period covered by the class definition in *O'Bannon*. (*See* CAC ¶¶ 24-128.)

the rulings issued in *O'Bannon*.

Collateral estoppel, or issue preclusion, "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).[5] The doctrine precludes a party from relitigating an issue in a subsequent proceeding when (i) the first proceeding ended with a final judgment on the merits, (ii) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding, (iii) the issue decided in the previous proceeding is the same as the issue that is sought to be relitigated, and (iv) there was a full and fair opportunity to litigate the issue in the previous action. *See, e.g.*, *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006); *Murray v. Sears, Roebuck & Co.*, No. 09-05744 CW, 2010 WL 2898291, at *2 (N.D. Cal. July 21, 2010) (Wilken, J.). All four factors are satisfied here.

First, the *O'Bannon* case clearly ended with a final judgment on the merits.[6]

Second, all of the members of the FBS football and men's basketball player classes, which this Court recently certified under Rule 23(b)(2), were parties or in privity with the parties in *O'Bannon*. It is well established that one need not be a party to a prior suit to be precluded by

[5] *See also Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."); *Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."); *Dodd v. Hood River County*, 136 F.3d 1219, 1224-25 (9th Cir. 1998) (collateral estoppel "serves to promote judicial efficiency by preventing multiple lawsuits and to enable the parties to rely on the finality of adjudications").

[6] The Ninth Circuit's decision is now final and binding for issue preclusion purposes even if one or more parties seek review by the Supreme Court. *See Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) ("[A] final judgment retains all of its [preclusive] consequences pending decision of the appeal." (citation omitted)); *Blum v. KPMG LLP*, No. SACV-11-01885, 2012 WL 8704117, at *4 (C.D. Cal. July 17, 2012) ("A decision of a trial court is considered final for purposes of collateral estoppel, despite the availability of appeal.").

operation of collateral estoppel from relitigating issues necessarily decided in that suit, provided that the non-party was "'adequately represented by someone with the same interests who is a party' to the suit." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (citation omitted). A party's representation of a non-party is "adequate" if "(1) [t]he interests of the nonparty and her representative are aligned, . . . and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 900 (citations omitted); *see also Mauro v. Federal Express Corp.*, No. CV 08-8526 DSF (PJWx), 2009 WL 1905036, at *3 (C.D. Cal. June 18, 2009).

Absent class members are quintessential privies who are bound by the decision in a certified class action like *O'Bannon*. In its opinion granting the *O'Bannon* plaintiffs' motion for class certification under Rule 23(b)(2), this Court concluded that the named plaintiffs and their counsel could adequately represent absent class members. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at *5-7 (N.D. Cal. Nov. 8, 2013). And as the Supreme Court stated in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), "[t]here is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Id.* at 874; *accord Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."); *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (explaining that for class actions under Rule 23(b)(2), "[d]ue process requires only that class members be adequately represented"). Accordingly, as members of the *O'Bannon* class, the named male plaintiffs here, and the thousands of absent class members they represent, are privies to the parties in *O'Bannon* and bound by that earlier decision.[7]

[7] To the extent that any FBS football and men's basketball player in the Rule 23(b)(2) classes in these actions arguably was not a member of the *O'Bannon* class, his interests are likewise completely aligned with the interests of the *O'Bannon* class representatives, who fully understood they were acting in a representative capacity on behalf of college football and basketball players seeking prospective injunctive relief with respect to the NCAA's compensation *(cont'd)*

Third, the issues litigated and decided in *O'Bannon* are the same as the issues that the *Jenkins* and consolidated action plaintiffs seek to relitigate here with respect to their injunctive relief claims. Indeed, the central question in each case is identical: whether NCAA rules capping allowable financial aid to student-athletes at their education-related cost of attendance constitute an unreasonable restraint of trade in violation of the Sherman Act. The holding in *O'Bannon* could not "have been rationally grounded upon an issue other than that which the defendant seeks to foreclose from consideration" in the *Jenkins* and consolidated actions. *See Durkin v. Shea & Gould*, 92 F.3d 1510, 1515 (9th Cir. 1996) (citation omitted).

To assess whether previously decided issues are the same as those sought to be litigated in the present case, courts consider (i) whether the claims are closely related, (ii) whether there is substantial overlap of evidence, argument, pretrial preparation and discovery, and (iii) whether the same rule of law applies. *See Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir. 1997); *Murray*, 2010 WL 2898291, at *2. Each of these factors is amply met here. The claims here and in *O'Bannon* could not be more closely related; both actions arise under Section 1 of the Sherman Act and challenge the NCAA's Division I rules that prohibit member schools from paying student-athletes more than their cost of attendance. Moreover, the evidence, argument, pretrial preparation and discovery relating to the competitive effects and justifications for the challenged rules would substantially overlap if plaintiffs were permitted to proceed with their injunctive relief claims here. Lastly, the same rule of law—the Rule of Reason under Section 1—applies here as it did in *O'Bannon*. Accordingly, there can be no serious dispute that the issues plaintiffs seek to relitigate here concerning the legality under the Sherman Act of the NCAA

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rules. Moreover, this Court in *O'Bannon* took special care to protect the interests of future student-athletes, awarding injunctive relief to prospective, as well as current and former, FBS football and Division I men's basketball players beginning nearly a year after the issuance of the Court's injunctive order. Under these circumstances, and given this Court's finding that membership in these classes is inherently transitory, it is clear that any FBS football and Division I men's basketball player in the Rule 23(b)(2) classes in these actions who arguably was not a member of the *O'Bannon* class is nonetheless in privity with Mr. O'Bannon and his co-plaintiffs. *See Taylor*, 553 U.S. at 894.

rules banning payments above the cost of attendance were fully litigated and decided in *O'Bannon*.[8]

Lastly, the *O'Bannon* plaintiffs had a full and fair opportunity to litigate the foregoing issues in the previous action. This Court held a fourteen-day bench trial between June 9 and June 27, 2014. After considering all of the testimony, documentary evidence and arguments of counsel presented both during and after trial, this Court entered judgment for plaintiffs, which judgment was affirmed in part and reversed in part by the Ninth Circuit. Plaintiffs could hardly have asked for more. *See, e.g.*, *Frontline Processing Corp. v. First State Bank*, 389 F. App'x 748, 752 (9th Cir. 2010) (concluding that there was a "full and fair opportunity to litigate the claims set for bench trial and the issues therein"); *Ivanova v. Columbia Pictures Indus.*, 217 F.R.D. 501, 508 (C.D. Cal. 2003) (applying collateral estoppel following bench trial), *aff'd sub nom. Laparade v. Ivanova*, 116 F. App'x 100 (9th Cir. 2004).

* * *

In sum, under the doctrine of *stare decisis*, the *Jenkins* and consolidated action plaintiffs

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[8] The *O'Bannon* plaintiffs exhaustively litigated the issue of whether the NCAA is actually committed to the preservation of amateurism, and that issue was decided in *O'Bannon*: "the district court found, and the record supports that there is a concrete procompetitive effect in the NCAA's commitment to amateurism." 802 F.3d at 1073. Plaintiffs may not relitigate that issue here. Similarly, the *O'Bannon* plaintiffs litigated the issue of whether the NCAA's limits on student-athlete payments promoted procompetitive objectives, and that issue, too, was decided in *O'Bannon*: "the NCAA's compensation rules serve the two procompetitive purposes identified by the district court," namely, "integrating academics with athletics" and "promoting [the NCAA's] current understanding of amateurism." *Id*. Plaintiffs may not litigate those issues again here. The *O'Bannon* plaintiffs also litigated the issue of whether less restrictive alternatives existed that would be equally effective at preserving amateurism as the NCAA's current rules limiting athletics-based financial aid to cost of attendance, and the Ninth Circuit conclusively decided that issue in the NCAA's favor. *Id*. at 1079 n.25. Indeed, the Ninth Circuit held that plaintiffs *could never meet their burden of proving such a less restrictive alternative* because paying cash sums to players "untethered to educational expenses" would require the NCAA to "surrender[ ] its amateurism principles entirely and transition[ ] from its 'particular brand of football' to minor league status." *Id.* at 1079. As the Ninth Circuit explained, paying student-athletes "cash compensation" would not promote amateurism as effectively as not paying them because "not paying student-athletes is *precisely what makes them amateurs*." *Id*. at 1076 (emphasis in original). Plaintiffs are not entitled to relitigate that same issue here.

are not entitled to relitigate the question of whether defendants' rules prohibiting member schools from paying student-athletes more than their cost of attendance violate the Sherman Act, and they are not entitled to an injunction against the enforcement of those rules. In addition, the members of the football and men's basketball classes are barred by collateral estoppel from relitigating that issue and, on that separate basis, are not entitled to the injunction they seek.

Conclusion

Defendants' current limits on payments to student-athletes are lawful under *O'Bannon*. As that decision made clear, "[t]he Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more." 802 F.3d at 1079. For all the foregoing reasons, defendants' motion for judgment on the pleadings should be granted.

Dated: May 16, 2016

Respectfully submitted,

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FILER'S ATTESTATION

I, Jeffrey A. Mishkin, am the ECF user whose identification and password are being used to file DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Jeffrey A. Mishkin

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2016, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ Jeffrey A. Mishkin