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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' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS** Date: August 2, 2016 Time: 2:30 p.m. Courtroom: Courtroom 2, 4th Floor Before: Hon. Claudia Wilken

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Preliminary Statement

In their moving memorandum ("Def. Mem."), defendants demonstrated that, as a matter of law, the Ninth Circuit's decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) ("*O'Bannon*"), precludes plaintiffs from stating a plausible antitrust claim challenging the current NCAA and conference defendant rules that prohibit Division I member schools from paying student-athletes more than their cost of attendance (the "Current COA Cap"). The *O'Bannon* decision definitively and unequivocally held that the NCAA and its members may lawfully adopt and enforce the Current COA Cap. "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." 802 F.3d at 1079. Defendants showed that the Ninth Circuit's *O'Bannon* decision binds *all* the members of plaintiffs' Rule 23(b)(2) classes—*including the members of the women's basketball player class*—as a matter of *stare decisis* and, further, binds the members of plaintiffs' football and men's basketball player classes as a matter of collateral estoppel. Accordingly, defendants established that they are entitled to judgment on the pleadings with respect to plaintiffs' antitrust claims seeking to invalidate the Current COA Cap.

In their opposition memorandum ("Pl. Mem."), plaintiffs attack the procedural posture of defendants' motion by erroneously arguing that the motion seeks judgment only as to certain relief and not as to one or more of plaintiffs' claims. In addition, plaintiffs attack the substantive merits of defendants' motion by incorrectly arguing that the factual and legal issues decided in *O'Bannon* are not identical to the claims and issues in this matter.

Plaintiffs are both procedurally and substantively wrong. Defendants' motion is procedurally sound; it seeks judgment on plaintiffs' entire *claim* that the Current COA Cap violates federal antitrust laws and should be invalidated. Moreover, defendants' motion is substantively sound; the dispositive factual and legal issues decided in *O'Bannon*—including, most importantly, whether the Sherman Act permits defendants to adopt and enforce rules that cap athletics-based payments to student-athletes at their cost of attendance—are identical to the dispositive issues in this action. As the Ninth Circuit observed, it is "self-evident" that paying student-athletes would "vitiate their amateur status as collegiate athletes." *Id.* at 1077. Accordingly, re-

gardless of the evidentiary record that they claim to be amassing in this case, plaintiffs cannot, as a matter of law, state a plausible claim to invalidate defendants' Current COA Cap. Defendants' are therefore entitled to judgment on the pleadings with respect to that claim.

Argument

A. ***Defendants' Motion Is Procedurally Sound***

Plaintiffs' argument that defendants' motion is procedurally defective because it is directed solely at a form of *remedy* and not an entire claim (Pl. Mem. at 6-7) is flatly wrong. Plaintiffs claim that the Current COA Cap violates the federal antitrust laws and should be enjoined. (*See Jenkins* Second Amended Complaint ("JAC") ¶¶ 1, 6; Consolidated Amended Complaint ("CAC") ¶¶ 9, 15.) Indeed, the *Jenkins* plaintiffs, who have insisted on keeping their case unconsolidated from the CAC plaintiffs' action, challenge *only* the Current COA Cap; they have no claim with respect to anything else. Defendants have moved for judgment on the pleadings with respect to the entire *Jenkins* action, and there is nothing procedurally improper about that motion.

Unlike the *Jenkins* plaintiffs, the CAC plaintiffs have two separate claims in this lawsuit, and defendants have addressed their motion for judgment on the pleadings to only one of those claims. The CAC plaintiffs make the same claim as the *Jenkins* plaintiffs that the Current COA Cap violates the antitrust laws and should be enjoined. In addition, the CAC plaintiffs separately claim that *former* NCAA Division I rules defining the value of an athletics-based grant-in-aid ("GIA") as tuition, room, board, books and fees (the "Former GIA") also violated the antitrust laws, entitling the CAC plaintiffs to damages for the difference between the Former GIA and the Current COA Cap.[1] No plaintiff seeks to enjoin the Former GIA rules because the Former GIA rules are no longer operative. And no plaintiff seeks damages arising from the Current COA Cap; all seek simply to invalidate and enjoin it.

[1] Since 2015, Division I rules have permitted member schools to award any student-athlete an athletics-based GIA up to that student-athlete's COA. For ease of reference and distinction, defendants refer to the pre-2015 GIA as the Former GIA and to the current GIA as the Current COA Cap.

The mere fact that the CAC plaintiffs challenge both the Former GIA and the Current COA Cap in the same causes of action, rather than pleading them separately, does not make a Rule 12(c) motion procedurally improper. As a matter of law, Rule 12(c) is an appropriate vehicle for dismissing separate claims within a single cause of action. *See, e.g.*, *Halloway v. Best Buy Co.*, No. C 05-5056 PJH, 2009 WL 1533668, at *4 (N.D. Cal. May 28, 2009) ("In light of the purpose of Rule 12(c) motions, . . . and given that each cause of action in the TAC alleges what could be construed as several separate claims, the court finds no reason not to consider Best Buy's motion for judgment on the pleadings as to less than entire causes of action."); *see also McKenzie v. Wells Fargo Bank, N.A.*, 931 F. Supp. 2d 1028, 1037-42 & n.3 (N.D. Cal. 2013) (where "excessive insurance claims" were included within the complaint's third through seventh causes of action along with other related claims, the court dismissed the excessive insurance claims as contrary to law); *Consumer Solutions REO, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1006-07 (N.D. Cal. 2009) (where plaintiff's Truth-in-Lending Act cause of action "actually assert[ed] two TILA claims, one for rescission and one for damages," and where one of those claims was time barred, court dismissed one of the two claims within the single cause of action).[2]

Defendants have moved for judgment on the pleadings only on the claim that the Current COA Cap violates the antitrust laws and should be invalidated. That motion is procedurally

[2] Because defendants' motion is directed at plaintiffs' entire claim that the Current COA Cap violates the antitrust laws, and not merely at a prayer for relief, the cases on which plaintiffs rely are inapplicable. Plaintiffs' cases apply only where the underlying claim is sound: "[t]he test of a complaint pursuant to a motion to dismiss lies in the claim, not in the demand." *Palantir Techs. v. Palantir Net*, No. C 10-04283 CRB, 2011 WL 3047327, at *3 (N.D. Cal. July 25, 2011) ("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)); *see also Caplan v. CAN Short Term Disability Plan*, 479 F. Supp. 2d 1108, 1111 (N.D. Cal. 2007) ("a motion to dismiss will not be granted merely because a plaintiff requests a remedy to which he is not entitled"). In *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978), which plaintiffs also cite, the Supreme Court actually affirmed dismissal of appellants' claim, explaining that "while a meritorious claim will not be rejected for want of a prayer for appropriate relief, a claim lacking substantive merit obviously should be rejected." *Id.* at 66.

sound, and plaintiffs' argument to the contrary should be rejected.[3]

B. Defendants' Motion Is Substantively Sound

Plaintiffs readily concede that they seek to invalidate the current "cap on the amount of compensation a school may provide a student-athlete" (Pl. Mem. at 8), predicating their claim that the Current COA Cap is unlawful on their contention that the Rule of Reason requires the NCAA to permit its schools to pay student-athletes more than their cost of attendance. Yet, incredibly, plaintiffs never acknowledge, or even mention, the Ninth Circuit's unambiguous holding in *O'Bannon* 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. In light of the Ninth Circuit's *O'Bannon* decision, plaintiffs simply cannot state a plausible claim to invalidate the Current COA Cap, and defendants are thus entitled to judgment on the pleadings on that claim.

Plaintiffs try to distinguish the *O'Bannon* decision from these cases in a number of ways that are factually incorrect, legally irrelevant, or both. In all relevant respects, the antitrust attack on the Current COA Cap being made in *Jenkins* and the consolidated cases is indistinguishable from the attack made, and ultimately rejected by the Ninth Circuit, in *O'Bannon*. Consequently, the *O'Bannon* decision binds all of the Rule 23(b)(2) class members here, including the members of the women's basketball player class, as a matter of *stare decisis* and, moreover, collaterally estops the members of the football and men's basketball classes, who were also members of the

[3] Plaintiffs' additional suggestion that defendants' motion may be untimely (Pl. Mem. at 3) is frivolous. Rule 12(c) expressly provides that any party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). Both conditions are clearly met here; discovery is ongoing and a trial in this matter will not occur any earlier than late 2017. This motion is thus timely and likely to hasten the resolution of this action. Indeed, it is plaintiffs, not defendants, who seek to delay the resolution of this action by inviting this Court to delay ruling on the motion with the expectation that the *Jenkins* case may later be remanded to New Jersey, and the motion ruled upon under the law of another circuit. (Pl. Mem. at 14-15.) Plaintiffs suggest that this Court should decline to rule on defendants' motion for the *purpose* of circumventing the preclusive effect of the Ninth Circuit's decision in these actions. As addressed in section B.4. below, plaintiffs' requested course of action would be unauthorized and inappropriate for the Court to follow.

O'Bannon class, from relitigating the issues decided in *O'Bannon*. Finally, as defendants have previously explained, the law of the Ninth Circuit applies to defendants' motion, and the *Jenkins* plaintiffs are not entitled to avoid the consequences of *O'Bannon* by insisting that this Court remand their case to the District of New Jersey.

1. Plaintiffs' Efforts to Distinguish O'Bannon *from These Cases Are Unavailing*

Plaintiffs try mightily to distinguish *O'Bannon* from these cases in a number of ways, but none of plaintiffs' purported distinctions is relevant to the dispositive holding in *O'Bannon* that permits defendants lawfully to agree to cap payments to student-athletes at their cost of attendance. That holding governs the Current COA Cap challenge of all plaintiff class members, including the women basketball players, as a matter of *stare decisis*, *Hart v. Massanari*, 266 F.3d 1155, 1171, 1175 (9th Cir. 2001), and binds all of the male plaintiff class members under the doctrine of collateral estoppel, *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012).

First, plaintiffs attempt to distinguish *O'Bannon* from these cases on the ground that, while the *O'Bannon* plaintiffs sought payment for the value of their name, image and likeness ("NIL") rights derived from their participation in intercollegiate athletics, plaintiffs here seek payment directly for their participation in intercollegiate athletics. (Pl. Mem. at 1.) Such a distinction, however, is irrelevant. The rules at issue in *O'Bannon* were not limited to the rules relating to the licensing of NIL rights, but included the Division I rules capping any forms of payment to student-athletes. As defendants showed in their moving memorandum (Def. Mem. at 2), this Court itself described the challenged rules in *O'Bannon* as the rules that "impose[ ] strict limits on the amount of compensation that student-athletes may receive from their schools. Most importantly, [the NCAA] prohibits any student-athlete from receiving 'financial aid based on athletics ability' that exceeds the value of a full 'grant-in-aid.'" *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 971 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015). In addition, this Court explained, the challenged rules in *O'Bannon* "prohibit[ed] any student-athlete from receiving financial aid in excess of his 'cost of attendance.'" *Id.*

Nor was the Ninth Circuit's decision in *O'Bannon* limited to the licensing of NIL rights. Although the appeals court acknowledged that the initial source of the dispute in *O'Bannon* was

the failure of student-athletes to be paid for the licensing of their NIL rights, the court ruled on the antitrust lawfulness of all the NCAA rules capping payments to student-athletes. As the Ninth Circuit made clear, the Division I rules capping payments to student-athletes challenged both in *O'Bannon* and here 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. 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). The court held that no principle of antitrust law requires the NCAA to permit schools to provide student-athletes more than their cost of attendance because "paying students cash compensation would [not] promote amateurism as effectively as not paying them." *Id.* Having determined that amateurism is an integral feature of intercollegiate sports, the Ninth Circuit held that the district court could not plausibly have concluded that "being a poorly-paid professional collegiate athlete is 'virtually as effective' [in preserving amateurism] as being an amateur." *Id.*

The Ninth Circuit's analysis and conclusions, which apply equally to payments for NIL rights and for on-field performance, 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. Given the breadth of the Ninth Circuit's Rule of Reason analysis and holding beyond the mere licensing of NIL rights, plaintiffs may not relitigate the antitrust legality of the Current COA Cap in this action. *See, e.g., Oyeniran*, 672 F.3d at 806; *Hart*, 266 F.3d at 1171, 1175.

Second, plaintiffs try to distinguish *O'Bannon* from these cases on the ground that the *O'Bannon* decision was predicated on purported factual evidentiary gaps related to possibly less restrictive alternatives; plaintiffs assert that, here, they will amass "an entirely different evidentiary record" that "will not suffer from any of the purported factual gaps found by the Ninth Circuit in *O'Bannon*." (Pl. Mem. at 1.) This contention is simply incorrect. The *O'Bannon* decision squarely addressed the antitrust legality of the NCAA's GIA rules, and determined that, as a matter of law, paying student-athletes amounts in excess of their cost of attendance was inconsistent with, and would undermine, the procompetitive purposes of the rules. The Ninth Circuit's

holding did not turn on any lack of evidence; indeed, the court observed that it was "self-evident" that paying student-athletes above their cost of attendance would "vitiate their amateur status as collegiate athletes." 802 F.3d at 1077. Moreover, having affirmed this Court's injunction that the NCAA must permit Division I schools to provide student-athletes with certain payments up to their cost of attendance, and having held that permitting schools to pay student-athletes more than their cost of attendance would undermine the procompetitive purposes of the rules, the Ninth Circuit's *O'Bannon* holding does not leave any room for a new evidentiary record about additional less restrictive alternatives. Plaintiffs here are simply not entitled to advance new less restrictive alternatives or to propound a new evidentiary record to try to improve the evidentiary record they developed in *O'Bannon*. *Hart*, 266 F.3d at 1175 (*stare decisis* applies and binds subsequent litigants "whether or not the lawyers [in the prior action] have done an adequate job of developing and arguing the issue").[4]

Third, plaintiffs further try to distinguish *O'Bannon* from these cases on the ground that the plaintiffs in *O'Bannon* were different from the plaintiffs here. (Pl. Mem. at 14.) This purported distinction is both factually wrong and legally irrelevant. As defendants previously showed (Def. Mem. at 7), each of the named plaintiffs in *Jenkins*, each of the named male plaintiffs in the consolidated action, and the thousands of male student-athletes who are absent members of the Rule 23(b)(2) classes in these actions, were absent class members in *O'Bannon*. Plaintiffs' assertion that these football and men's basketball players pursued a different interest

[4] Plaintiffs misleadingly assert that defendants previously conceded, in their opposition to plaintiffs' motion to certify the Rule 23(b)(2) classes, that the injunction sought here differs from the injunction sought in *O'Bannon*, and that that concession undermines defendants' motion for judgment on the pleadings. (Pl. Mem. at 2, 8.) The difference, which this Court itself recognized in its 2013 class certification decision in *O'Bannon*, was plaintiffs' request for a group license that would not cause class members to compete against one another for compensation, and thus would eliminate conflicts among class members that might otherwise preclude Rule 23(b)(2) class certification by "render[ing] irrelevant any differences in the value of each class member's individual publicity rights." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at *6 (N.D. Cal. Nov. 8, 2013). This distinction is entirely irrelevant to the question of whether the rule of antitrust law articulated by the Ninth Circuit in its 2015 merits decision in *O'Bannon* binds plaintiffs here.

in *O'Bannon* from the interest they now pursue here (Pl. Mem. at 14) is plainly meritless. In all of these cases, the male student-athletes have sought to invalidate the NCAA rules capping payments to student-athletes for their participation in intercollegiate athletics. Accordingly, the male athletes here are bound as a matter of *stare decisis* and collateral estoppel by the Ninth Circuit's decision in *O'Bannon* upholding the Current COA Cap as a matter of substantive antitrust law.

Plaintiffs are correct, of course, that the women's basketball players were not parties to the *O'Bannon* case, but that observation does not undermine this motion. The rule of law articulated in *O'Bannon*, which establishes that the Rule of Reason does not require the NCAA to permit Division I member schools to provide student-athletes with more than their full cost of attendance, applies to all student-athlete plaintiffs attacking the Sherman Act validity of the Current COA Cap in the Ninth Circuit, including the members of the women's basketball class in the consolidated action. As a matter of *stare decisis*, the women's basketball players, like the football and men's basketball players, are bound by the *O'Bannon* decision.

Lastly, plaintiffs contend that defendants' position on this motion that *O'Bannon* precludes plaintiffs from challenging the Current COA Cap is "strikingly at odds" with the NCAA's position in its petition for certiorari in *O'Bannon* that the Ninth Circuit erred in holding that the Former GIA rules were unlawful. (Pl. Mem. at 2.) But there is no inconsistency between these positions. On the one hand, the NCAA and the conferences fully agree with the Ninth Circuit's holding that the Rule of Reason does not require the NCAA to permit its member schools to provide student-athletes with more than their cost of attendance, and it is that holding that is the basis for defendants' motion for judgment on the pleadings. On the other hand, the NCAA does *not* agree with the Ninth Circuit's holding that the Rule of Reason requires the NCAA to permit its member schools to provide their student-athletes with financial aid up to their cost of attendance, and it is that holding that is the predicate for the NCAA's petition for certiorari. Indeed, in petitioning for certiorari, the NCAA does not seek to disturb the Ninth Circuit's holding that defendants may lawfully adopt and enforce the Current COA Cap, but expressly states that the Ninth Circuit "correctly held that requiring the NCAA to allow cash payments to student athletes above COA was not a valid alternative" to the Current COA Cap. (NCAA Pet. for Writ of Certi-

orari, at 19-20, *NCAA v. O'Bannon*, No. 15-1167 (U.S.).) Accordingly, the NCAA's petition for certiorari is entirely consistent with defendants' motion for judgment on the pleadings. In any event, the pendency of a petition for certiorari has absolutely no effect on the finality of the Ninth Circuit's decision for purposes of *stare decisis* and collateral estoppel. *See, e.g., Holman v. Experian Info. Solutions, Inc.*, No. C11-0180-CW, 2011 WL 2066722, at *2 (N.D. Cal. May 25, 2011) (Wilken, J.) ("Although [an earlier] opinion was subject to Experian's petitions for re-hearing *en banc* and for a writ of certiorari in the United States Supreme Court, the [earlier] opinion was 'nevertheless final for such purposes as stare decisis, and full faith and credit.'") (quoting *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983)).

In sum, the antitrust attack on the Current COA Cap being made in *Jenkins* and the consolidated cases is indistinguishable from the attack made, and ultimately rejected by the Ninth Circuit, in *O'Bannon*. Plaintiffs' effort to distinguish the *O'Bannon* decision from these cases in factually incorrect and legally irrelevant ways should be rejected.

2. The Ninth Circuit's O'Bannon *Decision Resolves the Antitrust Legality of the Current COA Cap for All Class Members, Including the Women's Basketball Players, as a Matter of* Stare Decisis

Because the *O'Bannon* decision resolves the antitrust legality of the Current COA Cap, it satisfies the requirement of *stare decisis* as a legal decision expressing "the detailed legal consequence following a detailed set of facts." *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996). As defendants previously explained, "[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*, 266 F.3d at 1171. "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. Moreover, contrary to their oft-stated aspirations (Pl. Mem. at 1, 6, 8, 11, 13), plaintiffs are not entitled to try to make a new evidentiary record to correct perceived "factual gaps" in *O'Bannon* once the Ninth Circuit in *O'Bannon* issued its legal decision expressing the detailed legal consequence of the detailed set of facts litigated in that case. As explained above, the rule of *stare decisis* applies and binds subsequent litigants, including all class members in the *Jenkins* and consolidated actions, "whether or not the lawyers [in the prior action] have done an adequate job of

developing and arguing the issue." *Hart*, 266 F.3d at 1175.

The Ninth Circuit in *O'Bannon* squarely addressed the antitrust legality of NCAA rules capping payments to student-athletes and held, as a matter of law, that the antitrust laws do not require the NCAA to permit its schools to provide student-athletes more than their cost of attendance. 802 F.3d at 1079. For that reason, plaintiffs' reliance on cases in which a prior decision did not squarely address the issue presented in a later action (Pl. Mem. at 8 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), and *United States v. Morales*, 898 F.2d 99, 102 (9th Cir. 1990)) or in which the operative issue was merely "lurking" in the record of the earlier case (*id.* (quoting *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004), and *Webster v. Fall*, 266 U.S. 507, 511 (1925)) is misplaced. The antitrust legality of NCAA rules capping payments to student-athletes was not lurking in the record or otherwise unaddressed in *O'Bannon*; it was central to the *O'Bannon* decision, and it controls the outcome of plaintiffs' antitrust challenge to the Current COA Cap here.

Plaintiffs concede, as they must, that the doctrine of *stare decisis* applies where, as here, "an earlier decision by the Ninth Circuit had 'considered the very scenario Plaintiffs now allege' . . . [a]nd the facts in the earlier case were 'in line with the facts alleged in the complaint' in the later action . . ., *i.e.*, that the same claims and same facts were presented." (Pl. Mem. at 9 (quoting *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1135 (9th Cir. 2012).) The *O'Bannon* decision considered the very issue that plaintiffs raise again here, and decided that the NCAA and its Division I members may lawfully agree to cap payments to student-athletes at their cost of attendance. As a matter of *stare decisis*, that decision binds all members of the Rule 23(b)(2) classes in the *Jenkins* and consolidated actions, including the members of the women's basketball player class, and precludes them from stating a plausible claim for the invalidation of the Current COA Cap. For that reason, defendants are entitled to judgment on the pleadings on that claim.

3. The FBS Football and the Men's Basketball Player Classes Are Collaterally Estopped from Relitigating the Issues Decided in O'Bannon

As defendants previously demonstrated (Def. Mem. at 7-12), collateral estoppel, or issue preclusion, "has the dual purpose of protecting litigants from the burden of relitigating an identi-

cal 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] And as defendants also showed, the issues at stake in *O'Bannon* and in these cases relating to the Current COA Cap and its lawfulness under the Rule of Reason are identical, these issues were actually litigated and decided in *O'Bannon*, the plaintiffs in *O'Bannon* had a full and fair opportunity to litigate these issues, and the issues were necessary to decide the merits of the *O'Bannon* case. *See*, *e.g.*, *Oyeniran*, 672 F.3d at 806.

Moreover, contrary to plaintiffs' argument (Pl. Mem. at 11-13), defendants faithfully described the standard for determining the identity of issues for collateral estoppel purposes, as set forth in *Steen v. John Hancock Mutual Life Insurance Co.*, 106 F.3d 904, 912 (9th Cir. 1997), and showed that that standard was amply met in this case. (Def. Mem. at 10.)[6] First, despite plaintiffs' assertion to the contrary (Pl. Mem. at 12), defendants previously explained that there is a substantial overlap between the evidence and argument to be advanced here and that advanced in *O'Bannon* concerning, among other things, whether NCAA rules capping allowable financial aid to student-athletes at their cost of attendance violates the Sherman Act. (Def. Mem. at 10-11 & n.8.) These issues were litigated and argued on a full evidentiary record in *O'Bannon* and plaintiffs may not relitigate them here. Second, as defendants previously showed (*id*. at 10), *O'Bannon* and the instant cases both involve application of the same rule of law, the Rule of Reason under Section 1 of the Sherman Act. Third, pretrial preparation and discovery relating to

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[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 Cnty.*, 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] Plaintiffs appear to contest defendants' paraphrase of the *Steen* standard in which defendants combined plaintiffs' first and third factor into a single element of the standard. (*Compare* Pl. Mem. at 12 *with* Def. Mem. at 10.)

the competitive effects and justifications for the challenged rules would substantially overlap if plaintiffs were permitted to relitigate their claim seeking the invalidation of the Current COA Cap. (*Id.*) And fourth, the claims here and in *O'Bannon* are closely related; both actions arise under Section 1 of the Sherman Act and challenge the Division I rules that prohibit member schools from paying student-athletes more than their cost of attendance. (*Id.*)

Accordingly, there can be no serious dispute that the issues plaintiffs seek to relitigate here concerning the antitrust legality of the Current COA Cap were fully litigated and decided in *O'Bannon*. Plaintiffs' effort to cobble together ancillary, and ultimately irrelevant, issues—like the shape of a hypothetical injunction—that they might choose to relitigate if given the chance does not alter the conclusion that the doctrine of collateral estoppel applies to preclude the football and men's basketball players here from contesting the antitrust legality of the Current COA Cap.

4. The Jenkins *Plaintiffs Are Not Entitled to Have Their Case Remanded to the District of New Jersey*

Plaintiffs' suggestion that the Court remand *Jenkins* to the District of New Jersey before ruling on defendants' motion for judgment on the pleadings is contrary to law. This Court has the sole jurisdiction, and responsibility, for deciding all dispositive pre-trial motions on all cases coordinated in this Court by the Judicial Panel on Multidistrict Litigation. And, as defendants have previously explained (Def. Mem. at 7 n.2), this Court is bound to apply Ninth Circuit law in its decisions on such motions, without regard to where the coordinated cases 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"). None of the cases on which plaintiffs rely is to the contrary. Accordingly, the *Jenkins* plaintiffs' request for remand to New Jersey to avoid the consequences of the *O'Bannon* decision should be denied.

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, as well as the reasons set forth in defendants' moving

memorandum, defendants' motion for judgment on the pleadings should be granted.

Dated: June 7, 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 June 7, 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