

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24-CV-017715-910

MEMBERS OF NORTH CAROLINA
STATE UNIVERSITY'S 1983 NCAA
MEN'S BASKETBALL NATIONAL
CHAMPIONSHIP TEAM, aka THE
"CARDIAC PACK," including
THURL BAILEY; ALVIN HARRELL
BATTLE; WALT DENSMORE;
TOMMY DINARDO; TERRENCE
PATRICK GANNON; MARTHA
LOU MOBLEY, as Administrator of
the Estate of QUINTON LEONARD
III; GEORGE CALVIN MCCLAIN;
COZELL MCQUEEN; ERNIE
MYERS; WALTER PROCTOR;
HAROLD LEWIS THOMPSON; and
MIKE WARREN,

Plaintiffs,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, aka
NCAA,

Defendant.

**BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS**

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INTRODUCTION

The issue of whether student-athletes should be compensated for their names, images, and likenesses (NIL) has generated widespread public commentary and significant litigation. In the last fifteen years alone, over ten lawsuits have been filed demanding increased student-athlete compensation, two of which were litigated to final judgment and all the way to the Supreme Court. Few legal issues have been better ventilated and more exhaustively litigated.

Against that backdrop, twelve former student-athletes¹ that participated in college athletics at North Carolina State University (NCSU) *over forty years ago* have filed this lawsuit seeking to litigate student-athlete NIL compensation as if it is a novel and groundbreaking issue. But their claims fail as a matter of law for the following independent reasons.

First, all of Plaintiffs' claims are time-barred. Chapter 75 of the North Carolina General Statutes sets forth a four-year statute of limitations for antitrust claims, N.C. Gen. Stat. § 75-16.2, while Plaintiffs' common law invasion of privacy and unjust enrichment claims are subject to a three-year

¹ Plaintiff Martha Lou Mobley is the sister of Quinton Leonard III and has been the Administrator of his estate since his passing in 2006. First Am. Compl. (Compl.) ¶¶ 25–26.

statute of limitations, *id.* § 1-52(1), (5). The face of Plaintiffs’ First Amended Complaint (Complaint) makes clear that Plaintiffs waited too long to bring their claims: Each of their claims is based on the allegation that they signed contracts releasing certain purported NIL rights to the NCAA *more than forty years ago*. Compl. ¶¶ 63–73, 176, 217–18. Plaintiffs address this glaring deficiency only through threadbare and conclusory allegations that are insufficient as a matter of law.

Second, Plaintiffs fail to plausibly plead infringement of a legally enforceable right, which is required to establish injury under North Carolina law. *United Daughters of the Confederacy v. City of Winston-Salem*, 881 S.E.2d 32, 49 (N.C. 2022). Central to all of Plaintiffs’ claims are allegations that the NCAA has violated their “publicity rights” by using archival footage to promote the NCAA Division I Men’s Basketball Tournament. But Plaintiffs have no right of publicity under North Carolina law, and even if they did, it would not extend to sports broadcasts or rebroadcasts. For that reason, the Sixth Circuit held—in a directly on-point case supported by decades of precedent—that student-athletes cannot establish injury in a case involving “broadcasts of sporting events.” *Marshall v. ESPN*, 668 F. App’x 155, 157 (6th Cir. 2016) (unpublished). Further, any claims Plaintiffs could state implicating such a hypothetical right would be preempted by the federal Copyright Act.

Third, Plaintiffs' claims for injunctive relief are barred by res judicata. There can be no dispute that all twelve Plaintiffs are members of the certified injunctive class in *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015). There, the plaintiff class litigated to final judgment a challenge to NCAA restraints on compensation for the use of student-athletes' NIL "in *game footage* or in videogames licensed or sold by Defendants," both during and after their eligibility to play college sports. *Id.* at 965 (emphasis added). Res judicata precludes Plaintiffs from relitigating those same claims and issues here.

Finally, Plaintiffs' unjust enrichment claim must be dismissed for the same reasons their antitrust claims fail. Plaintiffs cannot salvage their failed antitrust claims merely by repackaging them under the guise of unjust enrichment.

The Complaint should accordingly be dismissed in its entirety with prejudice.

BACKGROUND

The claims in this case do not arrive on a blank slate. Below, we summarize the most relevant details of the long history of litigation over NCAA rules and NIL.²

I. *KELLER AND O'BANNON*

On May 5, 2009, Sam Keller, a former college football player, filed suit in the Northern District of California against the NCAA and others. Keller claimed that the defendants had violated his state-law NIL rights by using his NIL in a popular college football video game. Shortly thereafter, on July 21, 2009, Ed O'Bannon, a former college basketball player, sued the NCAA and others in the same court. “The gravamen of O’Bannon’s complaint was that the NCAA’s amateurism rules, insofar as they prevented student-athletes from

² North Carolina “courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *QUB Studios, LLC v. Marsh*, 822 S.E.2d 113, 120–21 (N.C. Ct. App. 2018). “Courts may in their discretion take judicial notice of court filings made in other jurisdictions.” *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP*, No. 17-CVS-5480, 2018 WL 943954, at *6 (N.C. Super. Ct. Feb. 16, 2018). For example, in *Muteff v. Invacare Corp.*, the appellate court held the trial court did not err in judicially noticing a Texas Supreme Court opinion because the opinion was “capable of demonstration by readily accessible sources of indisputable accuracy.” 721 S.E.2d 379, 386-87 (N.C. Ct. App. 2012) (internal citation omitted); *see also West v. G. D. Reddick, Inc.*, 274 S.E.2d 221, 223 (N.C. 1981) (“this Court has, on at least one occasion, examined facts appearing in a published opinion of a federal court”).

being compensated for the use of their NILs, were an illegal restraint of trade under Section 1 of the Sherman Act.” *O’Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015). O’Bannon also specifically challenged NCAA rules allegedly requiring student-athletes to sign forms “relinquish[ing] all rights in perpetuity for use of their images, likenesses and/or names.” 3d Consolidated Am. Class Action Compl., *In re NCAA Student-Athlete Name & Likeness Licensing Litigation (In re NCAA NIL Litig.)*, 4:09-cv-1967-CW, ECF No. 832 ¶ 610 (N.D. Cal. July 19, 2013) (*O’Bannon* Complaint). The *O’Bannon* plaintiffs’ sweeping claims addressed the use of student-athlete NIL not only in live broadcasts but also archival footage used for promotional purposes. *See, e.g., id.* ¶¶ 444–79 (covering DVDs, on-demand video rentals, a “vault” of archival video, “video-clip sales to corporate advertisers and others,” “premium content on websites,” and photos). The *O’Bannon* plaintiffs also challenged the use of former student-athletes’ NIL in a college basketball videogame, including incorporation of “Classic Teams” such as the “1983 North Carolina State Wolfpack.” *Id.* ¶ 487. The district court consolidated the cases, which proceeded before the Honorable Claudia Wilken.

On November 8, 2013, the district court denied certification of a damages relief class, but certified an injunctive relief class in *O’Bannon* defined as:

All current and **former student-athletes** residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as ‘University Division’ before 1973) college or

university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men’s football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in **game footage** or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.

O’Bannon, 7 F. Supp. 3d at 965 (emphasis added). The reference to “game footage” covered both live and archival footage—as confirmed by the inclusion of *former* student-athletes in the definition of the *injunctive* class. The *O’Bannon* and *Keller* plaintiffs settled their claims against the non-NCAA defendants. After the district court’s class certification decision, the *O’Bannon* plaintiffs voluntarily dismissed their damages claims against the NCAA with prejudice. *O’Bannon* was subsequently deconsolidated from *Keller*. The *Keller* plaintiffs then settled their claims with the NCAA.³

³ As relevant here, the settlement between Keller and the NCAA involved a release of:

[A]ny and all past, present, and future 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-athletes’ name, image, photograph, or likeness in connection with EA’s NCAA-Branded Videogames by the NCAA, EA, CLC, or any Person, that have been, could have been, or should have been asserted in the Lawsuits, including but not limited to any claims based in any way on alleged rights of publicity or name, image, and likeness rights under the law of any state or the United States, whether recognized now or hereafter, including any rights recognized in court decisions or statutes.

The remaining injunctive claims against the NCAA in *O'Bannon* proceeded to a bench trial in June of 2014. The district court found that the challenged NCAA NIL compensation rules violated Section 1 of the Sherman Act in a narrow way. Judge Wilken accordingly prohibited the NCAA from capping scholarships to student-athletes “generated from the use of their names, images, and likenesses” at a number below the federal “cost of attendance” amount for each school. *Id.* at 1007–08. Second, Judge Wilken “prohibit[ed] the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires.” *Id.* at 1008. While the injunction “permit[ted] the NCAA to set a cap on the amount of money that may be held in trust,” it “prohibit[ed] the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically eligible to compete.” *Id.*

On September 30, 2015, the Ninth Circuit affirmed in part and reversed in part. The Ninth Circuit agreed with the district court’s finding of an

Am. Class Action Settlement Agreement & Release, *Keller v. NCAA*, 4:09-cv-1967-CW, ECF No. 1158-2 ¶ 33 (*Keller* Settlement). Plaintiffs here were all part of the *Keller* settlement class as the *EA Sports NCAA Basketball 09* videogame featured “Classic Teams” including the 1983 North Carolina State Wolfpack. *O'Bannon* Compl. ¶ 487.

antitrust violation related to NIL. *O'Bannon*, 802 F.3d at 1053. And it affirmed the district court's injunction prohibiting the NCAA from capping scholarships to student-athletes below the cost of attendance. *Id.* at 1075. But it concluded that the district court clearly erred by enjoining the NCAA to permit students "to receive NIL cash payments untethered to their education expenses." *Id.* at 1076. The Supreme Court denied certiorari. 580 U.S. 815 (2016) (Mem.).

II. *ALSTON*

In March of 2014, while *O'Bannon* proceeded, other student-athletes filed several different antitrust actions against the NCAA and many of the Division I (DI) conferences. On June 13, 2014, the Judicial Panel on Multidistrict Litigation consolidated those actions into an MDL under the caption *NCAA Grant-In-Aid Cap Antitrust Litigation (Alston)*.

"Rather than confining their challenge to rules prohibiting NIL compensation," the *Alston* plaintiffs "sought to dismantle the NCAA's entire compensation framework." *Alston*, 958 F.3d at 1247. That is, they challenged all NCAA limits on compensation and benefits in excess of the cost of attendance, not just those related to NIL. On December 4, 2015, the district court certified three different injunctive relief classes under Federal Rule of Civil Procedure 23(b)(2). See Order, *In re Nat'l Collegiate Athletic Ass'n Grant-*

In-Aid Cap Antitrust Litigation (Alston), No. 4:14-md-02541-CW (N.D. Cal. Dec. 4, 2015), ECF No. 305.

On February 3, 2017, the *Alston* parties submitted a settlement agreement that resolved only the damages claims. The injunctive relief claims were litigated in a bench trial. The district court found that “preventing unlimited cash payments” was a permissible procompetitive effect of the challenged rules, but concluded that that goal could be achieved through less restrictive means. *In re NCAA Litig. Grant-In-Aid Cap Antitrust Litigation (Alston)*, 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019). The Ninth Circuit affirmed. *Alston*, 958 F.3d at 1244. The Supreme Court, in turn, affirmed the Ninth Circuit, in a highly publicized opinion. 594 U.S. 69, 106–07 (2021).

III. OTHER SUITS

Several other antitrust suits against the NCAA and the athletic conferences are pending across the country. *See In re College Athlete NIL Litig.*, No. 4:20-cv-03919-CW (N.D. Cal.); *Hubbard v. NCAA*, No. 4:23-cv-01593 (N.D. Cal.); *Fontenot v. NCAA*, No. 1:23-cv-03076-CNS- STV (D. Colo.); *Carter v. NCAA*, No. 3:23-cv-06325-RS (N.D. Cal.). Other recent suits raising claims similar to this one have been filed in the Southern District of New York, Eastern District of Michigan, the Southern District of Ohio, and the Los Angeles County Superior Court.

IV. THIS CASE

Plaintiffs are twelve former student-athletes who played for NCSU's Division I basketball team during the 1982–83 season. *See* Compl. ¶¶ 19–32. Plaintiffs brought suit against the NCAA, as well as CBS Broadcasting, CBS Sports, Inc., TNT Sports, and Turner Sports Interactive, Inc. *Id.* ¶¶ 33–39. Plaintiffs voluntarily dismissed without prejudice all defendants but the NCAA on September 20, 2024. Plaintiffs allege that the NCAA has misappropriated their purported publicity rights—including their NIL—associated with their participation in the 1983 NCAA National Championship game and their game-winning basket at the conclusion of that game. *Id.* ¶¶ 1–4. As in *O'Bannon*, Plaintiffs challenge the use of “archival footage” of games they participated in, as well as “offering footage and images for sale or license.” *Id.* ¶¶ 46–47. Plaintiffs bring claims under N.C. Gen. Stat. §§ 75-1, 75.2 and common law, and seek injunctive and declaratory relief, actual and punitive damages, and disgorgement of profits. *Id.* ¶¶ 169–238.

ARGUMENT

The dismissal of a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is proper if there is an “absence of law to support a claim,” an “absence of fact sufficient to make a good claim,” or “the disclosure of some fact which will necessarily defeat the claim.” *Forbis v. Honeycutt*, 273 S.E.2d 240, 241 (N.C. 1981); *see also Sitelink Software, LLC v. Red Nova Labs, Inc.*,

No. 14-CVS-9922, 2016 WL 3918122, at *6 (N.C. Super. Ct. June 14, 2016). Although North Carolina’s Rule 12(b)(6) standard is less exacting than its federal counterpart, *Window World of Baton Rouge, LLC v. Window World, Inc.*, No. 15-CVS-1, 2016 WL 6242945, at *6 (N.C. Super. Ct. Oct. 25, 2016), that standard “does not allow a party to withstand a Rule 12(b)(6) motion based on conclusory allegations that are not supported by underlying factual allegations,” and courts are free to disregard “unwarranted deductions of fact,” “unreasonable inferences,” and “legal conclusions,” *Sitelink Software*, 2016 WL 3918122, at *6. For several reasons, Plaintiffs’ claims cannot clear that bar.

I. PLAINTIFFS’ CLAIMS ARE TIME-BARRED BECAUSE THEY CHALLENGE CONDUCT THAT OCCURRED FORTY YEARS AGO.

Plaintiffs’ claims are each based on facts that occurred more than forty years ago and thus are barred by the applicable statutes of limitations.⁴

Plaintiffs’ first four antitrust claims alleging violations of Chapter 75 of North Carolina General Statutes are subject to a four-year statute of limitations. N.C. Gen. Stat. § 75-16.2. “[A] cause of action pursuant to § 75[] accrues when the violation occurs.” *Hinson v. United Fin. Servs., Inc.*, 473 S.E.2d 382, 387 (N.C. Ct. App. 1996); *see also SL-x IP S.a.r.l. v. Merrill Lynch*,

⁴ A statute of limitations defense “may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim.” *Hargett v. Holland*, 447 S.E.2d 784, 786 (N.C. 1994).

Pierce, Fenner & Smith Inc., No. 21-2697, 2023 WL 2620041, at *2 (2d Cir. Mar. 24, 2023) (“A cause of action under the antitrust laws accrues ‘when a defendant commits an act that injures a plaintiff[]’”) (citation omitted).

Plaintiffs’ remaining common law claims—invasion of privacy and unjust enrichment—are subject to a three-year statute of limitations. N.C. Gen. Stat. § 1-52(1), (5) (requiring an action “[u]pon a contract, obligation or liability arising out of a contract, express or implied,” and an action “for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated” to be brought “[w]ithin three years”). These causes of action “accrue[] and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises.” *Acts Ret.-Life Cmtys., Inc. v. Town of Columbus*, 789 S.E.2d 527, 529 (N.C. Ct. App. 2016) (internal quotation marks and citation omitted).

Plaintiffs’ claims run headlong into these straightforward rules. Each claim stems from the central allegation that the NCAA “coerced” Plaintiffs to “sign[] a contract”—the alleged Student-Athlete Statement—each year before the athletic season began that “stripped them of their legal rights” and granted the NCAA “a perpetual license for uncompensated use of [their] name and likeness.” Compl. ¶¶ 56, 63, 154–55. Plaintiffs allege they signed these forms prior to participating in the 1982–1983 NCAA basketball season—more than forty years ago. *Id.* ¶¶ 67, 114, 154. Plaintiffs’ alleged injury thus occurred well

outside the four-year limitations period under N.C. Gen. Stat. § 75-16.2, and dismissal of Claims 1–4 is therefore required. *See Asheville Lakeview Props., LLC v. Lake View Park Comm’n, Inc.*, 803 S.E.2d 632, 638 (N.C. Ct. App. 2017) (affirming dismissal on statute of limitations grounds); *Izzy Air, LLC v. Triad Aviation, Inc.*, 877 S.E.2d 65, 70–71 (N.C. Ct. App. 2022) (same); *Fleet Real Estate Funding Corp v. Blackwelder*, 348 S.E.2d 611, 613–14 (N.C. Ct. App. 1986) (same).

Similarly, had Plaintiffs desired to challenge those alleged Student-Athlete Statements as wrongfully “assuming that [their alleged NIL rights] assignment is perpetual,” Compl. ¶ 196, or as unjustly enriching the NCAA by enabling it to “cash[] in on” game footage,” *id.* at ¶¶ 41, 83, 153, they needed to do so within three years of signing them, N.C. Gen. Stat. § 1-52(1), (5). Because they failed to do so, Claims 5 and 6 must also be dismissed. *See Losing v. Food Lion, L.L.C.*, 648 S.E.2d 261, 265 (N.C. Ct. App. 2007) (granting summary judgment because the plaintiff’s “claim for invasion of privacy is time-barred”); *Stratton v. Royal Bank of Canada*, 712 S.E.2d 221, 229–30 (N.C. Ct. App. 2011) (rejecting an unjust enrichment claim that “accrued no later than 1962” as untimely).

The only effort Plaintiffs offer to explain their decision to wait over *forty years* to file this lawsuit—even though many other student-athletes filed NIL-related lawsuits earlier—is a cursory gesture to an exception to the applicable

statutes of limitations, the “continuing wrong” doctrine. Specifically, they allege that “the NCAA’s illegal conduct continues to this day” in the form of ongoing rebroadcasts of videos and images of Plaintiffs captured in the 1980s. Compl. ¶¶ 17, 162, 164. But North Carolina courts only “narrowly” employ this doctrine, *Birtha v. Stonemor, N.C., LLC*, 727 S.E.2d 1, 7 (N.C. Ct. App. 2012), and to successfully invoke it a plaintiff “must show [a] continuing violation by the defendant that is occasioned by continual unlawful acts, *not by continual ill effects from an original violation*,” *Stratton*, 712 S.E.2d at 229 (citation and internal quotation marks omitted). Plaintiffs do not and cannot sufficiently plead that they are entitled to this exception.

Even if the alleged continued use of video and photo content from Plaintiffs’ college sports years raised viable legal concerns (*but see infra* Section II), such use would solely be a consequence of the alleged wrongful conduct that took place at least forty years ago when the NCAA allegedly obtained use of Plaintiffs’ purported NIL rights through their allegedly signed Student-Athlete Statements. Put differently, the purported wrongful conduct surrounding Plaintiffs’ alleged signing of the Student-Athlete Statements was “a discrete occurrence—not a cumulative one—that should have been discovered through reasonable diligence” decades ago. *Stratton*, 712 S.E.2d at 229; *see also Eubank v. Van-Riel*, No. COA11-1088, 2012 WL 2308310, at *8 (N.C. Ct. App. June 19, 2012) (unpublished) (affirming dismissal of the

plaintiff's asserted claims as time-barred because they "rest[ed] on a single alleged wrong" that could "not have the effect of tolling the applicable statute of limitations").

Furthermore, in the antitrust context, courts apply the continuing wrong doctrine only if there is "an overt act in furtherance of an antitrust conspiracy" that is "new and independent" from the previous unlawful conduct, or "a separate substantive [antitrust] violation which is committed within the limitations period."⁵ See *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 114 F.4th 280, 283, 289 (4th Cir. 2024) (citation and internal quotation marks omitted) (concluding that the defendant's allegedly anti-competitive conduct did not "inflict *new* harm causing *new* injury to [the plaintiff] within the limitations period"—"even though the allegedly unlawful conspiracy to exclude [the plaintiff] remain[ed] in effect").

Neither the alleged ongoing use of Plaintiffs' purported NIL rights obtained via allegedly signing Student-Athlete Statements (or any other allegedly anticompetitive activity) many years ago, nor the alleged continued

⁵ Although Plaintiffs' antitrust claims arise under state law, "the Court may consider federal case law as persuasive authority for the Antitrust Claims." *Sykes v. Health Network Sols., Inc.*, No. 13-CVS-2595, 2018 WL 1702036, at *4 (N.C. Super. Ct. Apr. 5, 2018); see also *Davis v. HCA Healthcare, Inc.*, No. 21-CVS-3276, 2022 WL 4354142, at *9 (N.C. Super. Ct. Sept. 19, 2022) (J. Davis) ("Our Supreme Court has held that federal decisions under the Sherman Act are instructive in evaluating claims under § 75-1.").

enforcement of the same longstanding NCAA rules and policies, constitutes a new and independent act amounting to a separate antitrust violation.

First, performance of a contract assigning rights and obligations—even an allegedly anticompetitive contract—is not an “overt act” that restarts a limitations period. *See Knudson v. Lenovo (U.S.) Inc.*, No. COA22-955, 2023 WL 6843307, at *3, *11 (N.C. Ct. App. Oct. 17, 2023) (unpublished) (affirming dismissal on statute of limitations grounds of an unfair and deceptive trade practices challenge to a small print statement that Lenovo would get rights to inventors’ ideas and potential revenue from licensing because “all of Plaintiff’s arguments concerning th[e] allegedly continuing wrong relate[d] to. . . rights already assigned. . . during or before 2017”).

Second, any antitrust harm flowing from the alleged Student-Athlete Statements that assigned away Plaintiffs’ purported NIL rights to the NCAA in the early 1980s is “merely the abatable but unabated inertial consequence of [a] pre-limitations action.” *CSX Transp*, 114 F.4th at 290 (internal citation omitted). Here, the only contract that Plaintiffs allege they signed is dated well outside the limitations periods, and Plaintiffs identify no new NCAA rules or policies causing them new and accumulating antitrust harm. All they point to is the NCAA’s alleged enforcement of a preexisting contract, which is not enough to circumvent the statute of limitations governing their claims.

This is therefore not a situation in which the “precise moment” of alleged wrongful conduct was “difficult to discover.” *Stratton*, 712 S.E.2d at 229; *see also Faulkenbury v. Tchrs.’ & State Emps.’ Ret. Sys. of N.C.*, 424 S.E.2d 420, 425-26 (N.C. Ct. App. 1993) (rejecting application of the continuing wrong doctrine because the plaintiff “was aware or had reason to know of the alleged violation”), *aff’d*, 436 S.E.2d 821 (N.C. 1993). That is particularly so given that Plaintiffs are members of classes who litigated these very issues long ago. Plaintiffs are not legally entitled to “remain[] idle for several decades.” *Stratton*, 712 S.E.2d at 229; *see also Spencer v. Town of Chapel Hill*, 290 F. Supp. 2d 655, 662 (M.D.N.C. 2003).

II. PLAINTIFFS HAVE FAILED TO SUFFICIENTLY PLEAD LEGAL INJURY.

Plaintiffs’ claims fail for an additional, independent reason: Plaintiffs have failed to satisfactorily allege infringement of a legal right, an essential requirement for establishing injury and thus standing. Plaintiffs’ Complaint is premised on the idea that the NCAA violated their rights by using “archival footage,” “game footage,” and “replays” of college games in which Plaintiffs played, and their Complaint refers to the NCAA website and YouTube channel of those rebroadcasts. Compl. ¶¶ 4, 7, 102, 104, 105–08, 111, 159. Central to Plaintiffs’ claims are allegations of so-called “publicity rights.” *See, e.g., id.* ¶¶ 4, 14, 18, 162, 176–77, 179–81. But North Carolina does not recognize a

right of publicity at common law or statute. Even if it did, a long line of precedent makes clear that Plaintiffs have no right of publicity in the at-issue rebroadcasts. *See, e.g., Marshall*, 668 F. App'x at 157 (characterizing the claimed right of publicity in a broadcast as a “legal fantasy”) (*affirming* 111 F. Supp. 3d 815 (M.D. Tenn. 2015)). For this reason, the federal district court in *Marshall* concluded that student-athletes “cannot have been injured by a purported conspiracy to deny them the ability to sell non-existing rights,” and granted a motion to dismiss a similar antitrust case. 111 F. Supp. 3d at 835 (citing *Square D Co. v. Niagara Frontier Tariff Bur., Inc.*, 476 U.S. 409, 416 (1986)). The Sixth Circuit then affirmed, concluding it had “little to add” to the district court’s “notably sound and thorough opinion”; that “[t]o state the plaintiffs’ theory in this case is nearly to refute it”; and describing their antitrust claims as “meritless.” *Marshall*, 668 F. App'x at 156–57; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569, 572 (6th Cir. 2009). The same logic applies here.

Even if North Carolina recognized a right of publicity and required clearances to broadcast or rebroadcast a sports event—and it does neither—that state law would be preempted by the federal Copyright Act because there is no plausible claim that Plaintiffs’ NIL is being used to endorse a product independent from the copyrighted work itself (*i.e.*, the DI Men’s Basketball

Tournament). *See* Compl. ¶ 5 (“The NCAA has used . . . the images and videos of the members of Cardiac Pack to advertise its *March Madness tournament*” (emphasis added)); *see also, e.g., Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294, 306 (2d Cir. 2022) (noting the Copyright Act preempts plaintiffs’ publicity claims absent a factual allegation that defendant “used the plaintiff’s identity or likeness to support a product that was independent from the copyrighted work itself”).

A. Plaintiffs Must Plausibly Plead Legal Injury to Satisfy Standing and Antitrust Requirements

Plaintiffs must plead and “establish standing in order to assert a claim for relief.” *United Daughters of the Confederacy*, 881 S.E.2d at 44 (citations omitted). Plaintiffs, “as the part[ies] that initiated the lawsuit, ha[ve] ‘the burden of proving that standing exists.’” *Id.* at 49 (citation omitted). To establish standing, Plaintiffs must “allege ‘the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution.’” *Id.* (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 853 S.E.2d 698, 734 (N.C. 2021)).

Here, the sole injury Plaintiffs claim is that they have not been compensated for the use of their names and images in rebroadcasts of televised basketball games—a violation of their “publicity rights.” *See, e.g.,* Compl. ¶¶ 176–79 (alleging that NCAA’s illegal conduct deprived Plaintiffs of profits

they would have earned from “publicity rights”), *id.* ¶ 185 (alleging that Plaintiffs were “unreasonably forc[ed] . . . to assign their publicity rights to the NCAA”).⁶ But as explained below, Plaintiffs have no right of publicity in North Carolina, and thus “cannot have been injured by a purported conspiracy to deny them the ability to sell non-existent rights.” *Marshall*, 111 F. Supp. 3d at 835; *see Marshall*, 668 F. App’x at 157 (similar).

Stated differently, Plaintiffs have “failed to allege the infringement of a ‘legally enforceable right’” because their claimed rights of publicity are not legally protected. *United Daughters of the Confederacy*, 881 S.E.2d at 60; *see id.* at 47–49 (dismissing claim relating to removal of a monument where plaintiff failed to allege “proprietary or contractual interest in the monument”); *see also Edwards v. Town of Louisburg*, 892 S.E.2d 76, 80–81 (N.C. Ct. App. 2023) (finding plaintiffs did not have standing because they “fail to show some ‘proprietary or contractual interest in the [property]’ . . . i.e., ‘a legally protected interest invaded by defendants’ conduct” (internal citations omitted)); *Aquino*

⁶ To the extent Plaintiffs claim their antitrust injury was having to sign a form allowing the NCAA to use their NIL for promoting NCAA events, *see* Compl. ¶¶ 63–73, 162, 176, 184–85, 196, 215–18, that claim fails for the same reasons. Plaintiffs have not alleged any use of their NIL to advertise independent goods or services, and use of Plaintiffs’ NIL to advertise broadcasts themselves is not a violation of their right of publicity. *See infra* Section II.B. In any event, any claim premised on that alleged injury is barred by the statute of limitations. *See supra* Section I.

v. City of Charlotte, 2023 WL 3828006, at *6 n.4, (W.D.N.C. June 5, 2023) (“North Carolina case law makes clear, the open courts [constitutional] provision must be coupled with—not just *any* injury—but a legally cognizable injury” (citations omitted)). Plaintiffs thus lack both North Carolina constitutional standing and antitrust injury. *United Daughters of the Confederacy*, 881 S.E.2d at 60; *Edwards*, 892 S.E.2d at 80–81; *Sitelink Software, LLC*, 2016 WL 3918122, at *7–8.

Rooney v. Columbia Pictures Industries, Inc., a federal decision, illustrates the point. Rejecting an antitrust claim based on purported publicity rights in old films, the court explained:

As to the first cause of action alleging a conspiracy since at least 1977 to refuse to deal with Rooney concerning his ‘publicity rights’ in pre-1960 films, it is manifest that, as Rooney had no such rights in the pre-1960 films, he cannot have suffered any antitrust injury as the result of any such conspiracy.

538 F. Supp. 211, 230 (S.D.N.Y. 1982), *aff’d*, 714 F.2d 117 (2d Cir. 1982). Here too, Plaintiffs cannot have suffered injury-in-fact or injury to their “business or property” by the denial of the opportunity to license something they do not own.⁷ *Square D Co.*, 476 U.S. at 416 (antitrust “[i]njury implies violation of a

⁷ Federal law is instructive on the scope of North Carolina antitrust law. *See supra* n.4. The federal courts have made clear that for similar reasons, Plaintiffs cannot establish injury-in-fact under federal law, or the essential requirement of antitrust standing under federal antitrust law. *See, e.g., Marshall*, 111 F. Supp. 3d at 835; *Marshall*, 668 F. App’x at 157; *cf. N.C. Gen.*

legal right”). Further, any claim arising under a hypothetical right of publicity would be preempted under the Copyright Act. Plaintiffs’ antitrust claims should therefore be dismissed.

B. Plaintiffs Have No Legally Protected Right of Publicity in North Carolina

North Carolina does not recognize a right of publicity at either common law or statute. Although Plaintiffs repeatedly invoke “publicity rights” throughout their Complaint, they fail to identify a single case or statute under North Carolina that recognizes such a right.

North Carolina’s choice not to recognize a publicity right in this context is consistent with jurisdictions throughout the United States that uniformly hold that the right to license a sporting event lies exclusively with the promoter or producer of the event. *See, e.g., Wis. Interscholastic Athletic Ass’n v. Gannett Co.*, 658 F.3d 614, 624–28 (7th Cir. 2011); *Laumann v. Nat’l Hockey League*, 907 F. Supp. 2d 465, 485 (S.D.N.Y. 2012). By virtue of its physical control of the venue, the promoter may place conditions upon entry—and may grant permission to broadcast the game only to one, or to a limited number, of broadcasters. *See, e.g., Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 492–93 (W.D. Pa. 1938); *Twentieth Century Sporting Club v. Transradio*

Stat. § 75-16; *Sitelink Software*, 2016 WL 3918122, at *7–8 (describing antitrust standing under North Carolina law).

Press Serv., 165 Misc. 71 (N.Y. Sup. Ct. 1937). Thus, it is long settled that an event's promoter exclusively owns broadcast rights for that event. *See, e.g., S.W. Broad. Co. v. Oil Center Broad. Co.*, 210 S.W.2d 230, 232 (Tex. Civ. App. 1947); *Okla. Sports Props., Inc. v. Indep. Sch. Dist. No. 11*, 957 P.2d 137, 139 (Okla. Civ. App. 1998); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542 (1993). As a result, courts also recognize that no state's law grants a right of publicity to the *participants* in a broadcast or rebroadcast of a sporting event. *See Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003); *Marshall*, 111 F. Supp. 3d at 825–29. Accordingly, courts have overwhelmingly agreed that simply broadcasting or rebroadcasting all or portions of a sports event does not involve players' rights of publicity. *See, e.g., Marshall*, 111 F. Supp. 3d at 825–27, *aff'd* 668 F. App'x at 157; *Dryer v. Nat'l Football League*, 55 F. Supp. 3d 1181, 1195–1200 (D. Minn. 2014), *aff'd* 814 F.3d 938 (8th Cir. 2016); *Nat'l Football League v. Alley*, 624 F. Supp. 6, 10 (S.D. Fla. 1983).

The Court should accordingly follow the prevailing judicial consensus. Doing so is correct as a matter of law but also basic logic. If mere presence in a sports broadcast connoted a right of publicity, every person depicted in a sporting event—not only players, but substitutes who never enter the game, coaches, cheerleaders, band members, referees, medical personnel, and even spectators—might try to assert such a right. Requiring licenses from all these

people would make broadcasts next to impossible by affording each participant power to veto a broadcast of a game.

For these reasons, all six claims should be dismissed for failure to allege infringement of a legally enforceable right.⁸ *United Daughters of the Confederacy*, 881 S.E.2d at 49.

C. Any Right of Publicity Claims, Even if Available, Would Be Preempted by the Copyright Act

Even if North Carolina recognized a right of publicity in broadcasts and rebroadcasts of sports events, that purported right would be preempted under the Copyright Act. 17 U.S.C. § 106; *see, e.g., Melendez*, 50 F.4th at 305–06; *In re Jackson*, 972 F.3d 25, 40 (2d Cir. 2020); *Maloney v. T3 Media, Inc.*, 853 F.3d 1004, 1016 (9th Cir. 2017); *Dryer v. Nat’l Football League*, 814 F.3d 938, 943 (8th Cir. 2016); *Ray v. ESPN, Inc.*, 783 F.3d 1140, 1144 (8th Cir. 2015); *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1145 (9th Cir. 2006).

⁸ Claims 5 and 6 are addressed further later in this brief. Plaintiffs’ fourth claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 is dependent on Plaintiffs’ antitrust claims and thus should be dismissed accordingly. As North Carolina courts have acknowledged, “[w]hen a section 75-1.1 claim derives solely from an antitrust claim, the failure of the antitrust claim also defeats liability under section 75-1.1.” *Sitelink Software, LLC*, 2016 WL 3918122, at *12 (citation omitted); *see also Sports Quest, Inc. v. Dale Earnhardt, Inc.*, 2004 WL 742918, at *8 (N.C. Super. Ct. Mar. 12, 2004) (“[T]o maintain an unfair trade practices claim[,] . . . the alleged act must injure the plaintiff” (citing *Dalton v. Camp*, 548 S.E.2d 704, 711 (N.C. 2001))). Therefore, the arguments as to why Plaintiffs do not have a cognizable right of publicity are also fatal to their fourth claim.

The reasons why are straightforward. Broadcasts of sports events are copyrighted audio-visual works. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997). Section 106 of the Copyright Act vests in the copyright owner the exclusive right to reproduce, distribute, display, and prepare derivative works of the copyrighted game footage. 17 U.S.C. § 106. The rights of the copyright holder thus trump any publicity rights in the broadcasts and preempt any claims seeking to vindicate such rights. *See Motorola, Inc.*, 105 F.3d at 848 n.4 (“[N]o person is entitled to any such right or equivalent right in any such work under” state law); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 679 (7th Cir. 1986).

Plaintiffs do not and cannot claim to possess a license, assignment, or other ownership interest in the broadcasts at issue. Thus, their right-of-publicity claims are preempted by the Copyright Act, unless they can show that “the defendant manipulated or imitated the plaintiff’s identity or likeness, or used the plaintiffs’ identity or likeness to support a product that was independent from the copyrighted work itself.” *Melendez*, 50 F.4th at 306 (citations omitted); *see Jackson*, 972 F.3d at 48 (acknowledging limited exemption to evade copyright preemption where NIL is used for advertising purposes “in a manner that implies the plaintiff’s endorsement, sponsorship, or approval” of an entity, product, or opinion, that is independent from the copyrighted work itself); *see also T3Media*, 853 F.3d at 1011; *Dryer*, 814 F.3d

at 942; *Ray v. ESPN, Inc.*, 783 F.3d 1140, 1144 (8th Cir. 2015). But Plaintiffs cannot plausibly make any such allegation here given that their allegations involve the display of highlights. *See, e.g.*, Compl. ¶ 5 (alleging “[t]he NCAA has used . . . videos of the members of Cardiac Pack to advertise its March Madness tournament”). Accordingly, even if there were any potential North Carolina right of publicity at issue here, the Copyright Act would override it.

D. Plaintiffs Fail to State a Claim for Invasion of Privacy

Plaintiffs fail to plead an adequate claim under common law for an invasion of privacy (the fifth claim for relief) for an additional, independent reason. North Carolina courts have recognized that misappropriation of a plaintiff’s name or likeness may constitute an invasion of privacy tort. But to “plead a *prima facie* claim for misappropriation of name or likeness, a plaintiff must allege: (1) an unauthorized use of plaintiff’s name or likeness by defendant (2) in connection with an ‘advertisement or other commercial enterprise.’” *RE Carroll Mgmt. Co. v. Dun & Bradstreet, Inc.*, 706 F. Supp. 3d 535, 542 (M.D.N.C. 2023) (citations omitted); *see also Miller v. Brooks*, , 472 S.E.2d 350, 353–54 (N.C. Ct. App. 1996) (same). Here, however, Plaintiffs repeatedly allege that they provided written and signed authorization to the NCAA to use their NIL to promote the Division I NCAA basketball championship and other NCAA events or programs. *See, e.g.*, Compl. ¶¶ 66–67 (“You authorize the NCAA [or a third party acting on behalf of the NCAA] to

use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs [T]he Student-Athlete Statements signed by Plaintiffs included this provision or one substantially similar to it.”). Thus, even taking Plaintiffs’ bare allegations as true, the NCAA was authorized to use Plaintiffs’ NIL, thus precluding their invasion of privacy claim.

III. PLAINTIFFS’ INJUNCTIVE CLAIMS ARE BARRED BY THE *O’BANNON* JUDGMENT.

The final judgment in *O’Bannon* resolved claims for injunctive relief on behalf of a certified class that covered, as relevant here, “all current and former student-athletes residing in the United States who compete on, or competed on, an NCAA [DI] men’s basketball team . . . and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in **game footage** or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.” *O’Bannon*, 7 F. Supp. 3d at 965 (emphasis added). That judgment—entered in a case challenging, among other things, the continued commercial use of game footage and photos after a student-athlete’s eligibility—bars relitigating the same issues here.

All twelve Plaintiffs here were members of the certified injunctive class in *O’Bannon*. Each competed on a men’s Division I basketball team. Compl.

¶¶ 19–32. Each alleges that the NCAA appropriated their NIL by using game footage. *Id.* ¶¶ 159–62. And each played prior to November 8, 2013, when the *O’Bannon* district court certified the class. *See id.* ¶¶ 19–32; *In re NCAA NIL Litig.*, 2013 WL 5979327, at *10 (N.D. Cal. Nov. 8, 2013). Plaintiffs are accordingly bound by the district court’s judgment in *O’Bannon*.

“[A] judgment in a properly entertained class action is binding on class members in any subsequent litigation.” *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).⁹ That judgment “prevent[s] a second suit based on the same cause of action between the same parties or those in privity with them,” and applies to “those issues which could have been raised in the prior action but were not.” *Clancy v. Onslow Cnty.*, 564 S.E.2d 920, 922–23 (N.C. App. 2002) (internal citation and quotation marks omitted); *see also Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (“A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”). The plaintiffs in *O’Bannon* challenged rules and practices precluding them from being compensated for the use of their NILs in “(1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other

⁹ “Federal common law . . . governs the claim-preclusive effect of federal-court judgments.” *Barrow v. D.A.N. Joint Venture Props. of N.C., LLC*, 755 S.E.2d 641, 645 (N.C. Ct. App. 2014).

archival footage.” *O’Bannon*, 802 F.3d at 1057. The Ninth Circuit conclusively resolved that challenge and delineated the forms of additional compensation the antitrust laws required the NCAA to permit. *Id.* at 1075–76.

That is the precise injunctive relief claim that Plaintiffs here seek to relitigate. Their Complaint essentially repeats allegations from the operative *O’Bannon* complaint. Plaintiffs here complain that they receive no compensation for the use of archival footage and images from their playing days as a result of the NCAA’s alleged requirement that they assign their purported NIL rights to the NCAA, Compl. ¶¶ 56, 112, 162, 184, and they seek “a permanent injunction enjoining the NCAA and any person acting through it from relying on any unenforceable assignment of publicity rights,” *id.* ¶¶ 191, 205, 213, 227. Those are exactly the same “rules and practices,” ¶¶ 176, 195, challenged in *O’Bannon*. See *O’Bannon* Compl. ¶¶ 22–23 (challenging assignment of rights); *id.* ¶¶ 336–68 (listing overlapping challenges to uses of those rights by the NCAA). Plaintiffs are therefore bound by the *O’Bannon* judgment and precluded from relitigating the *O’Bannon* injunction here.¹⁰ *Cooper*, 467 U.S. at 874; see also *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

¹⁰ Plaintiffs’ injunctive relief claims are barred even if the Court determines that collateral estoppel—the “companion doctrine[]” to res judicata—is the appropriate doctrine for evaluating Plaintiffs’ Complaint. “Under the doctrine of collateral estoppel, when an issue has been fully litigated and decided, it cannot be contested again between the same parties,

IV. PLAINTIFFS' UNJUST ENRICHMENT CLAIM MUST BE DISMISSED.

Beyond being time-barred, *supra* Section I, Plaintiffs' claim for unjust enrichment must be dismissed for several additional reasons.

First, courts have held that a plaintiff cannot salvage a failed antitrust claim by simply recharacterizing it as an unjust enrichment claim. *See, e.g., Yong Ki Hong v. KBS Am., Inc.*, 951 F. Supp. 2d 402, 424 (E.D.N.Y. 2013); *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995). That principle well applies here because Plaintiffs' unjust enrichment claim faces the same obstacles on the merits as their antitrust claims. It too is premised on Plaintiffs' failed right of publicity theory. *See, e.g., Ruffin-Steinback v. dePasse*, 267 F.3d 457, 462–63 (6th Cir. 2001); *Marshall*, 111 F. Supp. 3d at 837. It too would likewise be preempted by the Copyright Act, which preempts claims that the defendant was unjustly enriched by use of a protected work of authorship. *See, e.g., Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004); *Monbo v. Nathan*, 623 F. Supp. 3d 56, 112–14 (E.D.N.Y. 2022) (collecting cases); *Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc.*, 713 F. Supp. 2d 215, 229 (S.D.N.Y. 2010). So it too must be dismissed.

even if the first adjudication is conducted in federal court and the second in state court.” *First Recovery, LLC v. Unlimited Rec-Rep, LLC*, 884 S.E.2d 172, 174 (N.C. Ct. App. 2023) (quoting *McCallum v. N.C. Co-op. Extension Serv.*, 542 S.E.2d 227, 231 (N.C. Ct. App. 2001)).

Second, “it is well settled [that] ‘a claim for unjust enrichment cannot stand where an express contract exists covering the same subject.’” *Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC*, 2024 WL 3549145, at *42 (N.C. Super. Ct. July 12, 2024), opinion clarified, (N.C. Super. Ct. 2024). Although Plaintiffs repeatedly allege they have not consented to the NCAA’s use of their NIL nor have they been compensated for such use, *see, e.g.*, Compl. ¶ 234, Plaintiffs themselves allege they provided signed written authorization to the NCAA to use their at-issue NIL in exchange for consideration offered by member school NCSU, *id.* ¶¶ 66–67, 158. For this reason, Plaintiffs cannot maintain an unjust enrichment claim separate from their failed antitrust claims.

CONCLUSION

The Complaint should be dismissed in its entirety.

Respectfully submitted this 18th day of October, 2024.

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This the 18th day of October, 2024.

/s/ Alan M. Ruley

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