No. 17-15973

United States Court of Appeals
For the Ninth Circuit

LAMAR DAWSON,

Plaintiff – Appellant,
v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND PAC-12 CONFERENCE,

Defendants – Appellees

On Appeal From The United States District Court
For The Northern District of California
The Honorable Richard Seeborg
No. 16-cv-05487-RS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Absent congressional intent or statutory authority, Defendants' belabored incantation of the now tattered mantra of "amateurism" does not exempt contract student athletes who play Division I FBS football from the protections afforded them by state and federal labor laws.[1] That bargained-for exchange of labor for in-kind compensation is squarely within the ambit of both labor laws. In fact, Defendants concede, as they must, that there is ***no*** federal or state exemption or exclusion under the labor laws based upon the "tradition of amateurism." AB 21.

Defendants acknowledge that under controlling case law, the proper analysis of an employment relationship under the Fair Labor Standards Act ("FLSA") is one of "economic reality" (AB 1), yet incredibly argue that the present day economic realities of Division I FBS football, including the hundreds of millions of dollars reaped by the NCAA and PAC-12 from the players' fierce efforts, "is simply irrelevant." AB 14; Excerpt of Record ("ER") 106, 120-121, ¶¶ 8, 45. Defendants are flatly wrong.

The economic reality is that Defendants accept labor from Division I FBS football players in exchange for compensation. From that labor, the NCAA and PAC-12 generate mega-million dollar revenues that rival many Fortune 500 companies. ER 106-107, 110, 117, 120, ¶¶ 8, 9, 23, 38, 44. As this Court

[1] *See* Brief for the National Collegiate Athletic Association ("NCAA") and PAC-12 Conference ("PAC-12") (Dkt. 21) ("AB") 1, 2, 8, 19.

recognized in *O'Bannon*, the contract created by the NCAA's compensation rules for Division I FBS football players regulates the bargained-for exchange of "labor for in-kind compensation . . . [in] a quintessentially commercial transaction." Opening Brief of Plaintiff-Appellant ("OB") 19.[2]

The "commercial" relationship between Defendants and Division I FBS football players at issue here is fundamentally different from the one between the NCAA and members of the University of Pennsylvania's women's track and field team before the Seventh Circuit in *Berger*, upon which Defendants extensively rely.[3] Judge Hamilton's concurring opinion in *Berger* confirms this, noting that because "track and field is not a 'revenue' sport at Penn . . . . the economic reality and sometimes frayed tradition of amateurism both point toward dismissal" in that case. *Berger*, 843 F.3d at 294. However, Judge Hamilton explained that for "students who receive athletic scholarships to participate in so-called revenue sports like Division I [FBS football]," the "economic reality and the tradition of amateurism may ***not*** point in the same direction." *Id.* (emphasis added). Therefore, Judge Hamilton concluded, "with economic reality as our guide," any labor analysis related to revenue sports like Division I FBS football is beyond *Berger's* limitations. *Id.* The District Court's failure to conduct its analysis under

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[2] *O'Bannon v. NCAA*, 802 F.3d 1049, 1066 (9th Cir. 2015) ("*O'Bannon*"), *cert. denied*, 137 S. Ct. 277, 196 L. Ed. 2d 33 (2016).

[3] *See Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016) ("*Berger*").

this Court's controlling decision in *O'Bannon* and its misplaced reliance on the inapposite decision in *Berger* is reversible error.

As discussed in the OB and herein, Plaintiff has adequately pleaded under California and federal law that all Division I FBS football players are entitled to compensation for their work as contract student athletes given the primary economic benefit they uncontestably confer upon Defendants. *See* OB 17-36, 38-41. The Court's decision below should be reversed and the Complaint reinstated.

II. DIVISION I FBS FOOTBALL PLAYERS ARE COVERED EMPLOYEES UNDER THE FLSA

As explained by this Court in *O'Bannon*, the quintessentially commercial relationship between Defendants and Division I FBS football players falls clearly within the "striking breadth" of the FLSA's definition of "employ." *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). Division I FBS football is 'big business' (ER 106-107, 110, 117, 120, ¶¶ 8, 9, 23, 38, 44), and the bargained-for exchange of labor for in-kind compensation, by which Defendants reap billions of dollars from the work of such contract student athletes, places their relationship within the wide scope of the FLSA.

In enacting the FLSA, Congress sought to protect employees as well as law-abiding employers from unfair competition in the national economy. *See* 29 U.S.C. § 202. Such competitive concerns and the misuse of economic power

support the application of the FLSA in this case. As Judge Easterbrook of the Seventh Circuit explained 25 years ago:

> Many scholars understand the NCAA as a cartel, having power in the market for athletes . . . . The NCAA depresses athletes' income – restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes' services for less than the competitive market price.

United States v. Walters, 997 F.2d 1219, 1124-25 (7th Cir. 1993) (citing articles and cases). A quarter-century later, that "jaundiced eye" cannot ignore the tremendous economic advantage Defendants reap from their enormous competitive advantage over players in the revenue-producing sport of Division I FBS football.

Ignoring the Supreme Court's directive that the FLSA should be ***broadly interpreted to achieve its goals*** (*see* OB 15-16), Defendants improperly seek to narrow its scope, divorced of any congressional intent or statutory support, based simply on the shibboleth of "the century-old 'tradition of amateurism.'" *See* AB 1, 21, 15-27. As this Court in *O'Bannon* already admonished the NCAA, simply because a wrong has been carried on for many years does not make it lawful. 802 F.3d at 1073 ("The NCAA cannot fully answer the district court's finding that the compensation rules have significant anticompetitive effects simply by pointing out that it has adhered to those rules for a long time.").

Furthermore, Defendants' extensive reliance on *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 120 (1984) in support of its thread-bare "amateurism" argument is misbegotten. AB 1, 2, 8, 19. *Board of Regents*, an antitrust action which determined that the NCAA controlled the market for televised football games, found the NCAA ***was*** subject to the antitrust laws (not excluded from them); and its analysis of the Sherman Act is not germane to determine the scope of the FLSA, a broader, more comprehensive law. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947) ("*Walling*") ("[I]n determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance.").

Instead, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) ("*Alamo*"), also extensively relied upon by Defendants, is instructive. The Supreme Court considered whether commercial businesses operated by a non-profit religious organization (the "Foundation") were covered by the FLSA (*see id.* at 295-99), and held that the FLSA applied to the Foundation's commercial activities because the Act "contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations." *Id.* at 296. This 'no express or implied exception' holding quashes any notion that the extra-statutory term, "amateurism," somehow spares Defendants' very profitable

and commercial Division I FBS football program from the FLSA simply because they are conducted by educational organizations. In any event, Defendants' enormously profitable commercial activities are hardly "amateur."

In *Alamo*, the Supreme Court rejected arguments (nearly identical to Defendants' smokescreen of "amateurism" here) that the various commercial businesses it operated were exempt from FLSA coverage, regardless of the express terms of the Act, because they were "infused with a religious purpose." 471 U.S. at 298. The Court thus rejected the relevance of the Foundation's allegedly charitable purposes for operating the commercial businesses, stating that "***the admixture of religious motivations does not alter a business's effect on commerce***." *Id.* (emphasis added). Even more so here, the non-statutory guise of "amateurism" does not alter the commercial nature of Defendants' Division I FBS football program and its impact on the interstate market for televised sports and other sports-related products.

In light of *Alamo*, Defendants' argument that the commercial relationship between Division I FBS football players and Defendants is "outside the [FLSA's] scope" because it is motivated by "academic" pursuits and "amateurism" is wholly without merit. AB 31. As in *Alamo*, Defendants: (1) served the general public; (2) competed with other vendors; and (3) gained an unfair business advantage over

their competitors ***by operating with an underpaid workforce***. 471 U.S. at 299; OB 7-11.

Because FLSA coverage has been established here, contrary to Defendants' arguments (AB 16-21), the rights conferred by the FLSA may not be waived or abridged by private parties, ***even if no compensation agreement exists***. As the Supreme Court has long recognized, an employee's rights to the minimum wage, overtime compensation, and liquidated damages may not be abridged or waived because these fundamental FLSA rights affect the public interest. *See, e.g.*, *Alamo*, 471 U.S. at 302; *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-41 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.") (citation omitted).

III. FAILURE TO APPLY THE ECONOMIC REALITY TEST TO CONTRACT STUDENT ATHLETES IS REVERSIBLE ERROR

As Defendants concede, this Court's recent opinion in *Benjamin v. B&H Education, Inc.*, No. 16-17147 (9th Cir. Dec 19, 2017), recognizes that the ultimate "test of [FLSA] employment is . . . [one of] economic reality" in deciding whether students should be regarded as employees under the FLSA. *See* Dkt. 27-1. In *Benjamin*, this Court agreed with "those decisions that the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether

students should be regarded as employees under the FLSA." *Benjamin*, slip op. at 15-16 (Dkt. 27-2).

Defendants' argument that the economic realities analysis undertaken in *Benjamin* is not applicable to NCAA athletics (Dkt. 27-1) fails on a clear reading of the opinion, which, after examining the relevant Supreme Court cases, generally applies the economic realities test "in the student/employee context." *Benjamin*, slip op. at 15-16. Furthermore, *Benjamin* nowhere suggests that student activities, such as NCAA Division I FBS football, should be excluded or exempted from the economic realities analysis.[4] In fact, as Judge Thomas recognized in his dissent in *O'Bannon*:

> Even today, the NCAA's conception of amateurism does not fall easily into a bright line rule between paying student-athletes and not paying them. Tennis players are permitted to receive payment of up to $10,000 per year for playing their sport. A tennis player who begins competing at a young age could presumably earn upwards of $50,000 for playing his sport and still be considered an amateur athlete by the NCAA.

802 F.3d at 1083.

Other than repeatedly waving the tattered "amateurism" flag, Defendants provide no controlling Ninth Circuit or Supreme Court authority in support of their exclusionary argument. For example, Defendants mistakenly rely on *Walling*,

[4] The fact that the Seventh Circuit, in *Berger*, refused to apply the *Glatt* factors (*Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015)), adopted by the Ninth Circuit in *Benjamin*, is further reason to reject *Berger* as relevant authority here. *See Berger*, 843 F.3d at 291.

where the Supreme Court ruled in favor of the railroad because the trainees working alongside railroad workers, not the railroad, were the primary beneficiaries of the system since "the railroads ***receive no 'immediate advantage'*** from any work done by the trainees." 330 U.S. at 153 (emphasis added). In contrast, playing Division I FBS football is not a vocational or educational program where academic credits or vocational licenses are earned. And more importantly, the substantial and "immediate" economic advantage is directly and primarily gained by the NCAA and PAC-12, ***not*** the athletes.

In *Alamo*, as previously discussed, the Supreme Court looked at the "economic reality" of commercial businesses with "volunteers," and held that the "volunteers" were actually employees under the economic realities test, noting that the "volunteers" expected to receive in-kind non-cash benefits in exchange for their services, which amounted to "wages in another form." 471 U.S. at 301. Because the volunteers "work[ed] in contemplation of compensation," they were employees under the FLSA.[5] *Id.* at 301, 306. Here, an employment relationship

[5] For these reasons, Defendants' reliance on *Williams v Strickland*, 87 F.3d 1064, 1065 (9th Cir. 1996) and *Hale v. State of Ariz.*, 993 F.2d 1387, 1394 (9th Cir. 1993) where rehabilitation participants in a homeless shelter and prison inmates were found not to be employees because there was no bargained-for compensation relationship, in either case is misplaced. AB 17, 18, 20, 21, 34, 36. The prisoners worked because they had to work (*Hale*, 993 F.2d at 1394); and the rehabilitation participants had no expectation of compensation other than treatment. *Strickland*, 87 F.3d at 1067. Here, Division FBS I football players have a contractual compensation relationship which includes bargained for benefits in

unquestionably exists because the athletes expect to receive similar in-kind benefits such as food, lodging, grants-in-aid and scholarships, which amount to wages in another form. Indeed, as the Court held in *O'Bannon*, the bargained-for exchange of "labor for in-kind compensation" is "a quintessentially commercial transaction," not an educational one. 802 F.3d at 1066. Under these circumstances, the contract student athletes work "in contemplation of compensation" just as the *Alamo* "volunteers" did.

Thus, the Supreme Court's economic realities test establishes that an employment relationship unquestionably exists here. OB 17-22.

A. *Benjamin* Supports Reversal of Court Below

The *Benjamin* "primary beneficiary test" lists seven factors, all of which support a finding that contract student athletes are employees. Defendants argue that the first factor ("expectation of compensation") controls the instant outcome. Dkt. 27-1. This factor is easily met because the aid and scholarships to play in Division I FBS football programs are necessary to attract the best football players and, as discussed in *Alamo*, and *O'Bannon*, *supra*, are a bargained for exchange in kind constituting "an expectation of compensation." Indeed, the Court's decision in *O'Bannon* virtually compels the conclusion that the athletes expect compensation in exchange for their labor. 802 F.3d at 1066.

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exchange for services with Defendants that govern the terms and limits of their compensation. ER 117-19, ¶¶ 40, 41.

Considering the *Benjamin* factors clearly favors a finding of an employment relationship here: (1) there is an expectation of compensation in some form; (2) football is not a course of educational credit; (3) sports training occurs throughout the academic year; (4) actual academic performance is disrupted by game schedules; and (5) NCAA Division I FBS football does not provide any significant educational benefit to the players themselves.

Defendants' arguments otherwise are not credible or factually supportable: (1) the argument that athletic scholarships are not tethered to an athlete's skill (AB 8) is facially ridiculous, without any factual support in the record below, and flies squarely in the face of *O'Bannon*; (2) the allegation in Plaintiff's Complaint to the NCAA Bylaws discussing grant-in-aid money does not "disavow[] any argument that athletic scholarships are compensation for student-athletes' play" (AB 20), but instead demonstrates the extent of control that the NCAA and the PAC-12 jointly exercise as employers over all "compensation" for Division I FBS football players (ER 118); and (3) the form-over-substance argument that athletes play without any compensation agreement was summarily rejected in *Alamo*, where "volunteers" who worked ***without*** compensation agreements at the Foundation's commercial businesses (and claimed they did not expect to be paid for their work) nonetheless qualified as employees under the FLSA. 471 U.S. at 299-303. Contrary to the record below, even if some Division I FBS football players might not consider

their scholarships or grants to be "compensation agreements," as Defendants suggest, such opinions would not be "dispositive" because the "test of employment under the Act is one of 'economic reality.'" *Id.* at 301.

As in *Alamo*, the economic reality controls, not the label. 471 U.S. at 293, 301.[6] "If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act" – a result clearly contrary to congressional intent in enacting the FLSA. *Id*. at 302.

B. Defendants' Reliance on the DOL's Field Operations Handbook is Misplaced

Defendants' attempt to deprive contract student athletes of their employment rights based on the DOL's Field Operations Handbook ("FOH") also fails.

First, the FOH does not, as Defendants misleadingly suggest (AB 22-23), interpret the FLSA so as to exclude Division I FBS football players from the Act's coverage. While the FOH § 10b24(a) (Jan. 3, 2017) provides that "University or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of

[6] Courts look beyond labels the parties place on the relationship and examine the economic realities of the work. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (relationship depends on "circumstances of the whole activity" not isolated factors).

the Act," the categorization of students involved in extracurricular activities as non-employees depends for its *sine qua non* on the fact that such activities must be "***conducted primarily for the benefit of the participants***," rather than for the ***primary benefit*** of their institutional sponsors.

As expressly stated by section 10b03(e) of the FOH:

> As part of their overall educational program, [schools] . . . may permit or require students to engage in activities in connection with . . . intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, ***conducted primarily for the benefit of the participants*** as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution.

(Emphasis added).

Here, by marked contrast, even a cursory look at the economics of Division I FBS football confirms that those programs ***primarily benefit*** the Defendants, not the participating players. Defendants ignore both their own significant financial benefits and the FOH's limiting language, which requires for an activity to be exempted from the FLSA that the primary benefit not inure to the sponsoring institutions.

Second, other FOH provisions focus on who receives the "***primary benefit***" of an activity. For example, for a student with disabilities in a school-work program, "[t]he WHD [Wage and Hour Division] will not assert . . . an

employment relationship" where "[t]he activities are basically educational, ***are conducted primarily for the benefit of the participants***, and comprise one of the facets of the educational opportunities provided to the students." FOH § 10b03(h), (i)(1) (emphasis added). Further, "[t]he shift to an employment relationship may occur shortly after the placement or it may occur later. As a general rule, work for a particular employer, either a private employer or the school, after 3 months will be assumed by the WHD to be part of an employment relationship . . . ." *Id.*, § 10b03(j). Clearly, the DOL recognizes that certain students (non-revenue sports participants) may not be considered employees while others (contract student athletes in revenue sports) are employees based on the primary benefit of the activity.

Third, under "student-trainee" programs, students may "not [be] employees within the meaning of the FLSA" only if "[t]he employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may actually be impeded." *Id.*, § 10b11(b)(4). In the present case, Defendants cannot deny that they have ***primarily*** received, and continue to receive, "immediate" and substantial economic benefits from its Division I FBS football program.

Fourth, in examining the fundamental nature of the employment relationship, the FOH offers other basic guidelines that Defendants assiduously

ignore. Under FOH section 10b09, the DOL emphasizes that "[t]he subject-matter of the employment relationship must be work or its equivalent." In this regard, "the essential elements of work" are: "(1) Physical or mental exertion (whether burdensome or not);" "(2) Controlled or required by the employer;"' and "(3) ***Pursued necessarily and primarily for the benefit of the employer and his or her business***." FOH § 10b09 (emphasis added). Without dispute, Division I FBS football programs satisfy each of these elements as an employment relationship.

Thus, contrary to Defendants' misleading suggestion, the FOH compels the conclusion that an employment relationship exists between Defendants and the Division I FBS football players.[7]

C. Rescission of GC17-01 Does Not Support Defendants' Argument

In the OB, after demonstrating that Ninth Circuit precedent and other federal decisional law supported a determination that Division I FBS football players were employees of Defendants (OB 17-22), Plaintiff also cited *Northwestern University, Employer, and Collegiate Athletes Players Ass'n, Petitioner*, Case 13-RC-121359 (N.L.R.B.), decided March 26, 2014 (OB 31-34) and the January 31, 2017 Report of the NLRB General Counsel (GC 17-01) ("scholarship football players at

[7] The lack of any DOL enforcement action is neither relevant nor entitled to any weight. *See* AB 23 (citing lack of enforcement actions); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) ("We acknowledge that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred.").

Northwestern and other Division I FBS private colleges and universities are employees under the NLRA because they perform services for their colleges and the NCAA, subject to their control, in return for compensation"). OB 34.

On December 1, 2017, the current NLRB General Counsel, Peter Robb, rescinded his predecessor's Report. *See* Dkt. 26 at 1. The rescission was not based on any analysis or determination that GC 17-01 was erroneous. GC Robb simply stated that though "new General Counsels have often identified novel legal theories that they want explored through mandatory submissions to Advice," he had "not yet identified any such initiatives" and, without any analysis, he rescinded seven memoranda, including GC 17-01. Dkt. 26 at 6-7. The basis for the rescissions was simply that "cases that involve significant legal issues should be submitted to Advice." Dkt. 26 at 3.

While the prior GC Report has been rescinded, the reasoning of that Report remains as compelling as ever, as evidenced by the recent NLRB decisions cited at OB 34 n.16, which concluded that university students could be both students and employees. *See The Trustees of Columbia University in the City of New York, Employer, and Graduate Workers of Columbia-GWC, UAW, Petitioner*, Case 02-RC-143012 (N.L.R.B.), decided Aug. 23, 2016; *see also The George Washington University, Employer, and Service Employees Int'l Union, Local 500, a/w Service Employees Int'l Union, CTW, CLC, Petitioner*, Case 05-RC-188871 (N.L.R.B.

Region 5), decided April 21, 2017. Even after the rescission, it remains the only analysis from the GC's office on the question.[8]

In sum, GC 18-02 does not change the NLRB's policies or definition of the employment relationship under the FLSA which support Plaintiff's contention that he, as well as all Division I FBS football players whom he seeks to represent, were employees of the PAC 12 and the NCAA.

IV. DIVISION I FBS FOOTBALL PLAYERS ARE EMPLOYEES UNDER CALIFORNIA LABOR LAW

Work performed by Division I FBS football players provided substantial economic benefits to Defendants and was subject to Defendants' pervasive control on all levels. *See* OB 7-10. Application of well-settled California labor law to such straightforward facts dictates a finding here that they are employees.[9] *See Martinez*

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[8] Defendants cannot rely on the rescission of GC 17-01 to support their argument, since agency deference is not warranted where the agency has not actually addressed an issue within its discretion to address. *Aqua Products, Inc. v. Matal*, 872 F.3d 1290, 1318 (Fed. Cir. 2017); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-2126 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. . . .'[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'" [Citations omitted.] No such "reasoned explanation" appears in GC 18-02 for the rescission of GC 17-01, nor is any change in policy expressed therein. *See* OB 34-36.

[9] As with the majority of Plaintiff's cited case law, Defendants disregard the authority holding that evidence of employment status under FLSA informs the inquiry under California law (OB 39 n.17). The fact that Plaintiff and the California Class qualify as employees pursuant to the FLSA (*see* § III.A., *supra*) further supports such a finding under California law.

v. Combs, 49 Cal. 4th 35, 58, 64 (2010) (the "widely used 'employ, suffer or permit' standard reache[s] irregular working arrangements the proprietor of a business might otherwise disavow with impunity").

Failing to address the requisite California standard, Defendants' arguments fail by wrongly relying on misplaced analogy to entirely unrelated statutory schemes and authority, ignoring relevant authority, and misconstruing public policy. None of Defendants' self-serving conclusions circumvent the fact that the California Legislature has ***not*** in fact enacted an exclusion of student athletes (and more specifically Division I FBS football players) from California wage laws.[10] Nor is Defendants' reliance on the longevity of their entrenched system of exploitation (AB 47 n.10) compelling. *See O'Bannon*, 802 F.3d at 1073 (NCAA's long-time adherence to its own rules does not itself justify otherwise illegal conduct).[11] The District Court's failure to address the fact that Division I FBS

[10] None of Defendants' repeated claims that California has "codified that student-athletes at state schools are not employees" (AB 32 n.6) as "public policy" (AB 42) are supported by direct citation to such comprehensive principles, indeed because the California legislature and courts have not so held in the context of ***wage and hour law*** applicable here.

[11] In addition, the representation that the current system has been in place since 1906 is dubious according to accounts of the NCAA's history. *See e.g.*, Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (last visited Jan. 9, 2018) (indicating that college athletes were paid from 1929 to the late 1950s).

football players perform highly valuable work, always subject to Defendants' extensive control, is reversible error.

A. An Employment Relationship Exists Under California Law

Defendants go to great lengths to avoid discussing the relevant "control" test used by California courts to define an "employment" relationship, no doubt because the facts here compel a finding of employment. Defendants unquestionably had the right to control, and in fact exercised considerable control over Division I FBS football players, whose labors drove the economic engine of Defendants' enormous revenues. *See* ER 106, 107, 110, 117, 120 (¶¶ 8, 9, 23, 38, 44); OB 7-11. Indeed, the Bylaws relied upon by Defendants (*e.g.*, AB 45) demonstrate their total control over the players. *See NCAA Manual* 10, Bylaw 12.5.1.3 (prohibiting any references to "involvement in intercollegiate athletics" for promotion of their own business, art or other enterprise). Defendants certainly "exercised the lion's share of control over" Plaintiff and the California Class, and should be required to reimburse them for their labor. *Betancourt v. Advantage Human Resourcing, Inc.*, No. 14-cv-01788-JST, 2014 U.S. Dist. LEXIS 123504, at *13 (N.D. Cal. Sept. 3, 2014).[12]

Other than generically stating that the "control" factors and tests for employment under California common law should not apply (AB 52), Defendants

[12] Such facts equally support finding an employment relationship under the FLSA.

provide essentially no response to the authorities cited by Plaintiff (OB 39-41), arguing just two of the seven cases cited "*assume* that 'work' was performed" (AB 56), which is entirely irrelevant.

In *Martinez*, 49 Cal. 4th 35, the Court examined whether control established liability under the Labor Code, and found the definition of "to employ" held three alternative meanings - wages, hours or working conditions . *Id.* at 64 (emphasis in original). Since then, Courts have held that, under *Martinez*:

> [A]ny one of the three aspects . . . is sufficient to impute employer liability under California wage and hour law. Because this definition is in the disjunctive, it 'has the obvious utility of reaching situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work.' The test is also 'broad enough to reach through straw men and other sham arrangements to impose liability for wages on the actual employer.'

Torres v. Air to Ground Servs., Inc., 300 F.R.D. 386, 395 (C.D. Cal. 2014) (citing *Martinez*, 49 Cal. 4th at 59). *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 350-53 (1989), while examining independent contractor status, has provided a multi-factor test for employment that is consistently applied by courts with an eye toward control: "It is settled that the right to control job performance is the primary factor in determining any employment relationship . . . ." *State ex rel. Dep't of California Highway Patrol v. Superior Court*, 60 Cal. 4th 1002, 1012 (2015) (applying the *Borello* factors). *See also Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 532 (2014) ("the extent of the hirer's

right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists").

Rather than address the relevant factors, Defendants repeatedly argue, without support, that such tests were never intended to be applied to student athletes (*see, e.g.*, AB 56 n.14), and dismiss authority outlining the "control" test as contrary to *Townsend* and *Shephard.* This vastly overstates the holdings of those cases and neglects their context. *Townsend v. State of California,* 191 Cal. App. 3d 1530 (1987), examined the question of whether an athlete was an employee for the purposes of vicarious liability for personal injury. *Shepard v. Loyola Marymount Univ.*, 102 Cal. App. 4th 837 (2002), concluded that the plaintiff was not an employee under the workers' compensation law or the Fair Employment and Housing Act, neither of which is at issue here.[13]

Defendants also take issue with Plaintiff's characterization of Division I FBS football players as generating staggering revenue on Defendants' behalf,[14] yet that undeniable economic fact is highly relevant to the sound application of the wage and hour laws. For Division I FBS football players, "the NCAA limits their

[13] Even so, Defendants provide no meaningful response to the fact that the *Shepard* court's conclusion that it would be unreasonable for an athlete to be an employee for one purpose but not for another purpose lacked sound statutory analysis. *Id*. at 846-47; OB 45; AB 53-55.

[14] The District Court simply ignored the fact that Division I FBS football players generate substantial revenue while under Defendants' strict and pervasive control (*see* ER 122-26, ¶¶ 51-60).

scholarships to include only tuition, room and board, and books, often leaving substantial gaps between the real cost of a college education," yet in "the 2011-12 academic year, experts project that the NCAA's total revenue topped $ 871 million . . . ." Michelle A. Winters, Comment, *In Sickness and in Health: How California's Student-Athlete Bill of Rights Protects Against The Uncertain Future Of Injured Players*, 24 MARQ. SPORTS L. REV. 295, 301-303 (Fall 2013).

Defendants' argument that revenue is a "non-issue" is more than misleading. It is pure hypocrisy, and it demonstrates Defendants' willful blindness and indifference to their economic exploitation of Plaintiff and the California Class, while contending that their indentured workforce should remain unpaid regardless of the enormous revenues flowing from contract student labor. No wonder that Defendants are so highly criticized by commentators and courts alike. *See* OB 26-29.

As a matter of California law, Defendants cannot redefine their relationship with Division I FBS football players by unilaterally deciding that the players' activities are not "work." *See Narayan v. EGL, Inc.*, 616 F.3d 895, 904 (9th Cir. 2010) ("label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced") (citation omitted).[15] Defendants cite section 67360(a) of the California Education Code, whereby any person is prohibited

[15] *Accord O'Bannon*, 802 F.3d at 1065 (Describing the NCAA's argument that its compensation rules were simply "eligibility" restrictions as a "sleight of hand").

"from giving 'money or other thing of value' to induce or reward a student-athlete's participation in college athletics programs" as embodying a "legislative determination" that so-called "student-athletes are not employees." AB 44. However, subsection (b) of section 67360 exposes that the NCAA controls its relationship with its athletes:

> This section does not apply to any public or private institution of postsecondary education or to any officer or employee of that institution when the institution, officer, or employee is acting in accordance with an official written policy of that institution which is in compliance with the bylaws of the National Collegiate Athletic Association; or to any intercollegiate athletic awards approved or administered by the student athlete's institution; or to any other student of that institution; or to any member of the immediate family of the student athlete.

Cal. Educ. Code § 67360(b).

Nor does Defendants' citation to the Student Athlete Bill of Rights assist their position. Even if the Bill of Rights can be lauded as a "non-employment solution[ ]" (AB 45), that is beside the point. It does nothing to address whether or not wage and hour laws apply to contract student athletes, and clearly does not answer that question in the negative.[16]

[16] Defendants' reliance on the Bill of Rights is illusory because "most large athletic programs already offer a more comprehensive insurance policy than their smaller counterparts do," and in fact, served to allow athletes to "play without fear of incurring large medical bills if they are injured." *In Sickness and in Health*, 24 MARQ. SPORTS L. REV. at 318-19.

Accordingly, the District Court's erroneous decision permits Defendants to shirk their responsibility to pay fair wages under California Labor Law, and should be reversed.

B. Workers' Compensation Precedent Does Not Apply Here

Defendants pin their argument on the District Court's erroneous conclusion that since football players are excluded from workers' compensation coverage, they are perforce likewise excluded from all of California's other labor codes (including the State's wage and hour laws), and on a mischaracterization of section 3352(k) of the Labor Code as the "student-athlete exclusion" (AB 43). But section 3352(k) explicitly applies to the regulation of workers' compensation law, is expressly restricted to Division 4, and does not otherwise apply by its terms to other Divisions of the Labor Code, such as Division 2 (setting forth the "Employment Regulation and Supervision" of employee working hours and compensation, which ***nowhere*** excludes or exempts as employees for any purpose athletes - students or otherwise). *See* Cal. Lab. Code § 3350.

In short, section 3352(k) does not govern the question of the employment of contract student athletes for the purposes of the State's wage and hour laws. Defendants conveniently ignore that "there may be circumstances in which . . . two [differing] statutes are both potentially applicable to the same set of facts." *Shoemaker v. Myers*, 52 Cal. 3d 1, 21 (1990). Thus, while Plaintiff cannot bring an

action by reason of section 3352(k) under the workers' compensation laws, there is no legitimate reason why he should be nonetheless precluded from suing under the State's separate and distinct minimum wage and overtime laws. None of the cases cited by Defendants, holding that a football player's injury or death is not compensable as a work-related injury under state workers' compensation laws (involving different policy and fiscal considerations), address whether California wage requirements apply to Division I FBS football players, let alone prohibit it.[17]

In summarily dismissing *Van Horn v. Indus. Accident Comm'n*, 219 Cal. App. 2d 457 (1963), because it was retracted by the Legislature for fiscal reasons related to the regulation of state colleges and the administration of workers' compensation laws not present here, Defendants seek to avoid its persuasive finding that a member of an athletic team "may have the dual capacity of student and employee." 219 Cal. App. 2d at 465; *id.* at 464 ("direct compensation in the form of wages is not necessary to establish the relationship so long as the service is not gratuitous"). Applying such still sound reasoning, Division I FBS football

[17] Moreover, Defendants improperly rely on tort liability cases, such as *Avila v. Citrus Cmty. Coll. Dist.*, 38 Cal. 4th 148 (2006), *Munoz v. City of Palmdale*, 75 Cal. App. 4th 367 (1999), and *Torres v. Parkhouse Tire Service, Inc.*, 26 Cal. 4th 995 (2001), which involve a different legal and factual analysis under the doctrine of *respondeat superior* than the determination of whether an employment relationship exists under the FLSA or California labor laws. *See Krueger v. Mammoth Mountain Ski Area, Inc.*, 873 F.2d 222, 223 (9th Cir. 1989) (laying out differences between finding a traditional employment relationship, and *respondeat superior* liability).

players – who exchange their highly skilled labor for in-kind compensation – should be considered employees under the Labor Code, as well as students.

C. UCL and PAGA Claims Should Not Have Been Dismissed

As Defendants must recognize, should the Court rightly reverse the District Court and uphold claims pursuant to the California Labor Code and FLSA, claims under the UCL and the California Private Attorney Generals Act of 2004, Cal. Lab. Code §§ 2698, *et seq.* ("PAGA"), should be restored concurrently.

V. CONCLUSION

For the foregoing reasons, the District Court's decision was in error and its decision should be reversed.

DATED: January 10, 2018

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DATED: January 10, 2018

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