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14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **OAKLAND DIVISION**

17 IN RE: NATIONAL COLLEGIATE  
18 ATHLETIC ASSOCIATION ATHLETIC  
19 GRANT-IN-AID CAP ANTITRUST  
LITIGATION

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

20 THIS DOCUMENT RELATES TO:  
21 ALL ACTIONS

22 Date: August 2, 2016  
23 Time: 2:30 p.m.  
Courtroom: Courtroom 2, 4<sup>th</sup> Floor  
24 Before: Hon. Claudia Wilken

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

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

20 Here, Plaintiffs do not challenge Defendants' price-fixing of NIL rights or seek injunctive  
21 relief for such a violation. Rather, the matter now before this Court concerns Plaintiffs' claim that  
22 the "classes suffer antitrust harms by being undercompensated for the *services* they offer as student-  
23 athletes," in particular, the "cap on GIAs." *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*,  
24 311 F.R.D. 532, 536, 546 (N.D. Cal. 2015) (emphasis added). Given that Plaintiffs are asserting  
25 different claims than the *O'Bannon* plaintiffs, they also will build an entirely different evidentiary  
26 record—one which, among other things, will not suffer from any of the purported factual gaps found  
27 by the Ninth Circuit in *O'Bannon* with respect to the issue of less restrictive alternatives.

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

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

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

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

## 13 II. FACTS

### 14 A. Allegations in *Jenkins* Complaint and Consolidated Complaint

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

18 Consolidated Plaintiffs and Jenkins Plaintiffs allege in their complaints  
 19 that the NCAA and its member institutions violate federal antitrust law  
 20 by conspiring to impose the cap on the amount of compensation a  
 21 school may provide a student-athlete. Plaintiffs assert that, without the  
 22 NCAA's cap on GIAs, schools would compete in recruiting student-  
 athletes by providing more generous GIAs. Plaintiffs seek an injunc-  
 tion 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.

23 *NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 536 (footnote omitted).

24 Further, with respect to the issue of injunctive relief, this Court explained that Plaintiffs simply seek  
 25 to enjoin the cap on GIAs:

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

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

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

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

### 16 **B. O’Bannon Litigation**

17 In *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), this Court explained that  
18 “Plaintiffs seek to challenge the set of rules that bar student-athletes from receiving a share of the  
19 revenue that the NCAA and its member schools earn from the sale of licenses to use the student-  
20 athletes’ names, images, and likenesses in videogames, live game telecasts, and other footage.”  
21 Plaintiffs included a class of men’s football and basketball players but no women’s basketball play-  
22 ers. The challenged price fix that was examined and found to be illegal by this Court and eventually  
23 the Ninth Circuit was “that the NCAA’s compensation rules fix the price of *one component (NIL*  
24 *rights)* of the bundle that schools provide to recruits.” *O’Bannon*, 802 F.3d at 1072 (emphasis add-  
25 ed); *id.* at 1070-71 (“the plaintiffs demonstrated that the NCAA’s compensation rules ... fix the price  
26 of one component of the exchange between school and recruit”). Whereas *O’Bannon* challenged  
27 Defendants’ fixing of the price of one “component” of the transaction between athletes and their  
28



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

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

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

### 8 III. ARGUMENT

#### 9 A. The Motion Is Procedurally Flawed, Because a Judgment on the Pleadings Cannot Be 10 Granted Based on Defendants’ Contention That a Particular Remedy Is Unavailable

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

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

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

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

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

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

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

18 For a simple reason, Defendants ignore the fact that *O’Bannon*’s injunction reversal turned on  
 19 evidentiary shortcomings: it dooms their *stare decisis* argument. “[S]tare decisis is important only  
 20 for the decision, for the detailed legal consequence following a detailed set of facts.” *In re Osborne*,  
 21 76 F.3d 306, 309 (9th Cir. 1996). *Stare decisis* does not take hold where a prior “decision rests on  
 22 different facts.” *California v. Anglim*, 129 F.2d 455, 460 (9th Cir. 1942). As a consequence, the  
 23 findings about the evidence – or rather, the absence of evidence – that led the *O’Bannon* majority to

24 <sup>1</sup> *Accord, Mecum v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 31219, at \*15 (W.D. Wash.  
 25 March 9, 2016) (“Because a prayer for relief is a remedy and not a claim, a Rule 12(b)(6) motion to  
 26 dismiss for failure to state a claim is not a proper vehicle to challenge the requested relief.”); *SEC*  
 27 *v. Sells*, 2012 U.S. Dist. LEXIS 112450, at \*29 (N.D. Cal. Aug. 10, 2012) (“None of the claims  
 28 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”).

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

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

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

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

1 On top of the fact that *O'Bannon* cannot compel dismissal here, Defendants distort what  
2 *O'Bannon* held when they erroneously assert that *O'Bannon* “prohibit[s] Division I member schools  
3 from paying student-athletes more than their cost of attendance.” Mot. at 1. The Ninth Circuit held  
4 no such thing. The Court held, on the basis of the specific evidence before it, that the plaintiffs in  
5 *O'Bannon* proved that paying the full cost of attendance was a less restrictive alternative to the NIL  
6 restraints of the NCAA but that plaintiffs’ “threadbare” and “meager” evidence did not support the  
7 part of the injunction prohibiting rules against up to \$5,000 payments for the NIL rights. *O'Bannon*,  
8 802 F.3d at 1077, 1079. The Ninth Circuit plainly did not hold that no evidentiary record could ever  
9 support any payment or benefit above the full cost of attendance as a less restrictive alternative for a  
10 different violation than the NIL restraints. To the contrary, the Court found that even the “thread-  
11 bare” evidentiary record in *O'Bannon* supported compensation related to educational objectives as a  
12 less restrictive alternative to the NIL restraints, but did not support cash payments untethered to  
13 educational objectives of the NIL restraints. *Id.* at 1077. Indeed, the Court expressly noted evidence  
14 that some payments above full cost of attendance could satisfy the NCAA’s proffered “amateurism”  
15 procompetitive justification for the NIL restraints. *Id.* at 1079 n.24 (“student-athletes are already  
16 permitted to accept Pell grants that raise their total aid package above the cost of attendance”).

17 The principal case cited by Defendants—*Coalition to Defend Affirmative Action v. Brown*<sup>2</sup>—  
18 does not support their *stare decisis* argument. As the Ninth Circuit explained in *Coalition*, an earlier  
19 decision by the Ninth Circuit had “considered the very scenario Plaintiffs now allege.” 674 F.3d at  
20 1135 (citing *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997)). And the facts  
21 in the earlier case were “in line with the facts alleged in the complaint” in the later action. *Id.* at  
22 1139. It was on this basis, *i.e.*, that the same claims and same facts were presented, that *stare decisis*  
23 was applied. The same cannot plausibly be said here, because the cases involve different plaintiffs,  
24 different claims, different facts, and a different request for relief.

25  
26  
27 <sup>2</sup> *Coalition to Defend Affirmative Action, Integration & Immigrant Rights v. Schwarzenegger*,  
28 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).

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

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

6           The doctrine precludes a party from relitigating an issue in a subse-  
7 quent proceeding when (i) the first proceeding ended with a final  
8 judgment on the merits, (ii) the party against whom collateral estoppel  
9 is asserted was a party or in privity with a party at the first proceeding,  
10 (iii) the issue decided in the previous proceeding is the same as the  
11 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.).

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

14           Collateral estoppel applies to a question, issue, or fact when four con-  
15 ditions are met: (1) the issue at stake was *identical* in both proceed-  
16 ings; (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*.

17 672 F.3d at 806 (emphasis added to highlight omissions by Defendants).<sup>3</sup> As shown below, the rea-  
18 son Defendants omitted these factors is that they cannot satisfy them. And because the classes certi-  
19 fied here are not identical to the class certified in *O'Bannon*, collateral estoppel cannot be applied for  
20 this reason, as well.

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

22           Defendants do not meet their burden “of pleading and proving the identity of issues decided  
23 in the previous action.” *Little v. United States*, 794 F.2d 484, 487 (9th Cir. 1986). Specifically,  
24

25           <sup>3</sup> This Court similarly has explained that the issue must be identical in the two cases and that it  
26 must have been actually litigated in the first case. *See, e.g., LG Elecs., Inc. v. Hitachi Am. Ltd.*, 655  
27 F. Supp. 2d 1036, 1042 (N.D. Cal. 2009) (“in order for collateral estoppel to apply, ‘(1) the issue at  
28 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 determi-  
nation of the issue in the prior litigation must have been a critical and necessary part of the judgment  
in the earlier action.’”) (citation omitted).

1 Defendants do not identify an “identical issue” relating to injunctive relief in both *O’Bannon* and this  
2 matter that supports their collateral estoppel argument. Defendants erroneously assert that “the  
3 central question in each case is identical: whether NCAA rules capping allowable financial aid to  
4 student-athletes at their education-related cost of attendance constitute an unreasonable restraint of  
5 trade in violation of the Sherman Act.” Motion at 10. In fact, neither case presented that alleged  
6 issue. As discussed above, *O’Bannon* presented the issue of whether rules barring student-athletes  
7 from being paid for the use of NILs “are subject to the antitrust laws and, if so, whether they are an  
8 unlawful restraint of trade” (802 F.3d at 1052), while this matter addresses the GIA cap on athletic  
9 services. *NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 536.

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

15 And even if less restrictive alternatives or the scope of relief were at issue, Defendants cannot  
16 point—and have not pointed—to any “identical” issue on either score. As noted above, the injunc-  
17 tive relief requested in both cases is very different, and the less restrictive alternatives to be proposed  
18 here will be very different, too. To be crystal clear, while Plaintiffs will develop a factual record  
19 here to show the existence of a multitude of less restrictive alternatives, the case will not argue for  
20 any cash payments untethered from education objectives, for which the *O’Bannon* plaintiffs advoca-  
21 ted, as a less restrictive alternative. Nor will Plaintiffs here ask for an injunction identifying specific  
22 less restrictive alternatives.

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

1 (1) is there a substantial overlap between the evidence or argument to  
2 be advanced in the second proceeding and that advanced in the first?

3 (2) does the new evidence or argument involve the application of the  
4 same rule of law as that involved in the prior proceeding?

5 (3) could pretrial preparation and discovery related to the matter pre-  
6 sented in the first action reasonably be expected to have embraced the  
7 matter sought to be presented in the second?

8 (4) how closely related are the claims involved in the two proceedings?

9 106 F.3d at 912.

10 Application of those four factors underscores the conclusion that there is no “identical issue”  
11 that supports collateral estoppel against the injunctive relief sought here. First, the evidence and  
12 arguments in support of injunctive relief here, which focus on the cap on GIAs for athletic services  
13 and a different set of less restrictive alternatives, have little overlap with the evidence and arguments  
14 advanced in *O’Bannon* (concerning zero payment for NIL rights and two proffered less restrictive  
15 alternatives that are not going to be pursued in this MDL). Second, while the antitrust laws apply in  
16 both actions, the pretrial preparation and discovery in *O’Bannon* did not cover the matters at issue  
17 here, because the plaintiffs in *O’Bannon* challenged only the NIL rules, not the cap on GIAs, and  
18 focused on different less restrictive alternatives and pursued different injunctive relief. *See Pool*  
19 *Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1032 (9th Cir. 2001) (“Although the prior proceeding  
20 and this proceeding are similar in that they both contend that Olin’s acquisition of FMC is illegal  
21 under the antitrust laws, the issues resolved in the two proceedings are quite different.”).<sup>4</sup> And,  
22 finally, the claims in the two proceedings are not closely related, given the different focuses on NIL  
23 rules and the GIA cap, the different less restrictive alternatives (if any) to be considered, and the very  
24 different factual record that will be developed in support of the claims here. *See Resolution Trust*  
25 *Corp. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999) (applying *Steen* four-factor test in holding that  
26 issues were not identical, because “[w]hile the pattern of conduct in *Shields* and the present action  
27 are related, the claims and damages are substantially dissimilar”); *Murray v. Sears, Roebuck and Co.*,  
28 2010 U.S. Dist. LEXIS 97811, at \*10 (N.D. Cal. Sept. 3, 2010) (applying four-factor test in ruling

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<sup>4</sup> This is the only *Steen* factor Defendants even acknowledge, albeit by way of a conclusory state-  
ment unaccompanied by citation to evidence or argument.



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

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

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

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

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

1 F.R.D. 501, 508 (C.D. Cal. 2003), *aff'd sub nom. Laparade v. Ivanova*, 116 F. App'x 100 (9th Cir.  
2 2004). Again, this is the opposite of the situation here, where the legal claims are different, the relief  
3 sought is different, the less restrictive alternatives are different, and the factual records will be differ-  
4 ent.

5 Finally, the “opportunity to litigate” test is not met here because the plaintiffs in the two cases  
6 are not the same. To start, the plaintiff class in *O'Bannon* did not include any women’s basketball  
7 players. *Compare O'Bannon*, 7 F. Supp. 3d at 965 (Rule 23(b)(2) class consisted of then-current and  
8 former NCAA Division I men’s basketball and football players), *with NCAA Athletic Grant-in-Aid*  
9 *Cap Antitrust Litig.*, 311 F.R.D. at 537 (Rule 23(b)(2) classes includes all Division I women’s basket-  
10 ball players who received or were offered GIAs during pendency of case). And the men’s basketball  
11 and football classes in the two cases do not share the same interests. The *O'Bannon* class included  
12 then-current and former men’s football and basketball players who challenged restraints related to  
13 their NIL rights licensed for inclusion in game footage or videogames. 7 F. Supp. 3d at 965. In  
14 contrast, the classes here assert different claims unrelated to NIL licensing; the *O'Bannon* class did  
15 not represent those interests. These classes focus on the GIA cap, and they are defined to include all  
16 college athletes who have received or were offered FBS football and Division I basketball GIAs  
17 during the pendency of the case. So the current classes are not sufficiently “identified in interest  
18 with the [class from the] former litigation” to find that the *O'Bannon* class represented “precisely the  
19 same right in respect to the subject matter involved.” *United States v. Schimmels (In re Schimmels)*,  
20 127 F.3d 875, 881 (9th Cir. 1997). Because the classes in this case are notably different from the  
21 class in *O'Bannon*, collateral estoppel cannot apply.

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

25 As shown above, the Ninth Circuit’s decision in *O'Bannon* does not control or compel dis-  
26 missal of any case in this MDL. However, if this Court were to disagree, then it should exercise its  
27 discretion to decline to rule on the Rule 12(c) motion in *Jenkins* at this time and instead delay consi-  
28 deration 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



1 Dated: May 31, 2016

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**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