Nos. 14-16601 & 14-17068

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,
v.
EDWARD O'BANNON, OSCAR ROBERTSON, WILLIAM RUSSELL, HARRY FLOURNOY, THAD JARACZ, DAVID LATTIN, BOB TALLENT, ALEX GILBERT, ERIC RILEY, PATRICK MAYNOR, TYRONE PROTHRO, SAM JACOBSON, DAMIEN RHODES, DANNY WIMPRINE, RAY ELLIS, JAKE FISCHER, JAKE SMITH, DARIUS ROBINSON, MOSES ALIPATE, and CHASE GARNHAM,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees

From Orders Denying Summary Judgment and Granting a Permanent Injunction Entered By the United States District Court for the Northern District of California

The Honorable Claudia Wilken, Senior District Judge
Case Nos. 09-cv-1967 CW & 09-cv-3329 CW

PLAINTIFFS-APPELLEES' OPPOSITION BRIEF IN RESPONSE TO NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S MOTION TO STAY INJUNCTION

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INTRODUCTION

At this late date—eight months after filing its opening brief in this Court and nearly a year after the district court concluded that the National Collegiate Athletic Association ("NCAA") had violated the Sherman Act[1]—the NCAA seeks a stay of the prohibitory injunction, which compels no particular action and merely forbids the continuation of its unlawful anticompetitive agreement. Giving short shrift to the public interest and the likelihood of success on the merits, the NCAA focuses on the balance of harms, daringly suggesting that it, its member schools, and *even college athletes* will suffer irrevocably if the injunction takes effect, thereby ending a restraint of trade. But the NCAA already attempted these arguments in another guise at trial—styled there as procompetitive justifications for the restraint—and the district court was thoroughly unpersuaded after hearing testimony from dozens of the NCAA's own witnesses, whose positions were "not credible" and whose theories were "implausible." The NCAA is no more entitled to a stay today than it was a year ago, and the Court should deny the present motion for the same reason: the evidence does not support the NCAA's casual prognostications of doom. Staying *competition* is anathema to the antitrust laws.

[1] The district court also denied a stay but granted the NCAA and its member schools a year to prepare for the injunction.

ARGUMENT

Stays are an "intrusion into the ordinary processes of administration and judicial review" and are granted or denied at the discretion of the Court. *Nken v. Holder*, 556 U.S. 418, 427, 433-34 (2009) (quotation marks and citation omitted). In exercising this discretion, "a district court's [earlier] conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983).

A stay applicant faces a "heavy burden," *see, e.g.*, 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 2904 (3d ed.), in demonstrating that a stay is warranted under the Court's case-by-case consideration of four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). As to the first factor, a movant cannot merely propose the "possibility" of success and must instead establish a "reasonable probability" of success, tantamount to "a substantial case for relief on the merits." *Nken*, 556 U.S. at 434-35; *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). As to the second factor, irreparable harm must be

"probable" to satisfy this criterion. *See Leiva–Perez*, 640 F.3d at 968. Yet even certain irreparable harm does not entitle a party to a stay as a matter of right. *Nken*, 556 U.S. at 427; *Leiva-Perez*, 640 F.3d at 965.

I. THERE IS NO STRONG SHOWING THAT THE NCAA IS LIKELY TO SUCCEED ON THE MERITS.

In lieu of demonstrating a reasonable probability of success, the NCAA merely rehashes its appellate briefing in summary. That exercise cannot satisfy the NCAA's burden. Plaintiffs reluctantly respond in kind, mindful of the need for brevity:

- Dicta found in *NCAA v. Board of Regents*, 468 U.S. 85 (1984)—a case that the NCAA lost—does not immunize the NCAA's "amateurism" rules from antitrust scrutiny. Rather, *Board of Regents* prescribed a Rule of Reason analysis that the district court faithfully adhered to in weighing the evidence presented at trial, including the testimony of the NCAA's own witnesses. *See also American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (emphasizing that the Rule of Reason is the appropriate analytical framework "[w]hen 'restraints on competition are essential if the product is to be available at all'") (quoting *Board of Regents*, 468 U.S. at 101).[2] The propriety of the district court's analysis is underscored further by this Court's application of the Rule of Reason to challenges involving college-athlete recruitment and eligibility rules.

[2] The NCAA grasps at straws in proposing that *Board of Regents* shields its conduct *irrespective of the district court's factual findings after a full trial*, which included observations about the NCAA's inconsistent fidelity to its own conceptions of "amateurism." *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973-75 (N.D. Cal. 2014). And its heavy reliance on dicta is all the more conspicuous after *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2412-13 (2015), in which the Supreme Court emphasized its freedom "to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences."

See Tanaka v. Univ. of S. Calif., 252 F.3d 1059 (9th Cir. 2001); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315 (9th Cir. 1996).

- The NCAA's assertion that the rules challenged here are non-commercial, and therefore afield of the Sherman Act, is at odds with the substantial record evidence of the commercial nature of college-athlete recruitment; the Seventh Circuit's decision in *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 340 (7th Cir. 2012) ("No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program."); and even the NCAA's own *amici*. The Sherman Act has a wide purview that undoubtedly reaches the big business of college football and basketball recruiting.

- Plaintiffs have sustained antitrust injury in spades. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109-13 (1986) (15 U.S.C. § 26 requires only the threat of "loss or damage" from an antitrust violation). The NCAA mistakenly proposes that standing turns on an actionable right of publicity for every class member, which ignores the voluminous expert testimony from economists and industry experts attesting to the revenue-sharing that would occur between member schools and college athletes absent the restraint, regardless of each state's right of publicity law.[3] What is more, the underlying television contracts—and even the recent comments of NCAA Executive Vice President of Regulatory Affairs Oliver Luck—speak in terms of name, image, and likeness "rights" that have economic value (regardless of tort law), which are regularly bought and sold in the professional leagues. All of that evidence is consistent with the trial testimony of Joel Linzner, Executive Vice President, Business and Legal Affairs, Electronic Arts, Inc. ("EA"), who readily admitted that EA is eager to license the names, images, and likenesses of college athletes—and pay them for it.

  Even if the NCAA were correct that a specific cause of action would need to lie in order to establish antitrust injury, a substantial majority of

[3] The NCAA's stay motion, which reports that member schools will use their new-found freedom to remunerate players for the licensing and use of their names, images, and likenesses, clashes with the NCAA's arguments on antitrust injury (that no such compensation would ever occur).

states recognize a broad right of publicity that does not exempt sports broadcasts or videogames. And the First Amendment does not shield the NCAA, as it does not "provide the media with a right to transmit an entire performance [without permission] or to prohibit performers from charging fees." *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 624 (7th Cir. 2011); *see Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) ("[W]e are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."); *see also In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1284 (9th Cir. 2013), *cert. dismissed sub nom., Elec. Arts Inc. v. Keller*, 135 S. Ct. 42 (2014) ("EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment.").

- The district court's Rule of Reason analysis was thorough and sound, and its factual findings were not clearly erroneous. The district court carefully considered all of the evidence presented before determining that the restraint has significant anticompetitive effects (as even Dr. Rubinfeld, the NCAA's economic expert, agreed); the NCAA's procompetitive justifications were wanting; and less restrictive alternatives exist.

II. THE NCAA WILL NOT BE IRREPARABLY INJURED ABSENT A STAY.

The NCAA's chief argument concerning irreparable injury is that, come August 1, 2015, some member schools will offer deferred compensation and/or grants-in-aid up to the full cost of attendance *that they could not claw back in the event of an appellate victory*. This is hardly a sympathetic position, much less a demonstration of irreparable injury. Under the injunction, member schools that have the resources and desire to offer more as part of their recruiting package will

do so, unilaterally. That they might wish to avoid this sort of competition and keep those financial resources for other purposes is not reason for a stay.[4]

More troubling is the NCAA's suggestion that these modest payments, which will undoubtedly aid college athletes in paying for their education, their family needs (including travel expenses), and their medical bills, will lead to "diminished undergraduate experiences and diminished success afterward." Mot. to Stay Injunction ("Mot.") at 5. That position is hard to square with the NCAA's own advocacy of stipends to meet the true cost of attendance, which are now permitted among "autonomy" conferences in Division I as of this year—in no small part because of this litigation.[5] Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships,* NCAA MEDIA CENTER (Jan. 18, 2015), http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships; *see also* SER 415. Indeed, NCAA Division I Board Chair

[4] The real harm to member schools is the uncertainty injected by the NCAA's tardy stay request, which threatens to derail the careful planning of hundreds of institutions over the last year. NCAA Division I Board Chair Harris Pastides (and trial witness) noted months ago that "an NCAA committee is currently working on creating new NCAA bylaws" to comply with the injunction—and that he would not support a further appeal to the Supreme Court, preferring instead to "turn the page and start working within whatever framework we have." Jon Solomon, *NCAA D-I Board Chair Doesn't Want O'Bannon Appealed to Supreme Court,* CBS SPORTS (May 30, 2015), http://www.cbssports.com/collegefootball/writer/jon-solomon/25200396/top-ncaa-board-member-doesnt-want-obannon-appealed-to-supreme-court-.

[5] Notably, the NCAA and its member schools have resolved any questions about Title IX and taxation with respect to cost-of-attendance stipends.

(and trial witness) Harris Pastides has observed, with respect to this case, that "$5,000 is not that different from the numbers we're all declaring relative to cost of attendance." Jon Solomon, *NCAA D-I Board Chair Doesn't Want O'Bannon Appealed to Supreme Court,* CBS SPORTS (May 30, 2015), http://www.cbssports.com/collegefootball/writer/jon-solomon/25200396/top-ncaa-board-member-doesnt-want-obannon-appealed-to-supreme-court- ("I'm one of those people who was strongly in favor of cost of attendance sharing more money with the players to help college become more affordable."). It is difficult to comprehend how financial offers of a small fraction of a school's annual room, board, and tuition might trump a college athlete's consideration of his future "academic, athletic, and social communities."[6] Mot. at 5. The NCAA's paternalism knows no bounds.

The NCAA continues down this path, even proposing that *the actions of its member schools* would "damage the legitimacy of the athletic contests"—"irreparably tarnish[ing] the NCAA and the goodwill associated with its role in promoting amateur college athletics," which has waned considerably in recent years. *Id*. at 5-6. Yet the NCAA's own expert testified that the amount of money that schools will now be permitted, not required, to share with college athletes

[6] Certainly the evidence presented at trial does not support that speculation. *See, e.g., O'Bannon*, 7 F. Supp. 3d at 983.

would not affect amateurism or endanger college sports. *See O'Bannon*, 7 F. Supp. 3d at 983 ("The NCAA's own witness, Mr. Pilson, testified that he would not be troubled if schools were allowed to make five thousand dollar payments to their student-athletes and that his general concerns about paying student-athletes would be partially assuaged if the payments were held in trust. Trial Tr. 770:25–771:18."). This concession alone should extinguish the NCAA's stay request. In any event, the NCAA cannot obtain a stay to prevent its member schools from making choices that *the schools* do not believe will threaten college athletics or the NCAA.

Much of the confusion that the NCAA hopes to sow derives from its characterization of the prohibitory injunction. The injunction does not "require"[7] anything of member schools other than a unilateral evaluation of their football and basketball recruiting packages, consistent with their institutional and academic missions. The NCAA conjures up a doomsday scenario, without any citation to record evidence, in which member schools might slash athletic programs; eliminate entire teams; erode "the overall student-athlete experience"; and expend vast resources answering "difficult questions." Mot. at 6-8. The NCAA's witnesses and the documentary evidence told a very different story at trial, as reflected in the district court's findings. *See, e.g.*, *O'Bannon*, 7 F. Supp. 3d at 982-83. But the

[7] Mot. at 5.

simple fact is that no member school needs to change a thing under the injunction if it does not wish to do so. If the NCAA is correct, and modest compensation to college athletes is truly so thorny, no member school will choose to offer it after August 1, 2015. The NCAA's rampant speculation is no reason to deny the schools the freedom to make these decisions.

III. A STAY WOULD SUBSTANTIALLY INJURE CLASS MEMBERS.

The NCAA's proposed stay would, however, harm class members on the eve of their first opportunity for more vigorous competition among the member schools recruiting them. In its quick dismissal of this substantial injury, the NCAA incorrectly assumes that the injunction will not affect *current* college athletes who "have already decided where to matriculate." Mot. at 8. Yet the injunction is not so limited; it explicitly reaches current college athletes, who often transfer to another more attractive football or basketball program (and are recruited to do so after signaling their availability to other schools).

If this Court were to issue a stay, it may well[8] deprive prospective college athletes in Division I men's basketball and football of compensation (whether in the form of deferred compensation or a grant-in-aid up to the cost of attendance or both) for the 2016-2017 season. It would also likely deprive current college

[8] Depending on the amount of time between any stay and the Court's decision on the merits.

athletes in the same sports of any compensation in conjunction with their recruitment for the 2016-2017 season as transfers (subject to the NCAA's transfer rules and exceptions). All told, a stay could cost class members a substantial aggregate sum that their respective schools might otherwise elect to share with them in the upcoming recruiting cycle (beginning August 1, 2015 and relating to the 2016-2017 season).

Even a subsequent favorable decision on the merits might not make these individuals whole. If a stay issues, schools will be incentivized to recruit college athletes as soon as possible under the current status quo (i.e. a prohibition on payment for the licensing and use of names, images, and likenesses) and sign them up promptly, within the earliest deadlines available under the National Letter of Intent,[9] so as to insulate the schools from any new competition until the following season—even if the Court were to affirm the very next day. The recruiting cycle, at least as it pertains to that individual for the upcoming season, would be over, and thus there could be no compensation of the sort contemplated by the injunction.

Nor would any college athletes benefit from a stay. The NCAA invokes the district court's damages class-certification analysis, which considered the possibility that individual damages ***in excess of $100,000*** might have caused a small number of elite college athletes otherwise bound for the professional leagues

[9] *See* http://www.nationalletter.org/.

to remain in school another year (in the but-for scenario, absent the anticompetitive agreement). *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at *8-9 (N.D. Cal. Nov. 8, 2013). That hypothetical occurrence, however rare, might nonetheless lead to displacement of a handful of prospective college athletes whose roster spots would be occupied by the lingering elite college athletes. *See id*. This situation is extraordinarily unlikely in the present context, however. In essence, the NCAA is proposing that offers of ***$5,000 or less*** in deferred compensation and a grant-in-aid reflecting the full cost of attendance will cause those bound for the NBA or the NFL to remain in college another year—and for that reason an appreciable number of prospective college athletes might benefit from a stay. That argument feigns ignorance of professional athletes' salaries (with league minimums above $400,000 annually), as well as elite college athletes' incentives to go pro before sustaining an injury that might compromise their earning capacity. It comes as no surprise that the NCAA cannot identify a single class member who might benefit from a stay.

IV. THE PUBLIC INTEREST COUNSELS AGAINST A STAY.

The NCAA attempts to cloud this Court's consideration of the public interest by suggesting, in effect, that fans and college athletes do not support the injunction—or even sharing any of the staggering revenues in college athletics with the athletes themselves. That is absurd. Even a passing glance at Sports

Illustrated, ESPN, Deadspin, SB Nation, Bleacher Report, or the sports pages of any major newspaper reveals overwhelming support for the trial decision[10] and widespread dissatisfaction with the NCAA and its refusal to share with college athletes any portion of the spectacular sums that they generate (as the NCAA, its conferences, and its member schools experience exponential revenue growth and attendant spikes in executive and coaching salaries).[11] The public interest is not

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[10] *See, e.g.*, The Editorial Board, *The O'Bannon Ruling: 'Student-Athlete' Is History*, THE NEW YORK TIMES (Aug. 13, 2014), *available at* http://www.nytimes.com/2014/08/14/opinion/the-obannon-ruling-student-athlete-is-history.html?_r=0; The Editorial Board, *The O'Bannon Ruling: College Athletes Win*, THE NEW YORK TIMES (Aug. 13, 2014), *available at* http://www.nytimes.com/2014/08/14/opinion/the-obannon-ruling-college-athletes-win.html.

[11] *See, e.g.*, Billy Haisley, *1931 Op-Ed Eviscerates 'Hypocrisy… Utter Cowardice' of College Sports*, DEADSPIN (Mar. 26, 2015), http://deadspin.com/1931-op-ed-eviscerates-hypocrisy-utter-cowardice-1693823088; Rohan Nadkarni, *NCAA Deadenders Are Running Out of Arguments*, DEADSPIN (Aug. 8, 2014), http://deadspin.com/ncaa-deadenders-are-running-out-of-arguments-1618290766; Kevin Trahan, *Mark Emmert's About to Testify in Court. What Could Possibly Go Wrong?*, SB NATION (June 17, 2014), http://www.sbnation.com/college-football/2014/6/17/5817598/mark-emmert-ncaa-tesitmony-obannon-court-trial; Martin Rickman, *Arian Foster, Former College Athletes Sign 'Statement of Support' in O'Bannon Case,* SPORTS ILLUSTRATED (Apr. 4, 2014), http://www.si.com/college-football/campus-union/2014/04/04/ed-obannon-lawsuit-statement-of-support; Sean Gregory, *It's Time to Pay College Athletes,* TIME MAGAZINE (Sept. 16, 2013), *available at* http://time.com/568/its-time-to-pay-college-athletes; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), *available at* http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/; Mats Engdahl, *Righting a Wrong: Ed O'Bannon Takes the NCAA to Court*, BLEACHER REPORT (July 23, 2009), http://bleacherreport.com/articles/223090-lets-go-ed-taking-the-ncaa-to-court.

served by extending a "decades-old practice and tradition"[12] of expropriation that benefits only a few.

This is not a new argument either. The NCAA tried—and failed—to prove at trial that an injunction permitting revenue-sharing would diminish consumer demand. Its contention was that fans would turn off their televisions in protest if college athletes were to receive modest sums for the use of their names, images, and likenesses. But the evidence furnished by the NCAA did not support its position. As the district court found, "the NCAA's restrictions on student-athlete pay is not the driving force behind consumer interest in FBS football and Division I basketball." *O'Bannon*, 7 F. Supp. 3d at 978. Rather, "the evidence presented at trial suggests that consumers are interested in college sports for other reasons," including school loyalty and geographic affinity. *Id.* at 977-78, 1001 (citing trial testimony from NCAA witnesses Mark Emmert, Neal Pilson, and Christine Plonsky).

Emblematic of its counterfactual approach, the NCAA makes other self-serving assertions that lack record citation and were not borne out at trial, among them that "the injunction is likely to create great confusion"; that the rules at issue "have long protected student-athletes from commercial pressures" (along with the implicit suggestion that the injunction will somehow subject college athletes to

[12] Mot. at 9.

commercial pressures); and that complying with the injunction will "divert . . . resources and attention away from the[] educational mission." Mot. at 9; *see, e.g.*, *O'Bannon*, 7 F. Supp. 3d at 984 (noting evidence of the NCAA's "failure" in "protecting student-athletes from commercial exploitation," which NCAA President Mark Emmert acknowledged at trial), *id.* at 1002-03 (rejecting the NCAA's argument that "its restrictions on student-athlete compensation help educate student-athletes and integrate them into their schools' academic communities").[13] The NCAA's hyperbole reaches its zenith when it warns of a looming "threat[]" to "college sports as they have long been known and loved by participants and fans alike." Mot. at 9. The Court should recognize these warnings as nothing more than a frantic defendant hoping to preserve a profitable anticompetitive scheme for a few more months.

CONCLUSION

For all of the foregoing reasons, the NCAA's motion to stay the injunction should be denied.

Dated: July 27, 2015

[13] *See also* Big Ten Conference Commissioner James Delany, *Education First, Athletics Second: The Time for a National Discussion is Upon Us* 1-7 (2015), *available at* http://i.usatoday.net/sports/college/2015-4-17-Education%20First%20Athletics%20Second.pdf (lamenting the subordinate role of education in college athletics and decrying the "imbalance" that has only grown over the last few decades).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 27th day of July, 2015, I electronically filed the foregoing with the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Michael P. Lehmann*