

No. 14-16601

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWARD O'BANNON, JR.,
On Behalf of Himself and All Others Similarly Situated,
Plaintiff-Appellee,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,
and
ELECTRONIC ARTS, INC.; COLLEGIATE LICENSING COMPANY,
Defendants.

Appeal from the United States District Court
for the Northern District of California
Case No. 09-cv-03329 (Hon. Claudia Wilken)

**JOINT MOTION TO REVISE BRIEFING SCHEDULE
AND SET ORAL ARGUMENT**

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September 19, 2014

CORPORATE DISCLOSURE STATEMENT

The National Collegiate Athletic Association (NCAA) is an unincorporated, non-profit membership association composed of over 1,000 member schools and conferences. It has no corporate parent and no publicly held corporation owns 10 percent or more of its stock.

The parties to this appeal jointly move this Court to revise the briefing schedule and set oral argument as outlined below. The NCAA believes it is critical for this Court to resolve the appeal before the permanent injunction issued by the district court takes effect on August 1, 2015, and while Plaintiffs disagree that there is any such urgency, both parties wish to spare the Court adversarial motion practice.

* * *

Plaintiffs are a class of current and former college football and men's basketball players. They brought this action claiming, in their words, that the NCAA, its member schools, and its conferences have conspired to deprive college athletes in football and men's basketball of any portion of the revenues earned through the licensing of their names, images, and likenesses in television broadcasts, rebroadcasts, game clips, and videogames. After certifying a nationwide injunctive class and conducting a bench trial, the district court ruled that the NCAA had violated the Sherman Act, and issued a permanent injunction. *See* Case No. 09-cv-03329 (N.D. Cal.), Dkt. Nos. 291 (findings of fact and conclusions of law), 292 (permanent injunction), 293 (clerk's judgment), 298 (order clarifying permanent injunction).

The district court's injunction, the pertinent portion of which is quoted in the margin, is scheduled to take effect on August 1, 2015.¹ (The NCAA asked the district court in its post-trial brief to stay any injunction pending appeal; the district court denied a stay.) The NCAA contends that if this appeal is not resolved by that date, then absent a stay the NCAA and its members will, in the NCAA's words, be forced to make fundamental changes to the administration of collegiate athletics and to their relationships with student-athletes. Plaintiffs disagree vigorously that the injunction will present a disruption but are nevertheless amenable to a briefing and argument schedule that would permit both to be completed by April or May 2015.

According to the Court's scheduling order, the NCAA's opening brief is due November 28, 2014; Plaintiffs' brief is due December 29, 2014; and the NCAA's reply brief is due within fourteen days of service of Plaintiffs' brief. *See* Dkt. No.

¹ Specifically, the district court permanently enjoined the NCAA and its members "from agreeing to: a. Prohibit deferred compensation in an amount of \$5,000 per year or less (in 2014 dollars) for the licensing or use of prospective, current, or former Division I men's basketball and Football Bowl Subdivision football players' names, images, and likenesses through a trust fund payable upon expiration of athletic eligibility or graduation, whichever comes first; or b. Prohibit the inclusion of compensation for the licensing or use of prospective, current, or former Division I men's basketball and FBS football players' names, images, and likenesses in the award of a full grant-in-aid, up to the full cost of attending the respective NCAA member school, as defined in 20 U.S.C. § 1087*ll* and calculated by each school's financial aid office applying the same standards, policies, and procedures for all students." Case No. 09-cv-03329 (N.D. Cal.), Dkt. No. 292 at 1-2.

1-4 (Aug. 21, 2014). In light of the many holidays in November, December, and January, one or both parties could need to seek a streamlined extension under this schedule, potentially resulting in the briefing continuing into March.

To ensure that the briefing concludes earlier than that, the parties propose that the NCAA's opening brief be due November 14, 2014; that Plaintiffs' answering brief be due January 21, 2015; and that the NCAA's reply brief be due February 11, 2015. The parties further propose that no streamlined extensions be allowed so the opposing party has an opportunity to respond to any further extension requests.²

The NCAA also requests that oral argument be set for a date in April or May 2015, again with the objective of resolving the appeal before the district court's injunction takes effect; Plaintiffs do not oppose this request. The parties are amenable to having argument heard in San Francisco, Pasadena, or any other location the Court might set.

Finally, the parties propose that the foregoing briefing and argument schedule be applied even if the NCAA files a second notice of appeal from the district court's judgment. On September 4, the parties asked that court to certify its judgment as a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b), because the judgment does not apply to defendants Electronic Arts, Inc. or

² All transcripts of proceedings in the district court have been ordered.

the Collegiate Licensing Company—Plaintiffs’ claims against those defendants are the subject of a pending settlement—and hence is not immediately appealable under 28 U.S.C. § 1291. *See* Case No. 09-cv-03329 (N.D. Cal.), Dkt. No. 313. (Because the court entered an injunction, however, this Court has jurisdiction over the NCAA’s already-filed appeal under 28 U.S.C. § 1292(a)(1).) If the district court enters the requested 54(b) certification, the NCAA anticipates filing a second notice of appeal. But, again, the parties propose that the schedule suggested above be applied to that appeal as well (which the parties expect to move the Court to consolidate with the already-filed appeal).

For the foregoing reasons, the parties request that the Court revise the briefing schedule as follows:

November 14, 2014 – NCAA’s opening brief due;

January 21, 2015 – Plaintiffs’ answering brief due;

February 11, 2015 – NCAA’s reply brief due.

The parties further request that the Court specify that streamlined extensions are not available for any of these briefs, and the NCAA requests that the Court direct that oral argument be heard in April or May 2015, which Plaintiffs do not oppose.

Respectfully submitted,

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September 19, 2014

CIRCUIT RULE 25-5(f) ATTESTATION

I attest that plaintiffs concur in the content of this filing. *See* Cir. R. 25-5(f).

/s/ Seth P. Waxman
SETH P. WAXMAN

CERTIFICATE OF SERVICE

I certify that on this 18th day of September 2014, I served the foregoing on all parties in this case by filing it with the Court's ECF system. *See* Cir. R. 25-5(g).

/s/ Seth P. Waxman
SETH P. WAXMAN