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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	Case No. 4:14-md-02541-CW Case No. 4:14-cv-02758-CW
THIS DOCUMENT RELATES TO: ALL ACTIONS	CONSOLIDATED PLAINTIFFS' AND *JENKINS* PLAINTIFFS' JOINT BRIEF RE COORDINATION AND IMPACT OF NINTH CIRCUIT RULING

Pursuant to the Court's request, the Consolidated and *Jenkins* Plaintiffs hereby submit a plan regarding coordination of their cases, including revised class definitions, and a statement regarding the recent Ninth Circuit decision in *O'Bannon v. NCAA* ("*O'Bannon*").

I. TO PROMOTE JUDICIAL EFFICIENCY AND AVOID A RACE TO *RES JUDICATA* PLAINTIFFS WILL COORDINATE THEIR CASES AND STAY ONE CASE BEFORE TRIAL.

To maximize efficiencies for the Court and the classes, and to eliminate any concerns about concomitant issues relating to claim and/or issue preclusion and the Seventh Amendment, and subject to the Court's approval, lead counsel for the Consolidated and *Jenkins* Plaintiffs propose the following plan for coordination:

- Lead counsel for the Consolidated Plaintiffs (Hagens Berman Sobol Shapiro LLP and Pearson, Simon, & Warshaw LLP) and the *Jenkins* Plaintiffs (Winston & Strawn LLP) will serve together as co-lead class counsel for all Federal Rule of Civil Procedure ("Rule") 23(b)(2) injunctive relief classes in both the Consolidated and *Jenkins* actions.
- Pursuant to our Joint Motion, all injunctive relief classes should be certified. Appointing the same co-lead class counsel in both actions will maximize efficiencies for the Court, class members, and Defendants.
- Both cases will continue to proceed jointly through discovery and all pretrial proceedings pursuant to the Judicial Panel on Multidistrict Litigation's Transfer Order up until they are ready for trial in their respective districts.
- Assuming the Consolidated Plaintiffs' Rule 23(b)(3) damages classes have been certified, Plaintiffs would—prior to trial—seek to stay the *Jenkins* action so that the Consolidated action would be tried first, in this District, before a jury, by co-lead counsel. If for any reason the Rule 23(b)(3) damages classes were not certified, co-lead counsel would assess whether to seek to stay either the Consolidated or *Jenkins* action prior to trial of the other.[1]

Under the foregoing plan, there is no concern that Defendants will be deprived of any

[1] Plaintiffs will make any additional or revised submissions that the Court deems necessary to effectuate this plan.

Seventh Amendment rights, as a damages trial would proceed first. Moreover, there is no risk of a "race to *res judicata*" because even in the absence of any damages claim, Plaintiffs hereby commit to seeking a stay of one of the actions before the other is tried.[2]

Finally, as requested by the Court, attached are revised class definitions for each of the putative classes proposed by the *Jenkins* and Consolidated Plaintiffs. *See* Exhibit 1. These definitions do not substantively alter the proposed class definitions, but are revised for consistency between both actions.

II. THE NINTH CIRCUIT'S *O'BANNON* RULING HAS NO IMPACT ON THE PENDING RULE 23(B)(2) MOTION

The *O'Bannon* appellate ruling has no impact on the present procedural motion before this Court—Plaintiffs' joint motion to certify injunctive-relief classes under Rule 23(b)(2). In *O'Bannon*, this Court certified an injunctive-relief class. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at *7 (N.D. Cal. Nov. 8, 2013). There, after rejecting the NCAA's "supposed intra-class conflict" theory as "illusory" (*id.* at *6), this Court stated that "[w]ithout the requested injunctive relief, all class members—including [] current . . . student-athletes—would potentially be subject to ongoing antitrust harms . . . ." *Id.* at *7. Those words are equally applicable to the present case, and are undisturbed by the Ninth Circuit's ruling—which did not take issue with this Court's certification order. The only discussion regarding class certification in the entire 73-page opinion is a few sentences setting forth the procedural history of the *O'Bannon* litigation. *See, e.g.*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *4 (9th Cir. Sept. 30, 2015) ("In November 2013, the district court

[2] We nonetheless note that courts have broad discretion whether to apply claim or issue preclusion and thus a "race to *res judicata*" could be dealt with at a later juncture, if and when it ever arose. "Even when the traditional prerequisites for collateral estoppel are satisfied, trial courts . . . decide whether to apply offensive non-mutual collateral estoppel. Indeed, where the application of offensive collateral estoppel would be unfair to a defendant, a trial judge *should not* allow the use of collateral estoppel." *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007) (emphasis in original) (internal citations omitted); *see also Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co.*, 873 F. 2d 229, 234 (9th Cir. 1989) ("[I]t is inappropriate to apply collateral estoppel when its effect would be unfair."); *Grisham v. Philip Morris, Inc.*, 670 F. Supp. 2d 1014, 1036 (C.D. Cal. 2009) ("[The court] may consider the absence of a jury trial as a non-dispositive factor when balancing the equities of issue preclusion.")

granted the plaintiffs' motion for class certification" and "The court . . . certified the following class under Rule 23(b)(2) for injunctive and declaratory relief . . . .").

Nor did the Ninth Circuit have any reason to closely examine the class certification order. As this Court recognized at the hearing last week (*see* Oct. 1, 2015 Hr'g Tr. at 26:1-8), the NCAA did not seek Ninth Circuit review of its defeat on class certification under either Rule 23(f) or even after the Court conducted its bench trial. Accordingly, the Ninth Circuit focused its attention only on the two merits arguments actually at issue in the NCAA's appeal: (1) the Court's finding that the NCAA's compensation rules violated the antitrust laws; and (2) the appropriate injunctive remedy for those violations. *See generally O'Bannon*, 2015 WL 5712106 at *18-26.

The *O'Bannon* appellate decision certainly impacts this case, as it provides guidance to Plaintiffs on how to prove their claims under Ninth Circuit law. That decision, however, does not have an impact on the pending procedural motion.

CONCLUSION

Plaintiffs ask the Court to adopt the Plaintiffs' proposed plan regarding coordination and to certify all of the proposed injunctive relief classes of college football and men's and women's basketball athletes in both cases under Rule 23(b)(2).

Dated: October 8, 2015

Respectfully submitted,

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatory above.

/s/ Steve W. Berman
STEVE W. BERMAN