Steve W. Berman (*pro hac vice*)
Ashley Bede (*pro hac* to be filed)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
ashleyb@hbsslaw.com

Bruce L. Simon (96241)
Aaron M. Sheanin (214472)
Benjamin E. Shiftan (265767)
PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
asheanin@pswlaw.com
bshiftan@pswlaw.com

Jeffrey L. Kessler (*pro hac vice*)
David G. Feher (*pro hac vice*)
David L. Greenspan (*pro hac vice*)
Joseph A. Litman (*pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
jlitman@winston.com

Sean D. Meenan (SBN 260466)
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
smeenan@winston.com

Co- Lead Counsel for Injunctive Classes in the Consolidated Cases and in Jenkins
[Additional counsel listed on signature page]

UNITED STATES DISTRICT COURT

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	Case No. 4:14-md-02541-CW CONSOLIDATED PLAINTIFFS' AND *JENKINS* PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS Date: August 2, 2016 Time: 2:30 p.m. Courtroom: Courtroom 2, 4th Floor Before: Hon. Claudia Wilken

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

II. FACTS 3

A. Allegations in *Jenkins* Complaint and Consolidated Complaint 3

B. *O'Bannon* Litigation 4

III. ARGUMENT 6

A. The Motion Is Procedurally Flawed, Because a Judgment on the Pleadings Cannot Be Granted Based on Defendants' Contention That a Particular Remedy Is Unavailable 6

B. Even if the Motion Were Procedurally Proper, It Has No Substantive Merit 7

1. *Stare Decisis* Does Not Bar the Injunctive Relief Sought by Plaintiffs 7

2. Collateral Estoppel Does Not Preclude Plaintiffs' Request for Injunctive Relief 10

a. Defendants Do Not Identify Any Identical Issues That Estop Plaintiffs' Injunctive Relief Request 10

b. Defendants Do Not Even Address Whether Any "Identical Issue" Was Actually Litigated (and Necessary to Decide the Merits) in *O'Bannon* 13

C. In All Events, if This Court Were to Agree with Defendants' Erroneous Interpretation of *O'Bannon,* Then It Should Remand *Jenkins* Before Deciding the Rule 12(c) Motion so That Third Circuit Law Applies 14

IV. CONCLUSION 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

Brecht v. Abrahamson,
507 U.S. 619 (1993) 8

California v. Anglim,
129 F.2d 455 (9th Cir. 1942) 7

Caplan v. CNA Short Term Disability Plan,
479 F. Supp. 2d 1108 (N.D. Cal. 2007) 7

Coalition to Defend Affirmative Action, Integration & Immigrant Rights v. Schwarzenegger,
2010 U.S. Dist. LEXIS 129736 (N.D. Cal. Dec. 8, 2010) 9

Cooper Indus. v. Aviall Servs.,
543 U.S. 157 (2004) 8

Frontline Processing Corp. v. First State Bank,
389 F. App'x 748 (9th Cir. 2010) 13

Holt Civic Club v. Tuscaloosa,
439 U.S. 60 (1978) 6

Ivanova v. Columbia Pictures Indus.,
217 F.R.D. 501 (C.D. Cal. 2003) 13

In re Korean Air Lines Disaster of Sept. 1, 1983,
829 F.2d 1171 (D.C. Cir. 1987) 15

Lexecon Inc. v. Milberg Weiss Berhad Hynes & Lerach,
523 U.S. 26 (1998) 15

LG Elecs., Inc. v. Hitachi Am. Ltd.,
655 F. Supp. 2d 1036 (N.D. Cal. 2009) 10

Little v. United States,
794 F.2d 484 (9th Cir. 1986) 10

Mecum v. Wells Fargo Bank, N.A.,
2016 U.S. Dist. LEXIS 31219 (W.D. Wash. March 9, 2016) 7

Monaco v. Liberty Life Assur. Co.,
2007 U.S. Dist. LEXIS 11741 (N.D. Cal. Feb. 6, 2007) 7

Murray v. Sears, Roebuck and Co.,
2010 U.S. Dist. LEXIS 97811 (N.D. Cal. Sept. 3, 2010) 12

In re NCAA Athletic Grant-in-Aid Cap Antirust Litig.,
311 F.R.D. 532 (N.D. Cal. 2015).................................... *passim*

O'Bannon v. NCAA,
7 F. Supp. 3d 955 (N.D. Cal. 2014) 4

O'Bannon v. NCAA,
802 F.3d 1049 (9th Cir. 2015) .... *passim*

In re Osborne,
76 F.3d 306 (9th Cir. 1996) 7

Palantir Techs. v. Palantir Net,
2011 U.S. Dist. LEXIS 80470 (N.D. Cal. July 25, 2011)....................6

Pool Water Prods. v. Olin Corp.,
258 F.3d 1024 (9th Cir. 2001) 12

Resolution Trust Corp. v. Keating,
186 F.3d 1110 (9th Cir. 1999) 12

SEC v. Sells,
2012 U.S. Dist. LEXIS 112450 (N.D. Cal. Aug. 10, 2012)....................7

Steen v. John Hancock Mut. Life Ins. Co.,
106 F.3d 904 (9th Cir. 1997) 11, 12

Sullins v. Exxon/Mobil Corp.,
2009 U.S. Dist. LEXIS 79255 (N.D. Cal. Sept. 2, 2009) 7

United States v. Morales,
898 F.2d 99 (9th Cir. 1990) 8

United States v. Schimmels,
127 F.3d 875 (9th Cir. 1997) 14

OTHER AUTHORITIES

Fed. R. Civ. P. 12(b)(6)....................................7

Fed. R. Civ. P. 12(c) 2, 7, 11, 14

Fed. R. Civ. P. (b)(2)....................................14

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Consolidated Plaintiffs and the *Jenkins* Plaintiffs respectfully request that the Court deny Defendants' Motion for Judgment on the Pleadings ("Motion"). The Motion fails procedurally and substantively. The Motion is procedurally defective because a Rule 12(c) motion must seek judgment on an entire claim. But here, Defendants contend only that *one* aspect of *one* form of relief is barred, not that any Plaintiff – much less all Plaintiffs (the women's basketball player class is not the subject of the Motion) – fails to state a claim.

And the Motion is substantively without merit because the Ninth Circuit in *O'Bannon* did not make any ruling that bars the injunctive relief sought by Plaintiffs in this matter, whether as a matter of *stare decisis* or collateral estoppel. Contrary to Defendants' assertion, the factual and legal issues decided in *O'Bannon* are not identical to the claims and issues in this matter. *O'Bannon* addressed whether NCAA "rules prohibit[ting] student-athletes from being paid for the use of their names, images, and likenesses (NILs) … are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade." *O'Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015). The Ninth Circuit answered in the affirmative, "reject[ing] all of the NCAA's preliminary legal arguments" (*id.* at 1069) and upholding the judgment. Although the Ninth Circuit reversed part of this Court's injunction, that reversal was based upon insufficient *evidence* in the *O'Bannon* record relating to less restrictive alternatives for payments for the use of NIL rights. *Id.* at 1076-79.

Here, Plaintiffs do not challenge Defendants' price-fixing of NIL rights or seek injunctive relief for such a violation. Rather, the matter now before this Court concerns Plaintiffs' claim that the "classes suffer antitrust harms by being undercompensated for the *services* they offer as student-athletes," in particular, the "cap on GIAs." *In re NCAA Athletic Grant-in-Aid Cap Antirust Litig.*, 311 F.R.D. 532, 536, 546 (N.D. Cal. 2015) (emphasis added). Given that Plaintiffs are asserting different claims than the *O'Bannon* plaintiffs, they also will build an entirely different evidentiary record—one which, among other things, will not suffer from any of the purported factual gaps found by the Ninth Circuit in *O'Bannon* with respect to the issue of less restrictive alternatives.

Moreover, Plaintiffs are not seeking the type of injunctive relief addressed in *O'Bannon*, where two specific less restrictive alternatives—not relevant to the injunctive relief sought here—were identified. Indeed, Defendants themselves previously conceded that the "injunction that plaintiffs seek in this case is markedly different from the injunction sought in *O'Bannon*." Defendants' Opposition to Plaintiffs' Amended Joint Motion for Class Certification ("Class Cert. Opp'n"), ECF No. 216. In their Motion, however, Defendants now say the opposite. Defendants had it right the first time: in *O'Bannon*, the Plaintiffs sought and obtained an injunction implementing the two specific less restrictive alternatives for which they had advocated. Here, Plaintiffs will not propose the same less restrictive alternatives to establish liability, nor will they ask for specific alternative rules to be identified in the injunction. Rather, Plaintiffs seek the more traditional antitrust remedy of an injunction striking down illegal restraints without specifying what other rules would be lawful.

Defendants' 180-degree turns do not stop with the mischaracterizations about Plaintiffs' requests for relief. Their argument that the *O'Bannon* ruling bars the request for injunctive relief in this matter is also strikingly at odds with the NCAA's petition for certiorari in *O'Bannon*. In its petition, the NCAA conceded that the Ninth Circuit's "conclu[sion] that the district court's decision was largely correct" (*O'Bannon* at 1053) *supported* Plaintiffs' claims in this MDL. Defendants stated that the Ninth Circuit's ruling "exposes a host of NCAA rules, as well as the rules of other joint ventures, to litigation challenges and improper judicial tinkering." Pet. for Writ of Certiorari ("NCAA Pet."), at 11, *NCAA v. O'Bannon*, No. 15-1167 (U.S.); *see also id.* at 26 (the "decision below will only increase the frequency of [antitrust challenges to NCAA rules], particularly in the Ninth Circuit. (Indeed, the NCAA is already facing … other lawsuits asking courts to further second guess its rules. *See e.g. Jenkins* [ ].) And a court following the Ninth Circuit's reasoning here might find merit in a host of challenges that other courts have properly rejected…."). The NCAA's statement to the Supreme Court was correct: far from supporting any Rule 12(c) judgment against the Plaintiffs, *O'Bannon*'s liability holding confirms that "the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules." *O'Bannon* at 1079.

Even the timing of this Motion casts serious doubt on its credibility. The Ninth Circuit issued its decision in *O'Bannon* on September 30, 2015. Since then, the Parties have engaged in an enormous amount of work (written discovery, depositions, significant numbers of subpoenas, expert work, and more). If Defendants truly believed that *O'Bannon* bars injunctive relief in this matter, they would have filed the Motion long ago. One can only conclude that this exercise is an effort by Defendants to inflict delay on this case while they pursue Supreme Court review to *reverse* – not affirm – *O'Bannon*.

Finally, Defendants' Motion wholly ignores the certified women's basketball player class – comprising thousands of plaintiffs who did not sue in *O'Bannon* and whose claims cannot conceivably be extinguished by a lawsuit that did not involve them or their privies, and which was *won* by the plaintiffs. The Motion also ignores that the classes certified here are not the same as in *O'Bannon* so that there is no identity of parties for purposes of collateral estoppel.

II. FACTS

A. Allegations in *Jenkins* Complaint and Consolidated Complaint

As this Court explained in certifying classes of men's football and men and women's basketball players, Plaintiffs in these consolidated actions challenge Defendants' cap on the grant-in-aid ("GIA") that student-athletes may receive:

> Consolidated Plaintiffs and Jenkins Plaintiffs allege in their complaints that the NCAA and its member institutions violate federal antitrust law by conspiring to impose the cap on the amount of compensation a school may provide a student-athlete. Plaintiffs assert that, without the NCAA's cap on GIAs, schools would compete in recruiting student-athletes by providing more generous GIAs. Plaintiffs seek an injunction against the GIA cap. Consolidated Plaintiffs seek, in addition to an injunction, damages for the difference between the GIAs awarded and the cost of attendance.

NCAA Athletic Grant-in-Aid Cap Antirust Litig., 311 F.R.D. at 536 (footnote omitted). Further, with respect to the issue of injunctive relief, this Court explained that Plaintiffs simply seek to enjoin the cap on GIAs:

> Plaintiffs allege that all members of the proposed classes suffer antitrust harms by being undercompensated for the services they offer as student-athletes. The NCAA's GIA cap applies generally to the class by precluding schools from paying any class member more than the cap. Plaintiffs seek to enjoin the cap on GIAs--an injunction that

> would apply to all class members by permitting schools to compensate them independent of the GIA cap.

Id. at 546; *see also* Consolidated Amended Complaint ("CAC"), ECF No. 60, at ¶ 9 (seeking to enjoin "the NCAA and the Conference Defendants from maintaining and abiding by the present NCAA Bylaw that limits financial aid to the presently-defined GIA"); *Jenkins* Second Amended Complaint, ECF No. 194, at Prayer for Relief, , at ¶ 1 (praying for injunction against "Defendants' rules and agreements that prohibit, cap or otherwise limit remuneration and benefits to players in the Football Class or the Basketball Class for their athletic services to member institutions").

Unlike the *O'Bannon* plaintiffs, Plaintiffs here do not seek injunctive relief implementing or even identifying specific less restrictive alternatives. To be sure, Plaintiffs will propose a multitude of less restrictive alternatives that could be imposed by Conferences or schools if the existing NCAA ban on compensation above a GIA is struck down, and Plaintiffs are building their evidentiary record accordingly. But such less restrictive alternatives – which will be entirely different from the two less restrictive alternatives identified in the *O'Bannon* injunction – will not be part of the terms of any injunction that Plaintiffs request.

B. *O'Bannon* Litigation

In *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), this Court explained that "Plaintiffs seek to challenge the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage." Plaintiffs included a class of men's football and basketball players but no women's basketball players. The challenged price fix that was examined and found to be illegal by this Court and eventually the Ninth Circuit was "that the NCAA's compensation rules fix the price of ***one component (NIL rights)*** of the bundle that schools provide to recruits." *O'Bannon*, 802 F.3d at 1072 (emphasis added); *id.* at 1070-71 ("the plaintiffs demonstrated that the NCAA's compensation rules … fix the price of one component of the exchange between school and recruit"). Whereas *O'Bannon* challenged Defendants' fixing of the price of one "component" of the transaction between athletes and their

1 schools (the athletes' NIL rights), this case challenges Defendants' fixing the price of an entirely
2 *different* "component" of that transaction (the compensation for Plaintiffs' athletic services).

3 Further, based on the evidentiary record in *O'Bannon*, this Court found that while the rules
4 barring payment for NILs might "yield some limited procompetitive benefits by marginally increas-
5 ing consumer demand for the NCAA's product and improving the educational services provided to
6 student-athletes, Plaintiffs have identified less restrictive ways of achieving these benefits." *Id*. at
7 1007. The *O'Bannon* Plaintiffs proffered a few specific less restrictive alternatives, and the Court
8 tailored its injunction to provide for two of them: the NCAA could not prevent its members from
9 giving scholarships up to the full cost of attendance, and the NCAA could not prevent members from
10 allowing students to be paid up to $5,000 per year for their NIL rights.

11 On appeal, the Ninth Circuit explained that the NCAA's rules "prohibit student-athletes from
12 being paid for the use of their names, images, and likenesses (NILs). The question presented in this
13 momentous case is whether the NCAA's rules are subject to the antitrust laws and, if so, whether
14 they are an unlawful restraint of trade." 802 F.3d at 1052. Thus, the Court did not address whether a
15 cap on GIAs in exchange for athletic services is unlawful. The Ninth Circuit held that the district
16 court correctly identified one alternative to the current NCAA compensation rules for NILs that was
17 supported by the specific evidentiary record in *O'Bannon*—*i.e.*, allowing NCAA members to give
18 scholarships up to the full cost of attendance—but that the district court's other remedy, allowing
19 students to be paid cash compensation of up to $5,000 per year for their NIL rights, was not support-
20 ed by the specific evidentiary record presented, and thus was clearly erroneous under the standard for
21 reviewing findings of fact (not law). *Id*. at 1053; *id.* at 1061 (findings of fact reviewed for clear
22 error).

23 There can be no dispute that this aspect of *O'Bannon* was decided on a clear error standard of
24 *evidentiary* review because it was based on a review of the specific factual record at the trial of that
25 case. *Id.* at 1076 ("the district court clearly erred"). Indeed, the Ninth Circuit criticized the Court for
26 relying on "the meager evidence in the record," "threadbare evidence," and an "offhand comment
27 under cross-examination" and concluded that there was "simply not enough to support the district
28 court's far-reaching conclusion." *Id.* at 1079, 1077, 1078; *see also id.* at 1077 ("At best, these pieces

of evidence indicate that small payments to players … ") and ("[t]he other evidence cited by the district court is even less probative….").

Plaintiffs here are amassing a very different factual record in support of different claims and different less restrictive alternatives to the different rules being challenged. As set forth below, Plaintiffs' injunctive relief claim cannot be dismissed on the basis of purported evidentiary short-comings in different litigation involving different claims, with different plaintiffs seeking different relief.

III. ARGUMENT

A. The Motion Is Procedurally Flawed, Because a Judgment on the Pleadings Cannot Be Granted Based on Defendants' Contention That a Particular Remedy Is Unavailable

The Motion should be denied as procedurally improper because Defendants argue only that a particular type of injunctive relief is unavailable, not that judgment can be entered on any claim. In *Palantir Techs. v. Palantir Net*, 2011 U.S. Dist. LEXIS 80470, at *10 (N.D. Cal. July 25, 2011), the court stated, "Of special relevance in this case, '[t]he test of a complaint pursuant to a motion to dismiss lies in the claim, not in the demand.' … 'It need not appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that *some* relief can be granted.'" (Citations omitted; emphasis in original). The court then ruled that it would not address the motion to dismiss or strike the prayers for relief, because the plaintiff alleged a valid claim that could afford *some* relief:

> Although Palantir Technologies also moves to dismiss (or to strike) Palantir.net's prayers for relief, *see id* at 8-9, the Court does not rule on the applicability of remedies at this time. The Court notes, as stated above, that Palantir.net alleges a breach of the duty-to-cooperate clause, for which contract remedies are appropriate. *See id* at 7-9 (suggesting monetary damages and specific performance). However, as it appears that Palantir.net could obtain some relief if it prevailed on that claim, its Second Amended Counterclaim survives dismissal, regardless of the relief requested. *See Doe*, 753 F.2d at 1104.

Id. at *14-15. *See also Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 65-66 (1978) ("a meritorious claim will not be rejected for want of a prayer for appropriate relief"). This Court itself has held that a motion to dismiss will not be granted even where "a plaintiff requests a remedy to which he is not

entitled." *Caplan v. CNA Short Term Disability Plan*, 479 F. Supp. 2d 1108, 1111 (N.D. Cal. 2007) (citing *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1092 (C.D. Cal. 2003)).[1]

For this reason, this Court should not rule on Defendants' argument that *O'Bannon* precludes Plaintiffs from obtaining certain types of injunctive relief. Because the CAC seeks both damages *and* injunctive relief, judgment could not be entered under Rule 12(c) even if injunctive relief were unavailable. Further, as demonstrated below, Defendants fail to show that Plaintiffs in both actions cannot obtain *some* injunctive relief. And Defendants tellingly fail to say anything at all about the women's basketball player class's injunctive relief claims. In an analogous situation, this Court denied a motion to strike much of a prayer for relief because "the motion asks the Court to determine issues of damages that would be more appropriately addressed in a later stage of the litigation when the facts underlying Plaintiffs' claims have been more fully developed." *Sullins v. Exxon/Mobil Corp.*, 2009 U.S. Dist. LEXIS 79255, at *25 (N.D. Cal. Sept. 2, 2009). Similarly here, the issue of injunctive relief would be more appropriately addressed later in this litigation, because Plaintiffs will be seeking different injunctive relief, on a different record, than in *O'Bannon*, and that record and request for relief have not yet even been presented to the Court.

B. Even if the Motion Were Procedurally Proper, It Has No Substantive Merit

1. *Stare Decisis* Does Not Bar the Injunctive Relief Sought by Plaintiffs

For a simple reason, Defendants ignore the fact that *O'Bannon*'s injunction reversal turned on evidentiary shortcomings: it dooms their *stare decisis* argument. "*[S]tare decisis* is important only for the decision, for the detailed legal consequence following a detailed set of facts." *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996). *Stare decisis* does not take hold where a prior "decision rests on different facts." *California v. Anglim*, 129 F.2d 455, 460 (9th Cir. 1942). As a consequence, the findings about the evidence – or rather, the absence of evidence – that led the *O'Bannon* majority to

[1] *Accord*, *Mecum v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 31219, at *15 (W.D. Wash. March 9, 2016) ("Because a prayer for relief is a remedy and not a claim, a Rule 12(b)(6) motion to dismiss for failure to state a claim is not a proper vehicle to challenge the requested relief."); *SEC v. Sells*, 2012 U.S. Dist. LEXIS 112450, at *29 (N.D. Cal. Aug. 10, 2012) ("None of the claims against Sells has been dismissed and it is premature at this time to strike any prayer for relief."); *Monaco v. Liberty Life Assur. Co.*, 2007 U.S. Dist. LEXIS 11741, at *22 (N.D. Cal. Feb. 6, 2007) ("a complaint is not subject to a motion to dismiss for failure to state a claim under Rule 12(b)(6) because the prayer seeks relief that is not recoverable as a matter of law").

overturn part of this Court's injunction has absolutely no bearing here – in a case involving different facts, different remedies, and different claims.

Similarly, the Supreme Court has explained that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). For this reason, in *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), the Supreme Court held that *stare decisis* did not control its decision, because "we have never squarely addressed the issue" in a prior case. *See also United States v. Morales*, 898 F.2d 99, 102 (9th Cir. 1990) (when an issue "is neither contested nor ruled upon in a prior case, that prior case does not establish controlling precedent").

Plaintiffs' request for injunctive relief in this action did not even lurk in the *O'Bannon* record, and thus was not "squarely addressed" by the Ninth Circuit, for the simple reason that *O'Bannon* involved different plaintiffs asserting different claims and seeking different relief. The factual record that Plaintiffs will present here – including with respect to a variety of less restrictive alternatives – to support a *liability* finding (not relief) was never presented in *O'Bannon* at all. And even if *O'Bannon* bore the similarities regarding liability that Defendants posit, the liability finding in *O'Bannon* was *affirmed*, so it is of no help to Defendants.

None of the above is news to Defendants. In opposing class certification, Defendants told the Court that the "injunction that plaintiffs seek in this case is markedly different from the injunction sought in *O'Bannon*." Class Cert. Opp'n at 6. Plaintiffs here seek an injunction against "the cap on the amount of compensation a school may provide a student-athlete." *NCAA Athletic Grant-in-Aid Cap Antirust Litig*., 311 F.R.D. at 536. The Ninth Circuit in *O'Bannon* did not consider what injunctive relief is available if Plaintiffs prevail on their claim that the cap on GIAs for athletic services is an unlawful restraint of trade but instead reviewed the specific injunction requested by the *O'Bannon* plaintiffs on the basis of a different factual record about fixing compensation for NIL rights at zero. Any perceived deficiencies in that factual record will not exist here, as Plaintiffs are developing a specifically tailored record to support the liability claims being pursued and the relief being sought in this MDL – not in *O'Bannon*.

On top of the fact that *O'Bannon* cannot compel dismissal here, Defendants distort what *O'Bannon* held when they erroneously assert that *O'Bannon* "prohibit[s] Division I member schools from paying student-athletes more than their cost of attendance." Mot. at 1. The Ninth Circuit held no such thing. The Court held, on the basis of the specific evidence before it, that the plaintiffs in *O'Bannon* proved that paying the full cost of attendance was a less restrictive alternative to the NIL restraints of the NCAA but that plaintiffs' "threadbare" and "meager" evidence did not support the part of the injunction prohibiting rules against up to $5,000 payments for the NIL rights. *O'Bannon*, 802 F.3d at 1077, 1079. The Ninth Circuit plainly did not hold that no evidentiary record could ever support any payment or benefit above the full cost of attendance as a less restrictive alternative for a different violation than the NIL restraints. To the contrary, the Court found that even the "threadbare" evidentiary record in *O'Bannon* supported compensation related to educational objectives as a less restrictive alternative to the NIL restraints, but did not support cash payments untethered to educational objectives of the NIL restraints. *Id*. at 1077. Indeed, the Court expressly noted evidence that some payments above full cost of attendance could satisfy the NCAA's proffered "amateurism" procompetitive justification for the NIL restraints. *Id*. at 1079 n.24 ("student-athletes are already permitted to accept Pell grants that raise their total aid package above the cost of attendance").

The principal case cited by Defendants—*Coalition to Defend Affirmative Action v. Brown*[2]—does not support their *stare decisis* argument. As the Ninth Circuit explained in *Coalition*, an earlier decision by the Ninth Circuit had "considered the very scenario Plaintiffs now allege." 674 F.3d at 1135 (citing *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997)). And the facts in the earlier case were "in line with the facts alleged in the complaint" in the later action. *Id*. at 1139. It was on this basis, *i.e.*, that the same claims and same facts were presented, that *stare decisis* was applied. The same cannot plausibly be said here, because the cases involve different plaintiffs, different claims, different facts, and a different request for relief.

[2] *Coalition to Defend Affirmative Action, Integration & Immigrant Rights v. Schwarzenegger*, 2010 U.S. Dist. LEXIS 129736 (N.D. Cal. Dec. 8, 2010), *aff'd sub nom. Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012).

2. Collateral Estoppel Does Not Preclude Plaintiffs' Request for Injunctive Relief

Defendants also fail to establish the key factors that must be proven for collateral estoppel to apply: the issue in the second action must be *identical* to an issue that was *actually litigated* in the first action and that was *necessary to decide the merits* of the first action. Defendants instead ignore the "actually litigated" and "necessary to decide the merits" requirements. According to Defendants:

> 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.).

Mot. at 8. But this formulation omits the collateral estoppel requirements actually identified by the Ninth Circuit in *Oyeniran*:

> Collateral estoppel applies to a question, issue, or fact when four conditions are met: (1) the issue at stake was ***identical*** in both proceedings; (2) the issue was ***actually litigated*** and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was ***necessary to decide the merits***.

672 F.3d at 806 (emphasis added to highlight omissions by Defendants).[3] As shown below, the reason Defendants omitted these factors is that they cannot satisfy them. And because the classes certified here are not identical to the class certified in *O'Bannon*, collateral estoppel cannot be applied for this reason, as well.

a. Defendants Do Not Identify Any Identical Issues That Estop Plaintiffs' Request For Injunctive Relief

Defendants do not meet their burden "of pleading and proving the identity of issues decided in the previous action." *Little v. United States*, 794 F.2d 484, 487 (9th Cir. 1986). Specifically,

[3] This Court similarly has explained that the issue must be identical in the two cases and that it must have been actually litigated in the first case. *See*, *e.g.*, *LG Elecs., Inc. v. Hitachi Am. Ltd.*, 655 F. Supp. 2d 1036, 1042 (N.D. Cal. 2009) ("in order for collateral estoppel to apply, '(1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated by the party against whom preclusion is asserted in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.'") (citation omitted).

Defendants do not identify an "identical issue" relating to injunctive relief in both *O'Bannon* and this matter that supports their collateral estoppel argument. Defendants erroneously assert that "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." Motion at 10. In fact, neither case presented that alleged issue. As discussed above, *O'Bannon* presented the issue of whether rules barring student-athletes from being paid for the use of NILs "are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade" (802 F.3d at 1052), while this matter addresses the GIA cap on athletic services. *NCAA Athletic Grant-in-Aid Cap Antirust Litig*., 311 F.R.D. at 536.

Moreover, Defendants' Motion for judgment on the pleadings must address whether Plaintiffs have stated a claim, *i.e.*, liability – not the scope of injunctive relief. *O'Bannon* affirmed the Court's findings on liability. The decision is thus of no utility to Defendants at all. Rather, *O'Bannon* undermines Defendants' Motion, just like the NCAA told the Supreme Court in its petition for certiorari. NCAA Pet. at 11.

And even if less restrictive alternatives or the scope of relief were at issue, Defendants cannot point—and have not pointed—to any "identical" issue on either score. As noted above, the injunctive relief requested in both cases is very different, and the less restrictive alternatives to be proposed here will be very different, too. To be crystal clear, while Plaintiffs will develop a factual record here to show the existence of a multitude of less restrictive alternatives, the case will not argue for any cash payments untethered from education objectives, for which the *O'Bannon* plaintiffs advocated, as a less restrictive alternative. Nor will Plaintiffs here ask for an injunction identifying specific less restrictive alternatives.

In erroneously arguing that identical issues exist that support collateral estoppel, Defendants do not properly identify or apply the factors regarding "identical issues" listed in *Steen v. John Hancock Mut. Life Ins. Co*., 106 F.3d 904, 912 (9th Cir. 1997). *See* Motion at 10. Instead of the three purported factors listed by Defendants, *Steen* identified the following four factors to decide whether issues are identical:

> (1) is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first?
>
> (2) does the new evidence or argument involve the application of the same rule of law as that involved in the prior proceeding?
>
> (3) could pretrial preparation and discovery related to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second?
>
> (4) how closely related are the claims involved in the two proceedings?

106 F.3d at 912.

Application of those four factors underscores the conclusion that there is no "identical issue" that supports collateral estoppel against the injunctive relief sought here. First, the evidence and arguments in support of injunctive relief here, which focus on the cap on GIAs for athletic services and a different set of less restrictive alternatives, have little overlap with the evidence and arguments advanced in *O'Bannon* (concerning zero payment for NIL rights and two proffered less restrictive alternatives that are not going to be pursed in this MDL). Second, while the antitrust laws apply in both actions, the pretrial preparation and discovery in *O'Bannon* did not cover the matters at issue here, because the plaintiffs in *O'Bannon* challenged only the NIL rules, not the cap on GIAs, and focused on different less restrictive alternatives and pursued different injunctive relief. *See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1032 (9th Cir. 2001) ("Although the prior proceeding and this proceeding are similar in that they both contend that Olin's acquisition of FMC is illegal under the antitrust laws, the issues resolved in the two proceedings are quite different.").[4] And, finally, the claims in the two proceedings are not closely related, given the different focuses on NIL rules and the GIA cap, the different less restrictive alternatives (if any) to be considered, and the very different factual record that will be developed in support of the claims here. *See Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999) (applying *Steen* four-factor test in holding that issues were not identical, because "[w]hile the pattern of conduct in *Shields* and the present action are related, the claims and damages are substantially dissimilar"); *Murray v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 97811, at *10 (N.D. Cal. Sept. 3, 2010) (applying four-factor test in ruling

[4] This is the only *Steen* factor Defendants even acknowledge, albeit by way of a conclusory statement unaccompanied by citation to evidence or argument.

that issues were not identical even though plaintiffs in both actions challenged defendants' conduct in connection with marketing certain Kenmore laundry dryers, because "the allegations in the instant case are sufficiently different").

b. Defendants Do Not Address Whether Any "Identical Issue" Was Actually Litigated (and Necessary to Decide the Merits) in *O'Bannon*

Defendants erroneously argue that collateral estoppel applies because "the *O'Bannon* plaintiffs had a full and fair opportunity to litigate the foregoing issues in the previous action." Motion at 11. That assertion sidesteps Defendants' burden to show that the "identical issue" was "actually litigated" (and necessary to decide the merits) in *O'Bannon*. It also ignores that the classes certified here are not identical to the class certified in *O'Bannon*, so these classes never had any opportunity to litigate anything in *O'Bannon*.

Defendants' observation that there was a "fourteen-day bench trial" (*id.*) does not remotely show that *any* issue relating to Plaintiffs' injunctive relief claims – let alone an issue necessary to decide the merits – was actually litigated during that trial to collaterally estop Plaintiffs here. To the contrary, the parties in *O'Bannon* (which did not include any of the women' basketball player plaintiffs or identical classes) could not possibly have litigated the factual and legal bases for Plaintiffs' claim for liability and injunctive relief in this matter, because they were never joined. This dooms Defendants' collateral estoppel argument.

The cases cited by Defendants for their "full and fair opportunity" argument are inapposite. In *Frontline Processing Corp. v. First State Bank*, 389 F. App'x 748, 752 (9th Cir. 2010), the Ninth Circuit held that "the district court did not violate Defendant's due process rights by applying the findings of the bench trial later to issues on summary judgment. Defendant had a full and fair opportunity to litigate the claims set for bench trial and the issues therein." So the defendant in *Frontline* actually litigated all relevant issues for the second case in the prior bench trial. That is not possible here, where the new factual record and new less restrictive alternatives have yet to be presented. And in the second case cited by Defendants, the plaintiff sought to establish that he owned certain copyrights, but the judgment and findings in a previous trial "could not be any clearer—Ivanova does not own or have the right to distribute the 8 Pictures." *Ivanova v. Columbia Pictures Indus.*, 217

F.R.D. 501, 508 (C.D. Cal. 2003), *aff'd sub nom. Laparade v. Ivanova*, 116 F. App'x 100 (9th Cir. 2004). Again, this is the opposite of the situation here, where the legal claims are different, the relief sought is different, the less restrictive alternatives are different, and the factual records will be different.

Finally, the "opportunity to litigate" test is not met here because the plaintiffs in the two cases are not the same. To start, the plaintiff class in *O'Bannon* did not include any women's basketball players. *Compare O'Bannon,* 7 F. Supp. 3d at 965 (Rule 23(b)(2) class consisted of then-current and former NCAA Division I men's basketball and football players), *with NCAA Athletic Grant-in-Aid Cap Antirust Litig.*, 311 F.R.D. at 537 (Rule 23(b)(2) classes includes all Division I women's basketball players who received or were offered GIAs during pendency of case). And the men's basketball and football classes in the two cases do not share the same interests. The *O'Bannon* class included then-current and former men's football and basketball players who challenged restraints related to their NIL rights licensed for inclusion in game footage or videogames. 7 F. Supp. 3d at 965. In contrast, the classes here assert different claims unrelated to NIL licensing; the *O'Bannon* class did not represent those interests. These classes focus on the GIA cap, and they are defined to include all college athletes who have received or were offered FBS football and Division I basketball GIAs during the pendency of the case. So the current classes are not sufficiently "identified in interest with the [class from the] former litigation" to find that the *O'Bannon* class represented "precisely the same right in respect to the subject matter involved." *United States v. Schimmels (In re Schimmels)*, 127 F.3d 875, 881 (9th Cir. 1997). Because the classes in this case are notably different from the class in *O'Bannon*, collateral estoppel cannot apply.

C. In All Events, if This Court Were to Agree with Defendants' Erroneous Interpretation of *O'Bannon,* Then It Should Remand *Jenkins* Before Deciding the Rule 12(c) Motion so That Third Circuit Law Applies

As shown above, the Ninth Circuit's decision in *O'Bannon* does not control or compel dismissal of any case in this MDL. However, if this Court were to disagree, then it should exercise its discretion to decline to rule on the Rule 12(c) motion in *Jenkins* at this time and instead delay consideration of the 12(c) motion until after the time comes for the Court to remand *Jenkins* to the District of New Jersey. This way, any dispositive motion in *Jenkins* would be decided under Third Circuit

law, not *O'Bannon*. Such a result would be a just and proper outcome, as the *Jenkins* class has the right to a trial on the merits following remand to the original court from which it was transferred. *Lexecon Inc. v. Milberg Weiss Berhad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

Indeed, were the court to conclude that *O'Bannon* compels dismissal of the injunctive relief claims in the California-filed Consolidated Action, the purpose of this multidistrict proceeding would come to a close. And the "pendency of dispositive motions is not an obstacle" that would prevent this Court from allowing the District of New Jersey to hear Defendants' motion in *Jenkins*. *In re Express Scripts, Inc., Pharmacy Benefits Mgmt. Litig.*, No. MDL 1672, Remand Order, ECF No. 67, slip op. at 2 n.1 (J.P.M.L. Dec. 8, 2015) (citing *In re Baseball Bat Antitrust Litig.*, 112 F. Supp. 2d 1175, 1177 (J.P.M.L. 2000) (remanding case with dispositive motions pending where transferee court determined that sole remaining case was best heard by transferor court)). Class counsel would thereafter determine how to proceed with *Jenkins* vis-à-vis the Consolidated Action damages claims. *See* ECF No. 291, Plaintiffs' Joint Brief re Coordination.

This approach would be consistent with justice and equity, as well as the principles set forth in Defendants' own cases. *See* Mot. at 7 n.2. Defendants' cited decisions are the progeny of *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987), *aff'd on other grounds sub nom.*, *Chan v. Korean Air Lines Ltd.*, 490 U.S. 122 (1989), which instructs that transferor forum law "merits close consideration" because, even while engaging in their own analyses, "federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts." *Id.* Here, "close consideration" of Third Circuit law – which is not controlled by *O'Bannon* – should be made by the Court where the *Jenkins* Plaintiffs filed their lawsuit. Indeed, if *Jenkins* were to be tried in New Jersey, it would make sense for the trial court to determine whether there is a merits basis for a trial under the law of the circuit that would also govern at trial.

IV. CONCLUSION

For all of the above reasons, the Motion should be denied, because it is both procedurally improper and substantively without merit.

1 Dated: May 31, 2016

Respectfully submitted,

2 By *___/s/ Steve W. Berman___*
3 Steve W. Berman (*pro hac vice*)
Ashley Bede (*pro hac vice*)
4 HAGENS BERMAN SOBOL SHAPIRO LLP
5 1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
6 Telephone: (206) 623-7292
Facsimile: (206) 623-0594
7 *steve@hbsslaw.com*
ashleyb@hbsslaw.com

8 Jeff D. Friedman (173886)
9 Jon T. King (205073)
HAGENS BERMAN SOBOL SHAPIRO
10 LLP
715 Hearst Avenue, Suite 202
11 Berkeley, CA 94710
Telephone: (510) 725-3000
12 Facsimile: (510) 725-3001
jonk@hbsslaw.com
13 *jefff@hbsslaw.com*

14 By *___/s/Bruce Simon___*
15 Bruce L. Simon (96241)
Aaron M. Sheanin (214472)
16 Benjamin E. Shiftan (265767)
PEARSON, SIMON & WARSHAW, LLP
17 44 Montgomery Street, Suite 2450
18 San Francisco, CA 94104
Telephone: (415) 433-9000
19 Facsimile: (415) 433-9008
bsimon@pswlaw.com
20 *asheanin@pswlaw.com*
bshiftan@pswlaw.com

21 *Co- Lead Counsel for Injunctive Classes in the*
22 *Consolidated Cases and in Jenkins*

By *___/s/ Elizabeth C. Pritzker___*
23 Elizabeth C. Pritzker (146267)
24 Jonathan K. Levine (220289)
Bethany L. Caracuzzo (190687)
25 Shiho Yamamoto (264741)
PRITZKER LEVINE LLP
26 180 Grand Avenue, Suite 1390
Oakland, California 94612
27 Telephone: (415) 692-0772
Facsimile: (415) 366-6110

28 *Additional Class Counsel*

By *___/s/ Jeffrey L. Kessler___*
Jeffrey L. Kessler (*pro hac vice*)
David G. Feher (*pro hac vice*)
David L. Greenspan (*pro hac vice*)
Jennifer M. Stewart (*pro hac vice*)
Joseph A. Litman (*pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
jstewart@winston.com
jlitman@winston.com

Sean D. Meenan (SBN 260466)
Jeanifer E. Parsigian (SBN 289001)
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
smeenan@winston.com
jparsigian@winston.com

Co- Lead Counsel for Injunctive Classes in the Consolidated Cases and in Jenkins

E-FILING ATTESTATION

I, Steve W. Berman, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Steve W. Berman
STEVE W. BERMAN