

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

DENARD ROBINSON; BRAYLON  
EDWARDS; MICHAEL MARTIN; SHAWN  
CRABLE, Individually and on behalf of  
themselves and former University of  
Michigan football players similarly situated,

Case No.: 24-12355  
Honorable Terrence G. Berg

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION aka "NCAA", BIG TEN  
NETWORK "aka" BTN, and the BIG TEN  
CONFERENCE, INC.

Defendants.

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**PLAINTIFFS' RESPONSE IN OPPOSITION TO THE MOTION TO  
DISMISS AMENDED COMPLAINT BY DEFENDANTS  
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION  
AND THE BIG TEN CONFERENCE, INC. [ECF NO. 40]**

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## ISSUES PRESENTED

- I. Whether this Honorable Court should deny Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) on the basis of the statute of limitations because it is a disfavored basis for dismissal at the pleadings stage, the continuing violations doctrine applies to Plaintiffs' claims, and equitable tolling also preserves Plaintiffs' claims.

Plaintiffs answer "yes."

Defendants answer "no."

- II. Whether this Honorable Court should deny Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) because the *Keller* settlement, the *O'Bannon* injunction, and the *Alston* settlement do not bar Plaintiffs' claims which assert different injuries, theories of liability, and factual predicates.

Plaintiffs answer "yes."

Defendants answer "no."

- III. Whether this Honorable Court should deny Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs have alleged viable antitrust injuries, copyright interests are unnecessary to recover for these injuries, the Copyright Act does not preempt Plaintiffs' claims, and Plaintiffs have legally cognizable publicity rights.

Plaintiffs answer "yes."

Defendants answer "no."

- IV. Whether this Honorable Court should deny Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs have, in fact, alleged a legally viable and plausible unjust enrichment claim.

Plaintiffs answer "yes."

Defendants answer "no."



## **PREFACE**

The NCAA and the Big Ten Conference unashamedly took advantage of student athletes--especially in major college football-- for nearly a century, so it comes as no surprise now when they to shirk any responsibility for past wrongdoings that remain current, and try to dismiss this case. What makes it especially egregious, though, is how early they are trying to do so. The NCAA and Big Ten want the case dismissed now so they don't have to engage in discovery and produce financial records and records related to TV rights, jersey sales, conference member payouts, etc. They don't want this class of former Michigan football players to be able to demonstrate publicly just how much they were damaged financially. This must not be countenanced, and for the reasons set forth, as well as the caselaw which strongly favors Plaintiffs, the NCAA/Big Ten's Motion to Dismiss must be denied.

## **STANDARD OF REVIEW**

Rather than restate the oft-cited standard of review under Rule 12(b)(6), Plaintiffs simply emphasize that “all reasonable inferences” must be drawn in their favor. *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). “If a reasonable court can draw the necessary inference from the factual material stated in the complaint,” as in this case, “the plausibility standard has been satisfied.” *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012). “*Specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the*

*grounds upon which it rests.” Keys*, 684 F.3d at 608 (quoting from *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotation marks omitted)) (emphasis added). “The ultimate question is whether the complaint, read sympathetically, shows that the plaintiff is at least plausibly entitled to relief.” *Stratton v Portfolio Recovery Assocs, LLC*, 770 F.3d 443, 447 (6th Cir. 2014). And even when “recovery [seems] very remote and unlikely,” a complaint may survive a motion to dismiss. *Kovalchuk v City of Decherd, Tennessee*, 95 F.4th 1035, 1043 (6th Cir.), cert. denied, 145 S. Ct. 274 (2024) (quoting from *Stratton*, 770 F.3d at 447).

## **ARGUMENT**

### **I. THE STATUTE OF LIMITATIONS IS NO BAR TO PLAINTIFFS’ CLAIMS.**

#### **A. The Statute of Limitation is a Disfavored Basis for Dismissal Under Rule 12(b)(6).**

“Generally, a motion under Rule 12(b)(6), which considers only the allegations in the complaint, is an ‘inappropriate vehicle’ for dismissing a claim based upon a statute of limitations.” *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir. 2013) (quoting *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir.2012)). After all, the statute of limitations is an affirmative defense, and the defendant must prove it; and Rule 8 does not require a plaintiff to plead compliance with the statute of limitations. *Michalak v. LVNV Funding, LLC*, 604 F. App’x 492, 493 (6th Cir. 2015). Therefore, dismissal based on the statute of

limitations is only appropriate “*if a plaintiff affirmatively pleads himself out of court.*” *Rembisz v. Lew*, 590 F. App'x 501, 504 (6th Cir. 2014) (emphasis added). “Where a plaintiff does not affirmatively plead himself out of court,” as in this case, “a statute of limitations challenge is prematurely raised in a motion to dismiss.” *Mingo v. Fed Cmty.*, 484 F. Supp. 3d 506, 510 (E.D. Mich. 2020).

Here, nothing in Plaintiffs’ First Amended Complaint “affirmatively pleads them out of court.” Contrary to Defendants’ argument, and as set forth in more detail below (§I(B)), Plaintiffs’ antitrust allegations are predicated on a present anti-competitive regime of NCAA rules, bylaws, and agreements that Defendants have symbiotically perpetuated by continuous conduct in furtherance of a conspiracy to monetize Plaintiffs’ NIL, for Defendants’ exclusive benefit, by among other things, profiting from the use of historic games and moments involving Plaintiffs’ NIL on various revenue-generating media platforms; profiting from Plaintiffs’ NIL in revenue-generating promotional events, advertising and sponsorship contracts; and profiting from the NIL in jersey and merchandise sales. Plaintiffs’ claims are not *facially* time-barred.

**B. Plaintiffs’ Claims Are Not Time-Barred Because of Application of the Continuing Violations Doctrine.**

**1. Legal Principles.**

A cause of action accrues, and the limitations period commences, each time a defendant commits an act which injures a plaintiff. *Zenith Radio Corp. v. Hazeltine*

*Research, Inc.*, 401 U.S. 321, 338 (1971). A continuing antitrust violation is “one in which the plaintiff’s interests are *repeatedly invaded*.” *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (quoting from *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9<sup>th</sup> Cir. 1987)) (emphasis added). Two “discrete rules” apply, firstly “[w]hen a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants.” *Peck*, 894 F.2d at 849 (quoting *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74, 81 (6th Cir.1981)). And secondly, “in the context of a continuing conspiracy, the statute of limitations runs from the commission of the act that causes the plaintiff’s damage.” *Peck*, 894 F.2d at 849 (quoting from *Chiropractic Coop. Ass’n of Michigan v. American Medical Ass’n*, 867 F.2d 270, 275 (6th Cir.1989)). As such, “an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.” *Peck*, 894 F.2d at 849. *Z Technologies Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014).

“Continuing contracts in restraint of trade,” are “typically subject to continuing re-examination,” and “even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its re-examination as circumstances change.” *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1253 (9th Cir. 2020), *aff’d sub nom. Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69 (2021) (quoting from

Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1205c3 (4th ed. 2018)) (emphasis added).

## **2. The Continuing Violations Doctrine Applies to Plaintiffs' First Amended Complaint.**

Plaintiffs have alleged a present, ongoing, evolving, and systematic regime of anti-competitive NCAA rules, bylaws, practices, and agreements whereby Defendants have collectively, symbiotically, and systematically decreased the compensation (and taken it for themselves) for Plaintiffs' NIL, from college to present, from what Plaintiffs would otherwise receive in a competitive market. (Am. Compl. ¶¶ 13, 19, 37, 57; ECF No. 24; PageID # 225, 228-229, 235, 243-244).

Plaintiffs have alleged examples of the anti-competitive rules and practices, including, but not limited to, those embodied in Bylaws §§ 2.9, 12.5 and 14.1.3.1, promulgated by the NCAA with the active support of the Big Ten. (Am. Compl. ¶¶ 27, 57-58; ECF No. 24; PageID # 232, 243-244). But for the anticompetitive nature of the NCAA's regime of bylaws, rules, practices, and agreements, student athletes would financially benefit from the promotional activities and the commercial uses of their NIL. (Am. Compl. ¶¶ 22, 57-58, 70; ECF No. 24; PageID # 230, 243-244, 250).

Plaintiffs have also alleged examples of Defendants' ongoing concerted and symbiotic conduct to monetize their NIL. Since 2006, Plaintiffs' NIL has contributed to the creation of "hundreds of millions of dollars from broadcasting rights,

advertising, and subscription fees” through the showcasing of past and present football games, highlights, and video clips featuring Plaintiffs’ NIL. (Am. Compl. ¶¶ 21, 65-66, 132; ECF No. 24; PageID # 230, 247-248, 272-273). Indeed, Plaintiffs’ NIL is showcased on various revenue-generating platforms, including BTN, NCAA.com and YouTube. (Am. Compl. ¶ 64; ECF No. 24; PageID # 246). For example, highlights and games featuring Denard Robinson, Braylon Edwards, Michael Martin, and Shawn Crable are consistently aired on BTN and affiliated platforms to generate revenue while Plaintiffs receive no part of that revenue. (Am. Compl. ¶ 46; ECF No. 24; PageID # 239). The NCAA, Big Ten, and the BTN have and continue to enter into licensing agreements that bundle archival footage featuring Plaintiffs’ NIL into digital content sold to advertisers and streaming platforms. (Am. Compl. ¶ 73; ECF No. 24; PageID # 351). Defendants have also leveraged the Plaintiffs’ NIL to promote lucrative “live events, such as Big Ten Media Days and conference championships” and in “sponsorship deals with major brands, allowing advertisers to associate with the network’s iconic moments and athletes without sharing any revenue with the” Plaintiffs. (Am. Compl. ¶ 74; ECF No. 24; PageID # 251-252). Defendants coordinate to develop “marketing and promotion strategies that integrate athletes’ NIL into BTN’s offerings, from subscription-based streaming services to high-profile sponsorship deals,” attracting subscribers and increasing advertising revenue. (Am. Compl. ¶ 75; ECF No. 24;

PageID # 252). The NCCA and Big Ten’s “policies are motivated by the Big Ten’s own financial interests, which are directly tied to its media contracts, including an ownership interest in BTN.” (Am. Compl. ¶ 61; ECF No. 24; PageID # 245). “By ensuring that BTN retains exclusive control over this content, the Big Ten effectively locks athletes out of a marketplace built on their own contributions.” (Am. Compl. ¶ 75; ECF No. 24; PageID # 252).

Moreover, the NCAA has and continues to monetize Plaintiffs’ NIL through the sale of jerseys and merchandise bearing their names and numbers. (Am. Compl. ¶ 60; ECF No. 24; PageID # 244-245). More specifically, the NCAA has long maintained a website—NCAA.com—that “features a store where visitors can purchase NCAA Championships gear, jerseys, t-shirts, and other ‘team-spirited’ items” (Am. Compl. ¶ 60; ECF No. 24; PageID # 244-245). Plaintiffs have never received any compensation from these sales, which are generated from their NIL.

In short, Defendants act collectively and symbiotically to create, enforce, and develop ongoing anti-competitive activities through various evolving medias and platforms to suppress (and take for themselves) Plaintiffs’ compensation for their NIL under the “guise” of maintaining “amateurism.” (Am. Compl. ¶ 61; ECF No. 24; PageID # 245). The result of this anti-competitive regime is the generation of “billions of dollars annually” from the “uncompensated use of these athletes’

identities,” including “long after their college careers have ended.” (Am. Compl. ¶ 77; ECF No. 24; PageID # 253).

Defendants’ motion glosses over these allegations and misstates the nature of Plaintiffs’ allegations. Specifically, Defendants claim that Plaintiffs allege only one overt act, namely the signing of forms transferring publicity rights while in college. Defendants incorrectly state that their continued use of Plaintiffs’ NIL is “merely an effect of that initial act [of forcing students to waive their NIL rights.]” In contrast, as set forth above, the execution of the forms is a mere manifestation of the underlying anticompetitive problem, i.e., a regime of *evolving* and *ongoing* anti-competitive rules, procedures, bylaws, and agreements that eliminate competition over Plaintiffs’ NIL rights and that Defendants symbiotically conspire to profit from. As elaborated above, with each agreement to rebroadcast games and replay historic moments featuring Plaintiffs’ NIL on Defendants’ platforms, each promotional advertisement and commercial sponsorship featuring Plaintiffs’ NIL, each sale of merchandise bearing Plaintiffs’ NIL, and each new licensing agreement involving their NIL (where Plaintiffs receive no compensation) there is an independent, actionable event that inflicts new and accumulating injuries on Plaintiffs. (Am. Compl. ¶¶ 45, 73-74; ECF No. 24; PageID # 238-239, 251-252). As such, the continuing violations doctrine applies here because each unauthorized use, or invasion, of Plaintiffs’ NIL constitutes a fresh and independent violation, restarting



the limitations period. (Am. Compl. ¶ 70; ECF No. 24; PageID # 250). Thus Defendants' argument is not only premature, but it is substantively meritless.

### **C. Equitable Tolling Also Preserves Plaintiffs' Claims.**

The well-established doctrine of equitable tolling applies when “a defendant fraudulently conceals its actions, misleading a plaintiff respecting the plaintiff's cause of action.” *Hill v U.S. Dept. of Labor*, 65 F.3d 1331, 1335 (6<sup>th</sup> Cir. 1995). Equitable tolling is warranted where a plaintiff, despite exercising reasonable diligence, was unable to discover the existence of their claims due to the defendant's fraudulent concealment or misconduct. *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 422 (6<sup>th</sup> Cir. 2009).

Here, Plaintiffs allege the Defendants maintained a culture of secrecy and misinformation regarding the commercial use of student-athletes' NIL, further obstructing Plaintiffs' ability to assert their legal rights. Through restrictive bylaws and policies, coercive contractual agreements, and deliberate misinformation, Defendants created a legal landscape where Plaintiffs were unable to appreciate the full extent of their injuries. (Am. Compl. ¶¶ 30; 48; 50; 57-59; ECF No. 24, PageID # 233, 240, 241, 243-244). Changes in the legal landscape demystifying plaintiffs' rights justify equitable tolling here. “Equitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances.” *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2<sup>d</sup> Cir. 1996). See also

*Arellano v McDonough*, 598 US 1, 9 (2023) (noting that equitable tolling may be appropriate when a person diligently pursues their rights, but an extraordinary circumstance prevents them from bringing a timely action.) Therefore, alternatively, equitable tolling principles preserve Plaintiffs’ right to seek redress for Defendants’ ongoing and unjust enrichment at their expense.

## **II. PLAINTIFFS’ CLAIMS ARE NOT BARRED BY THE *ALSTON* AND *KELLER* SETTLEMENTS OR THE *O’BANNON* JUDGMENT.**

### **A. The *Keller* Settlement Does Not Bar Plaintiffs’ Claims.**

None of the specific claims asserted here are barred by the *Keller* release. And because this case does not involve the same factual predicate as *Keller*, Plaintiffs do not assert claims that could or should have been asserted in *Keller*. *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir.2008) (unasserted claims are only released if “based on the identical factual predicate as that underlying the claims in the settled class action.”); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir.1992) (holding same); *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 135–36 (2d Cir. 2011) (holding same); and *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009) (holding same).

First, as an initial matter, this case involves an entirely different class than *Keller*. In *Keller*, the certified class included “[a]ll NCAA Division I football...players (1) listed on a roster published or issued by a school whose team was included in the *NCAA-Branded Videogame* originally published or distributed

from May 4, 2003 through September 3, 2014 and (2) *whose assigned jersey number appears on a virtual player in the software, or whose photograph was otherwise included in the software.*” (Keller Final Judgment, 09-cv-01967-CW, ECF No. 1255, PageID # 3) (emphasis added). This case has nothing to do with videogames. Defendants have not established that Plaintiffs and their putative class come within the scope of the *Keller* class, that each received notice of the class action, that each received the benefits of the settlement, and thus that each are bound by it as class members or privies.

Second, the *Keller* release is no bar here. The *Keller* release includes claims “arising out of, involving, or relating to the alleged use of any name, image, photograph, or likeness in EA’s production, manufacture, sale, distribution, or publication of *NCAA-Branded Videogames*, or the alleged use of or failure to compensate for the alleged use of any NCAA student-athlete’s name, image, photograph, or likeness *in connection with EA’s NCAA-Branded Videogames by the NCAA, EA, CLC...*, that have been, could have been, or should have been asserted in the Lawsuits...” (Keller Settlement Agreement, 09-cv-01967-CW, ECF No. 1158-2, PageID # 11-12) (emphasis added).

Here, Plaintiffs’ claims do not involve the same factual predicate as *Keller*. Unlike *Keller*, this case has nothing to do with the use of NIL in videogames. And because a release extends to unasserted claims only “where those claims depended

on the same set of facts as the claims that gave rise to the settlement,” Plaintiffs have not asserted a claim that could or should have been raised in *Keller*. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir.2006). Moreover, the factual predicate rule is not satisfied where, as in this case, the alleged underlying injuries are not identical. *Reyn's Pasta Bella, LLC*, 442 F.3d at 749. Therefore, the *Keller* release is no bar to Plaintiffs’ claims.

**B. The *O’Bannon* Injunction Does Not Bar Plaintiffs’ Requested Injunctive Relief.**

“Under the judicially-created doctrine of res judicata, when a court of competent jurisdiction enters a final judgment on the merits in an action, the parties and their privies are barred from relitigating in a subsequent action matters that were actually raised or might have been raised in the prior action.” *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981). In an anti-trust context, adjudications are fact-bound and the rule of reason contemplates a “case-by-case adjudication.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

Here, the *O’Bannon* permanent injunction does not preclude Plaintiffs’ requested injunctive relief for several reasons. (Permanent Injunction, 09-cv-03329-CW, ECF No. 292). First, the parties and the matters asserted in *O’Bannon* are fundamentally different than in this case. As an initial matter, Defendants have not clearly established that Plaintiffs and their putative class members were part of the *O’Bannon* class. Assuming *arguendo* that they were, there can be no dispute that

the matters and claims asserted in *O'Bannon* are fundamentally different than this case. In *O'Bannon*, the defendants conspired to utilize NCAA's restrictions to exclusively profit from plaintiffs' NIL in defendant Electronic Arts' videogames.

In contrast, Plaintiffs' liability theory is much broader. Plaintiffs' putative class broadly includes "[a]ll persons who were NCAA student-athletes prior to June 15, 2016, whose image or likeness has been used in any video posted by or licensed by..., Defendants, or their agents, distributors, contractors, licensees, subsidiaries, affiliates, partners, or anyone acting in concert with any of the foregoing entities or persons." (Am. Compl. ¶ 88, ECF No. 24, Page ID # 257) (emphasis added). Plaintiffs do not advance a liability theory involving video game manufacturers, but instead seek to recover from the NCAA, Big Ten Network, and the Big Ten Conference for their symbiotic anti-competitive monetization of their NIL through evolving technologies, media platforms, and various advertising and licensing agreements (between Defendants and third parties). Because the class membership, defendants, liability theories, and factual predicates are entirely dissimilar from *O'Bannon*, the *O'Bannon* injunction is no bar to injunctive relief in this case.

Second, Defendants' argument fails for an additional reason. "When a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel." *Erebia v. Chrysler Plastic Prods. Corp.*, 891 F.2d 1212, 1215

(6th Cir. 1989) (quoting from *Jaffree v. Wallace*, 837 F.2d 1461, 1466 (11th Cir.1988)). “A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.” *Erebia*, 891 F.2d at 1215 (quoting from *Jaffree*, 837 F.2d at 1466). See also *FCA US, LLC v. Spitzer Autoworld Akron, LLC*, 887 F.3d 278, 289 (6th Cir. 2018) (holding that “only that the part of the prior judgment that has been reversed cannot support collateral estoppel.”)

Here, the Ninth Circuit affirmed the district court’s permanent injunction, but only in so far as it allowed “NCAA members to give scholarships up to the full cost of attendance.” *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1053 (9th Cir. 2015). The Ninth Circuit reversed and vacated the district court’s permanent injunction in so far as it allowed “students to be paid cash compensation.” *O’Bannon*, 802 F.3d at 1053. As such, only that part of the *O’Bannon* injunction that addresses education-related benefits has preclusive effect. But, here, Plaintiffs’ First Amended Complaint does not seek education-related benefits. Instead, Plaintiffs seek the benefits from NIL untethered to educational benefits. Therefore, for this additional reason, the *O’Bannon* injunction is no bar to Plaintiffs’ requested injunction.

**C. The *Alston* Settlement Does Not Bar Plaintiffs' Claims.**

None of the specific claims asserted here are barred by the *Alston* release, and because this case does not involve the same factual predicate as the *Alston* case, Plaintiffs do not advance claims that could or should have been asserted in *Alston*. *Williams*, 517 F.3d at 1133; *City of Seattle*, 955 F.2d at 1287; *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d at 135–36; and *Moulton*, 581 F.3d at 349.

First, as an initial matter, this case involves an entirely different class than *Alston*. In *Alston*, and unlike the putative class here, the class included “[a]ll current and former NCAA Division I Football Bowl Subdivision (“FBS”) football student-athletes who, at any time from March 5, 2010 through the Date of Preliminary Approval [i.e., April 3, 2017<sup>1</sup>] of this Settlement Agreement, received from an NCAA member institution for at least on academic term... (1) a full athletics grant-in-aid required by NCAA rules set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid.” (Settlement, 14-md-02541-CW, ECF No. 560-1, PageID # 5) (emphasis added). Moreover, and unlike here, the injuries alleged in *Alston* were temporally limited to seven years (March 2010 to April 2017). Defendants have not established that Plaintiffs come within the scope of the *Alston* class, that each received notice of the class action, that each received the benefits of the settlement, and thus that each are bound by it as class members or privies.

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<sup>1</sup> Preliminary Approval Order, 14-md-02541-CW, ECF No. 611.

Second, assuming *arguendo* that this is the case, the *Alston* release is no bar to Plaintiffs' claims. The *Alston* release is limited to those claims that were, or could have been, asserted in the lawsuit. (*Id.*, at PageID # 8-9). As set forth above, the anti-competitive injuries asserted in *Alston* were two-fold, namely the restriction and artificial elimination of competition in "the amounts, terms and conditions of financial aid and awards to Class Members," and the deprivation of competition as to the "amount, terms and conditions of grants-in-aid from NCAA member institutions..." (*Alston* Operative Complaint ¶¶ 514, 524, 536, 14-md-02541-CW, ECF No. 60, PageID # 163-164, 173). The *Alston* complaint requested, among other things, a declaratory judgment voiding caps on grants-in-aid. (*Id.*, ¶¶ 518, 530, 542, PageID # 163, 165, 167).

Here, and unlike *Alston*, Plaintiffs make no factual allegations regarding education-related benefits and seek no relief regarding them. Instead, Plaintiffs seek to recover broadly for anti-competitive regime of NCAA rules, bylaws, and agreements that Defendants have symbiotically perpetuated by continuous conduct in furtherance of a conspiracy to monetize Plaintiffs' NIL, for Defendants' exclusive benefit, by among other things, profiting from the use of historic games and moments featuring Plaintiffs' NIL on various revenue-generating media platforms; profiting from Plaintiffs' NIL in revenue-generating promotional events, advertising and sponsorship contracts; and profiting from jersey and merchandise sales with



Plaintiffs’ NIL. (Am. Compl. ¶ 88, ECF No. 24, Page ID # 257). It is this fundamental difference in factual predicate and relief that prevents the *Alston* release from barring this action. Because a release extends to unasserted claims only “where those claims depended on the same set of facts as the claims that gave rise to the settlement,” Plaintiffs do not assert claims that could or should have been raised in *Alston*. *Reyn's Pasta Bella, LLC*, 442 F.3d at 749. “A settlement agreement may preclude a party from bringing a related claim in the future ‘even though the claim was not presented and might not have been presentable in the class action,’ but only where the released claim is ‘based on *the identical factual predicate as that underlying the claims in the settled class action.*’” *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (emphasis added). Although the parties may draft “the settlement agreement to include as broad a release as possible,” a release is “enforceable [only] as to subsequent claims ... depending upon the same set of facts.” *Williams*, 517 F.3d at 1134. Moreover, the factual predicate rule is not satisfied where, as in this case, *the alleged underlying injuries are not identical*. *Reyn's Pasta Bella, LLC*, 442 F.3d at 749; *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 725 Fed.Appx. 560, 563 (9th Cir. 2018).

Finally, Defendants’ argument has been previously rejected in *House v. NCAA*, 545 F. Supp. 3d 804, 819 (N.D. Cal. 2021), for the reasons elaborated above. In *House*, a plaintiff was a member of the class in *Alston* and the NCCA asserted, as in

this case, that the plaintiff was subject to the *Alston* release. Nevertheless, the district court rejected the NCAA's argument that the *Alston* settlement barred that plaintiff's damages claims because they were "not based on the identical factual predicate as the damages claims in *Alston*." *House*, 545 F. Supp. 3d at 819.

### **III. PLAINTIFFS HAVE PLAUSIBLY PLED COGNIZABLE INJURIES.**

#### **A. Plaintiffs Have Asserted Viable Antitrust Injuries.**

Plaintiffs have alleged cognizable antitrust injuries, namely, that absent the NCAA's continuous regime of anti-competitive rules, bylaws, practices, and agreements (with the Big Ten and BTN), they would be paid, at least in part, from the "hundreds of millions of dollars from broadcasting rights, advertising, and subscription fees" gained from showcasing past and present football games, highlights, and video clips featuring Plaintiffs since 2006. (Am. Compl. ¶¶ 21, 65-66; ECF No. 24; PageID # 230, 247-248). Because of the Defendants' symbiotic conspiracy and anticompetitive actions, Plaintiffs are denied compensation from the commercialization of their NIL by Defendants (1) on various platforms, including NCAA.com and YouTube, and "to promote live events, such as Big Ten Media Days and conference championships;" (2) through "sponsorship deals with major brands, allowing advertisers to associate with the network's iconic moments and athletes without sharing any revenue with the" Class Members; (3) through licensing agreements that bundle archival footage featuring the Class Members into digital

content sold to advertisers and streaming platforms; (4) through “marketing and promotion strategies that integrate athletes’ NIL into BTN’s offerings, from subscription-based streaming services to high-profile sponsorship deals,” attracting subscribers and increasing advertising revenue; and (5) through the sale of jerseys bearing their names and numbers. (Am. Compl. ¶¶ 60, 64, 73-75, 132; ECF No. 24; PageID # 244-245, 251-252, 272-273).

In short, the antitrust injuries alleged in this case are of the type recognized by other courts. For example, the Ninth Circuit affirmed that where “the plaintiffs have shown that, absent the NCAA’s compensation rules, video game makers would likely pay them for the right to use their NILs in college sports video games,” they “satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury.” *O’Bannon*, 802 F.3d at 1069. The monetization of the use of Plaintiffs’ NIL by Defendants in their own advertising, in sponsorship deals with major brands, the sale of merchandise (including jerseys), and marketing and promotion strategies, is of the type of antitrust injuries recognized in *O’Bannon*.

## **B. Defendants’ Arguments Regarding Copyright Interests And Publicity Rights Have No Merit.**

### **1. Plaintiffs Do Not Need Copyright Interests.**

To refute Plaintiffs’ asserted antitrust injuries, Defendants must demonstrate that they are not the type that *the antitrust laws* were intended to prevent. *Associated Gen. Contractors v Cal State Council of Carpenters*, 459 US 519, 534 (1983). “The

injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” *Zenith Radio Corp*, 395 U.S. at 125.

Here, Plaintiffs’ claims have nothing to do with copyright laws. As set forth above, Plaintiffs have asserted cognizable *antitrust injuries*, and their claims are not dependent on copyright law. Indeed, Defendants’ argument has been raised and rejected elsewhere. For example, in *O’Bannon*, the Ninth Circuit concluded that, “the NCAA’s argument about the Copyright Act, even if correct, *is irrelevant to whether the plaintiffs lack standing.*” *O’Bannon*, 802 F.3d at 1069. “That the NCAA’s rules deny the plaintiffs all opportunity to receive this compensation is sufficient to endow them with standing to bring this lawsuit.” *O’Bannon*, 802 F.3d at 1069. This argument was also rejected by the court in *House*, which concluded that an antitrust plaintiff “can show that it was injured in fact by alleging that it was deprived of the opportunity to receive compensation it otherwise would have received but for the challenged conduct,” and to “make this showing, a plaintiff need not have a legal entitlement to the compensation in question.” *House*, 545 F.Supp.3d at 816.

Here, Plaintiffs allege that Defendants’ symbiotic conspiracy to create and enforce anti-competitive restrictions -- and to continuously monetize their NIL -- deprives them of ongoing opportunities to financially benefit from their NIL as

featured in Defendants' promotions and advertising on various platforms, re-airing of historic games, sponsorship deals with major brands, advertising and marketing contracts, and jersey sales. (Am. Compl. ¶¶ 60, 64, 73-75, 132; ECF No. 24; PageID # 244-245, 251-252, 272-273). As such, Plaintiffs have alleged antitrust injuries that are not (and need not be) dependent on copyright interests.

## **2. Plaintiffs Have A Cognizable Right of Publicity.**

Even if Plaintiffs were somehow required to demonstrate something beyond an antitrust injury for standing, e.g., a violation of their right to publicity, Plaintiffs could do so here. The right of publicity safeguards the commercial value of an individual's identity. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 (1977). In *Zacchini*, the Supreme Court found a performer's right of publicity could be infringed even though the performer did not own the copyright to the footage at issue. The Court emphasized how the economic harm arose from the unauthorized commercial use of the performer's act, not from any copyright infringement.

Moreover, the Sixth Circuit has consistently recognized a right of publicity. The right of publicity protects the commercial interest of celebrities," including Plaintiffs, "in their identities." *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). And other circuits have recognized this right too. *See Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (holding that a right

of publicity claim protects a person's identity, not the copyrightable material in which that identity appears); *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) (holding that the right of publicity protects an individual's persona rather than a creative work); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (holding that a right of publicity claim is independent of any copyright ownership in the video game content); and *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1276 (9th Cir. 2013).

Here, and consistent with these authorities, Plaintiffs have a right of publicity in the commercial use of their identities. In fact, Michigan now recognizes that student athletes have a general right to be compensated for the use of their NIL. MCL § 390.1732. "A person's name, image, and likeness belong to the individual, and the individual should be able to explore opportunities to benefit from his or her skill and achievements. This is especially true for those in sports with a high risk for injury." Michigan House Fiscal Agency Bill Analysis, H.B. 5217, 3/12/2020.

For the reasons elaborated above, Defendants' reliance on *Marshall v ESPN*, 111 F. Supp. 3d 815 (M.D. Tenn. 2015), *aff'd Marshall v. ESPN*, 668 Fed. Appx. 155 (6th Cir. 2016), is misplaced. But this reliance is also misplaced because the district court's decision in *Marshall* predates both *Alston* and *O'Bannon*. *Marshall* also endorsed dictum from *NCAA v Bd of Regents*, 468 US 85, 117 (1984), stating generally that most NCAA regulations are a justifiable means of fostering

competition among amateur sports. In other words, *Bd of Regents* was the primary basis for deciding there were no antitrust violations in *Marshall*. However, *Alston* requires a different conclusion. Moreover, the district court in *Marshall* concluded that the plaintiffs had no right of publicity in sports broadcasts under Tennessee law. *Marshall*, 111 F. Supp. at 824-825. Specifically, the *Marshall* plaintiffs' common law right to publicity was supplanted by Tennessee law, which allows such claims only when one's NIL is used "for the purposes of advertising products, merchandise, goods, or services...without such individual's prior consent[.]" *Marshall*, 111 F. Supp. at 827. As elaborated above, Michigan has no such limitation.

Moreover, at least one district court has recently rejected the NCAA's argument predicated on *Marshall*. In *House*, the district court recognized that the plaintiffs' allegations, like this case, are "sufficient to raise the reasonable inference that competition among schools and conferences would increase in the absence of the challenged rules, and that this increased competition would incentivize schools and conferences to share their broadcasting and other commercial revenue with student-athletes even if the student-athletes lacked publicity rights in broadcasts." *Grant House v. Nat'l Collegiate Athletic Ass'n*, 545 F. Supp. 3d 804, 816 (N.D. Cal. 2021). As such, the alleged injuries were sufficient to "to claim injury in fact at this juncture." *Id.* That certain NIL plaintiffs "may not have a legal entitlement to broadcasts under the laws of some states," was immaterial. *Id.*

### **3. Plaintiffs' Right of Publicity is Not Pre-Empted by the Copyright Act.**

Defendants also wrongly argue that any claim involving the use of copyrighted video footage is pre-empted by the Copyright Act. This argument misinterprets the scope of copyright pre-emption, which only applies to state law claims that are equivalent to the exclusive rights protected under the Copyright Act, such as the rights to reproduce, distribute, and display a copyrighted work. 17 U.S.C. § 301(a). However, Plaintiffs' allegations are not directed at the copyrighted work itself, but at the commercial exploitation of their identities. In other words, "the tort of misappropriation of name or likeness protects a person's *persona*. A *persona* does not fall within the subject matter of copyright[.]" *Seifer v. PHE, Inc.*, 196 F. Supp. 2d 622, 627 (S.D. Ohio 2002). *See also Toney*, 406 F.3d at 910 (7th Cir. 2005) (a right of publicity claim is not pre-empted because it protects a person's identity, not the copyrightable material that might depict that identity.) Because the right of publicity focuses on the individual's *persona* and economic value, it is separate and non-equivalent to the interests protected by Copyright Act.

In short, this is an antitrust case and, as such, Plaintiffs' claims are grounded in a separate legal framework untethered to the Copyright Act. This Court should, therefore, reject Defendants' argument.



#### **IV. PLAINTIFFS' UNJUST ENRICHMENT CLAIM IS VIABLE.**

Contrary to Defendants' unsupported conclusions, courts in this circuit have allowed antitrust plaintiffs to simultaneously assert unjust enrichment as an alternative basis for recovery. See *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000); *Kiriapoulos v. Gen. Motors LLC*, No. CV 22-10785, 2023 WL 2789622, at \*15 (E.D. Mich. Apr. 5, 2023). And as elaborated above, Defendants' various arguments against Plaintiffs' antitrust claims have no merit and, therefore, these arguments are no obstacles to Plaintiffs' viable unjust enrichment claim.

#### **CONCLUSION AND RELIEF REQUESTED**

For the reasons elaborated above, this Honorable Court should deny Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (ECF No. 40) in its entirety.

Respectfully submitted,

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Dated: March 13, 2025

**PROOF OF SERVICE**

I declare under penalty of perjury that on March 13, 2025, I served a copy of the foregoing instrument via electronic filing through the Eastern District of Michigan, Southern Division, efile website. The above statement is true to the best of my knowledge and information.

/s/ Karrie Ohlsson