

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,

Defendants.

**MEMO IN OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS**

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INTRODUCTION

This year, and each year for the past four decades, the NCAA misappropriated images of Plaintiffs to promote its own products and those of its co-conspirators, generating massive financial gain for itself. The NCAA now claims that it cannot be held to account for that conduct. None of its arguments hold water.

The NCAA claims that it is immune from suit because it has been unlawfully appropriating Plaintiffs' images, and otherwise violating their legal rights, for a long time. But the statute of limitations does not protect defendants who continue to engage in wrongful behavior within the statutory period simply because they also engaged in wrongful conduct before the statutory period. Nor does the statute of limitations give comfort to defendants that have, as the NCAA has here, engaged in an ongoing conspiracy and committed ongoing acts in furtherance of that conspiracy within the statutory period. Further, a Rule 12(b)(6) motion is not the vehicle to address the factual disputes that underpin the NCAA's statute of limitations arguments. Thus, the NCAA's statute of limitations argument should be rejected.

The NCAA's argument that Plaintiffs have not alleged a "legal injury" also fails. North Carolina courts have long recognized that commercial entities may not use citizens' images for commercial purposes without their consent. This legal protection is based on citizens' rights to "reap the reward of [their] endeavors," *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977), which is an "inalienable right" under Article I, Section 1 of our State's Constitution.

Consequently, North Carolina citizens have property and privacy rights in the commercial use of their images and performances. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55, 64 (1938) (quoting *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 79 (1905)) (cleaned up). In this case, Plaintiffs’ Amended Complaint alleges in detail how the NCAA violated Plaintiffs’ right to prevent unauthorized commercial use of their images and likenesses. *See* Am. Compl. ¶¶ 98–112. Thus, this Court should reject as meritless the NCAA’s claim that North Carolina does not protect its citizens from unauthorized commercial use of their images.

The NCAA’s copyright preemption argument also fails. A state law claim is preempted by the Copyright Act only where the claim does not “require proof beyond the elements required to establish copyright infringement.” *Out of the Box Devs., LLC v. LogicBit Corp.*, No. 10-cvs-8327, 2012 N.C.B.C. 53, 2012 WL 5356282, at *9 (N.C. Super. Oct. 30, 2012). Plaintiffs’ claims here rest on several other factors beyond those at issue in a copyright action. And even the cases upon which the NCAA relies establish that where, as here, the defendant is alleged to have used the plaintiffs’ images for advertising, copyright preemption is inapplicable.

The NCAA’s consent defense is patently absurd. The NCAA claims that the Amended Complaint facially alleges that Plaintiffs *consented* to the appropriation of their images. To the contrary, the Complaint repeatedly alleges the opposite—that is, that the consent forms were contracts of adhesion, signed in coercive circumstances, and thus are not valid as a matter of law. *See, e.g.*, Am. Compl. ¶¶ 63–

73, 214–20. The NCAA’s argument that the Complaint can only be read as alleging valid, enforceable consent to the appropriation of Plaintiffs’ images is therefore meritless.

Finally, Plaintiffs’ injunctive claims are not precluded by the *O’Bannon* judgment. See *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) (hereinafter, “*O’Bannon* judgment”) The claims Plaintiffs raise here are not the same as those decided in *O’Bannon*. Thus, the *O’Bannon* judgment does not provide a final judgment on the merits with regard to Plaintiffs’ injunctive relief claims here. Accordingly, Plaintiffs’ injunctive relief claims are not precluded. In any event, the NCAA’s preclusion claim would not affect Plaintiffs’ entitlement to proceed on their damages claims.

Plaintiffs here seek compensation for the NCAA’s unauthorized, uncompensated, and ongoing use of their names, images, and likenesses for advertising and other commercial purposes. That alleged conduct occurred this year and each year for many years prior; it violated Plaintiffs’ legally protected rights; it is not merely a copyright claim in other clothes; and Plaintiffs did not consent to such commercial use. Plaintiffs’ claims, if true, provide a basis for relief. Accordingly, the NCAA’s motion to dismiss should be denied.

BACKGROUND

The Cardiac Pack’s nail-biting post-season run was not only the epitome of what later became known as “March Madness”; it defined the term. The Pack’s

unlikely march to victory in the NCAA tournament created a new archetype—the “Cinderella team”—and drove a new level of interest in future NCAA tournaments. *See Am. Compl.* ¶¶ 113–45.

The Cardiac Pack players were kids forced by the NCAA to sign legally invalid waivers purporting to assign to the NCAA perpetual rights to use the students’ images and related publicity rights as a condition of being eligible to play. Most of these kids went on to eke out modest livings, while the NCAA used their performances and images to build an empire, earning billions and paying tens of millions to its staff and lawyers.

For decades, those lawyers, paid in large part from funds that rightfully should have gone to the student-athletes, managed to persuade courts not to recognize student-athletes’ rights. They did so by exploiting a passing comment of the U.S. Supreme Court. Specifically, in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, the U.S. Supreme Court stated, in dicta, that the NCAA’s restrictions were “entirely consistent with the goals of the Sherman Act.” 468 U.S. 85, 120 (1984). The NCAA’s lawyers used that dictum to convince courts that the NCAA’s conduct was presumptively lawful for nearly forty years.

The U.S. Supreme Court finally set the record straight in 2021, unanimously repudiating the NCAA’s position and declaring the NCAA a monopoly subject to the Sherman Act. *See Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 86, 96 (2021).

Yet, even after *Alston*, the NCAA continued its anticompetitive and otherwise illegal conduct largely unabated. It continued to require student-athletes to sign over

their publicity rights, and it continued to exploit the images of both current and former athletes based on these illegally coerced waiver forms. It continued to refuse to pay athletes or former athletes for using their images for commercial purposes. And it continued to try to limit the ways in which member schools could compensate their athletes for uses of their images.

With this lawsuit, Plaintiffs seek compensation for the NCAA's continual and repeated, unauthorized, and uncompensated commercial use in advertising of Plaintiffs' likenesses for the NCAA's financial gain.

ARGUMENT

The NCAA's arguments for dismissing this case must fail. Plaintiffs' claims are timely because the Amended Complaint alleges that the NCAA has engaged in discrete wrongful acts within the statutory period that have harmed Plaintiffs, as well as an ongoing conspiracy and continuing wrongs. Plaintiffs have alleged a cognizable legal injury, and they do not allege that they have consented in any way to the NCAA's exploitation of their names and likenesses. Further, Plaintiffs claims are not preempted by the Copyright Act or precluded by the *O'Bannon* judgment.

I. THE LENGTHY DURATION OF THE NCAA'S ILLEGAL CONDUCT IS NOT A DEFENSE.

Each claim in the Amended Complaint is timely, because the claims arose within the statutory period and, independently, because the allegations in the Amended Complaint establish timeliness under the continuing wrong doctrine.

A. Legal Standards

“The standard [for a] Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true.” *Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina*, 281 N.C. App. 1, 5, 869 S.E.2d 1, 3 (2021) (quoting *Suarez v. Am. Ramp Co.*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890, *disc. review denied*, 373 N.C. 257, 836 S.E.2d 653 (2019)). “[T]he issue for the court is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim.” *Id.* (quoting *Howe v. Links Club Condo. Ass’n, Inc.*, 263 N.C. App. 130, 137, 823 S.E.2d 439, 447 (2018)).

“[I]t is seldom appropriate” for a defendant to raise a statute of limitations defense in a Rule 12(b)(6) motion to dismiss because “[a] motion under Rule 12(b)(6) is intended to test the legal adequacy of the complaint, and not to address the merits of any affirmative defenses.” *Diop v. BMW of N. Am., LLC*, 511 F. Supp. 3d 679, 684 (E.D.N.C. 2021) (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)). “Dismissal pursuant to Rule 12(b)(6) on the grounds that a claim is barred by the statute of limitations is proper only when all the facts necessary to establish that the claim is time-barred are either alleged or admitted in the complaint, construing the complaint liberally in favor of plaintiff.” *Lau v. Constable*, 2017 NCBC 10, 2017 WL 536361, at *4 (N.C. Super. Feb. 7, 2017) (quoting *Fox v. Sara Lee Corp.*, 210 N.C. App. 706, 708–09, 709 S.E.2d 496, 498 (2011)).

The statute of limitations begins to run either when “the right to maintain a suit arises,” or, if the continuing wrong doctrine applies, when “the violative act

ceases.” *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008) (quoting *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178–79, 581 S.E.2d 415, 423 (2003)). When the right to maintain a suit arises depends on the cause of action and the factual context of the case, but generally, the right arises when the plaintiff first suffers an injury caused by a wrongful act of the defendant. *Epcon Homestead, LLC v. Town of Chapel Hill*, 905 S.E.2d 83, 87 (N.C. 2024) (“A party can sue when it sustains an injury to a ‘legally protected interest.’”) (citing *Arendas v. N.C. High Sch. Athletic Ass’n*, 217 N.C. App. 172, 174, 718 S.E.2d 198, 199 (2011)). Where the complaint alleges an ongoing conspiracy, the statute of limitations “begins to run upon the last act in furtherance of the conspiracy.” *C.G.C. by & through Homes v. Petteway*, 2022-NCCOA-918, ¶ 11, 287 N.C. App. 393, 881 S.E.2d 761 (2022), *rev. denied*, 894 S.E.2d 757 (N.C. 2023) (unpublished) (citing *Carlisle v. Keith*, 169 N.C. App. 674, 685, 614 S.E.2d 542, 549 (2005)).

When a defendant engages in an ongoing course of wrongful conduct, the continuing wrong doctrine may extend the statute of limitations. The continuing wrong doctrine applies where defendants are alleged to have engaged in “continual unlawful acts,” as opposed to merely causing plaintiffs to suffer from “continual ill effects from an original violation.” *Babb*, 190 N.C. App. at 481, 660 S.E.2d at 637 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir.1981)). “The doctrine has been said to arise from ‘separate obligations stemming from the same essential legal obligation,’ rather than from ‘a discrete occurrence.’” *Soft Line, S.p.A. v. Italian Homes, LLC*, 2015 NCBC 6, 2015 WL 246709, at *5 (N.C. Super. Jan. 16, 2015) (first

quoting *Eubank v. Van-Riel*, 221 N.C. App. 433, 727 S.E.2d 25 (2012) (unpublished), then quoting *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 87, 712 S.E.2d 221, 229 (2011)). In other words, when the defendant is alleged to have engaged in discrete acts within and outside of the statutory period, each of which separately causes injury to the plaintiff, the continuing wrong doctrine applies, and the claims are not time-barred merely because some of the acts occurred outside of the statutory period. Instead, the statute of limitations begins to run when the last “violative act ceases.” *Babb*, 190 N.C. App. at 481, 660 S.E.2d at 637 (quoting *Williams*, 357 N.C. at 178–79, 581 S.E.2d at 423).

For example, in *Babb*, the court explained that where a party “continuously refused to make distributions under [certain] trusts until he was removed as trustee,” the statute of limitations did not begin to run until such removal. 190 N.C. App. at 481, 660 S.E.2d at 637–38. Accordingly, where a complaint alleges that “[d]efendants continuously committed unlawful acts” within the statutory period, the claims based on such acts are timely. *Burton v. Hobart Fin. Grp., Inc.*, 2024 NCBC 10, 2024 WL 774901, at *18 (N.C. Super. Feb. 26, 2024) (quoting *Soft Line*, 2015 WL 246709, at *5).

B. Application

As alleged in the Amended Complaint, which must be accepted as true and liberally construed in favor of Plaintiffs, “[t]he NCAA and its members, affiliates, and co-conspirators have used videos and images of Plaintiffs—without Plaintiffs’ consent and without compensating Plaintiffs—in commercial advertising throughout the last

four decades, *up to and including this year.*” Am. Compl. ¶ 183 (emphasis added). That allegation alone suffices to defeat the NCAA’s statute of limitations argument. Each unauthorized use of Plaintiffs’ likenesses for commercial purposes constitutes another wrongful act by the NCAA and by its conspirators. And, contrary to the NCAA’s argument (Def.’s Br. 12–13), the statute of limitations does not protect defendants simply because they also violated plaintiffs’ rights outside the statutory period. Because the complaint plainly alleges that the NCAA engaged in discrete wrongful acts within the statutory period, dismissal under Rule 12(b)(6) is not appropriate as to any count.

1. The antitrust conspiracy claims are timely.

Counts One through Three allege that the NCAA is and has been engaged in an antitrust conspiracy in furtherance of its monopoly. The complaint alleges that the conspiracy is ongoing and that the NCAA has engaged in acts in furtherance of that conspiracy within the statutory period that injured plaintiffs—namely, misappropriating Plaintiffs’ likenesses and publicity rights without compensating Plaintiffs *this year*. Am. Compl. ¶¶ 175–84.

A conspiracy claim is timely so long as a member of the conspiracy engaged in any act in furtherance of the conspiracy within the statutory period. *See C.G.C. Homes*, 2022-NCCOA-918, ¶ 11 (citing *Carlisle*, 169 N.C. App. at 680, 685) (“[T]he statute of limitations for civil conspiracies begins to run upon the last act in furtherance of the conspiracy.”). Accordingly, the antitrust conspiracy claims are timely.

In *O'Bannon*, which the NCAA elsewhere claims is preclusive (Def.'s Br. 27–29), the court addressed and rejected the same argument the NCAA makes here:

Under the continuing wrong doctrine, an antitrust claim “accrues each time a plaintiff is injured by an act of the defendant and the statute of limitations runs from the commission of the act. A continuing violation is one in which the plaintiff’s interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured.” A plaintiff must allege “an overt act by the defendant to restart the statute of limitations.” . . . [The former student-athlete Plaintiff] alleges that NCAA continues to enter into agreements that allow the use of his image without compensation paid to him. . . . Thus, [he] has sufficiently alleged a continuing violation.

O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-1967 CW, 2010 WL 445190, at *6 (N.D. Cal. Feb. 8, 2010) (cleaned up) (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir.1987)).¹ The *O'Bannon* court, therefore, denied the NCAA’s Rule 12(b)(6) motion to dismiss the antitrust claim based on the NCAA’s affirmative statute of limitations defense. *Id.*

The *O'Bannon* court’s analysis is correct and is equally applicable here. This Court should deny the NCAA’s motion.

2. The UDTPA claim is timely.

Plaintiffs allege that the “usurpation and misappropriation of Plaintiffs’ publicity rights constitutes an unfair trade practice.” Am. Compl. ¶ 216 (cleaned up). The complaint alleges that the usurpation and misappropriation occurred this

¹ Federal antitrust decisions are persuasive authority for interpretation of North Carolina antitrust law. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973) (“[T]he body of law applying the Sherman Act, although not binding upon this Court in applying G.S. 75-1, is nonetheless instructive in determining the full reach of that statute.”).

calendar year. Am. Compl. ¶¶ 102–05, 109–11, 175–84. Accordingly, the UDTPA Claim (Claim Four) is timely.

3. The common-law claims are timely.

Again, the Amended Complaint’s allegation that NCAA misappropriated Plaintiffs’ likenesses this year renders Claim Five, for misappropriation of Plaintiffs’ likenesses, timely.

The complaint also alleges that, by keeping all of the profit from its use of Plaintiffs’ likenesses, the NCAA has been unjustly enriched. “[T]he statute of limitations [for unjust enrichment does] not begin to run until Defendants refuse[] to turn over the proceeds” or otherwise “exercise[] ownership over the proceeds.” *Stitz v. Smith*, 272 N.C. App. 415, 419–20, 846 S.E.2d 771, 774–75 (2020). Absent the defendant wrongly keeping the proceeds, no unjust enrichment, and hence no cause of action, exists. Accordingly, where, as here, the defendant obtained funds rightly due to the plaintiff and “refused to turn over the proceeds” to plaintiffs within the statutory period, an unjust enrichment claim is timely. *See id.*

Plaintiffs allege that the NCAA has engaged in an ongoing course of misappropriation from which it is generating profits each year, and that the NCAA has not paid Plaintiffs the funds rightly due them at any point. Thus, Claim Six is timely.

4. The Court should reject the NCAA’s misconstruction of the Amended Complaint.

The NCAA’s statute of limitations argument relies on a fundamental misreading of Plaintiffs’ Amended Complaint. The NCAA incorrectly claims that the

sole alleged wrongful act causing Plaintiffs' injury was the NCAA coercing Plaintiffs to sign certain waiver forms. Def.'s Br. 12–13. That construction of the complaint is wrong.

Dismissal under Rule 12(b)(6) would be appropriate only if the only reasonable reading of the Amended Complaint were that the sole act causing the injury alleged in the complaint was the NCAA's coercion of Plaintiffs to sign a waiver form. "In ruling upon [a Rule 12(b)(6)] motion, . . . the trial court should not dismiss the complaint 'unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.'" *Meyer v. Walls*, 347 N.C. 97, 111–12, 89 S.E.2d 880, 888 (1997) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)). But far from being the only reasonable reading of the Amended Complaint, the NCAA's position rests on a misconstruction of the complaint and a misunderstanding of the conduct at issue.

The wrongful acts forming the basis of Plaintiffs' claims are not the coercive waivers. Rather, the wrongful acts that created Plaintiffs' injuries are the repeated and ongoing uses of Plaintiffs' images for advertising and other commercial purposes without Plaintiffs' consent and without compensating Plaintiffs. *See Am. Compl.* ¶¶ 177–80, 209, 216.

Plaintiffs' allegations regarding the coerced waiver forms establish that the NCAA did not have valid consent to use the footage and images. These allegations anticipate and establish the inapplicability of an affirmative defense—one the NCAA makes in support of its motion, Def.'s Br. 26–27—that by signing certain forms,

Plaintiffs consented to the NCAA's use of their likenesses. Because the waiver forms were the product of illegal coercion, the forms do not establish consent or excuse the NCAA's conduct in first appropriating Plaintiffs' images and then not compensating Plaintiffs for the use of their images. The coercion was an antecedent act toward the realization of the NCAA's goal of entirely usurping Plaintiffs' publicity, broadcasting, and likeness rights. The antitrust conspiracy enabled that coercion, but the goal of the conspiracy was not simply to obtain waiver forms; it was to allow the NCAA and its co-conspirators to use those waiver forms to illegally keep all of the profits from the NCAA's continued advertising use of Plaintiffs' likenesses.

As the NCAA recognizes, a cause of action accrues only once an act of the defendant causes an injury to the plaintiff. *See* Def.'s Br. 11–12. The coercion itself did not independently cause injury to Plaintiffs; the injury occurred only once the NCAA relied on the illicitly obtained consent forms to use and allow others to use Plaintiffs' likenesses for commercial purposes. The complaint alleges (and the NCAA has not disputed) that the NCAA and its co-conspirators have committed that wrongful act repeatedly over the past four decades, including within the statutory period applicable to each claim.

The NCAA's statute of limitations argument hinges on this misconstruction of the complaint. Yet, any reasonable reading of the complaint—and certainly the liberal reading in favor of Plaintiffs required at this stage—shows that the complaint alleges wrongful acts of the NCAA within the statutory period applicable to each claim, and those acts caused injury to Plaintiffs.

The Court must reject the NCAA's misreading of the complaint and its statute of limitations argument based on that misreading and should deny the NCAA's Rule 12(b)(6) motion raising the affirmative defense of the statute of limitations.

II. PLAINTIFFS HAVE PLEADED A LEGAL INJURY.

The NCAA next argues that Plaintiffs have not alleged a "legal injury" resulting from the NCAA's appropriation of their images for commercial purposes. This argument also fails.

A. North Carolina law protects citizens from the unauthorized usurpation of their images for commercial gain.

In *Flake*, our Supreme Court held, "the unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives rise to a cause of action which would entitle the plaintiff [to recover] damages, and to injunctive relief, if and when the wrong is persisted in by the offending parties." 212 N.C. 780, 195 S.E. at 64. That is precisely the conduct Plaintiffs allege here. *See, e.g.*, Am. Compl. ¶ 230 ("The NCAA and its members, affiliates, and co-conspirators misappropriated Plaintiffs' photographic likenesses repeatedly over the last four decades, up to and including the present, for their commercial advantage, as part of advertisements and without Plaintiffs' consent.").

The NCAA claims, without citation, that North Carolina law provides no protection against corporations profiting from the unauthorized use of images and likenesses of North Carolina's citizens, including unauthorized broadcast of their performances. But *Flake* establishes that it is wrong. The Court should reject as

meritless the NCAA's claim that North Carolina does not protect its citizens from unauthorized commercial use of their images.

B. The Copyright Act does not preempt Plaintiffs' claims.

The NCAA's copyright preemption argument also fails. A state-law claim is preempted by the Copyright Act only where the claim does not "require proof beyond the elements required to establish copyright infringement." *Out of the Box Devs.*, 2012 WL 5356282, at *9. "The elements of a copyright infringement claim are: '(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original.'" *Id.* (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991)). None of the claims here turn on these two elements. Each requires proof beyond or separate from such elements.

The antitrust claims (Claims One through Three) turn on issues of price fixing and monopolization, as well as advertising and other commercial use of Plaintiffs' images, factual matters wholly unrelated to the elements of a copyright violation. Courts have repeatedly rejected arguments that copyright preemption provides a complete defense to alleged antitrust violations.² For example, in *United States v. Microsoft Corp.*, the D.C. Circuit explained:

² "[C]ase law supports the proposition that a holder of a patent or copyright violates the antitrust laws by 'concerted and contractual behavior that threatens competition.'" *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1215 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1185 n.63 (1st Cir. 1994)). *See, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143, (1948) (holding that horizontal conspiracy to engage in price-fixing in copyright licenses violates the Sherman Act); *Straus & Straus v. Am. Publishers' Ass'n*, 231 U.S. 222, 234 (1913) ("No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade . . .").

Microsoft’s primary copyright argument borders upon the frivolous. “[I]f intellectual property rights have been lawfully acquired,” [Microsoft] says, then “their subsequent exercise cannot give rise to antitrust liability.” . . . That is no more correct than the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: “Intellectual property rights do not confer a privilege to violate the antitrust laws.”

253 F.3d 34, 63 (D.C. Cir. 2001) (first quoting Microsoft’s brief, then quoting *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000)). Preemption of the antitrust claims is particularly inappropriate here because Plaintiffs’ claim is that the NCAA obtained its copyrights by illicit means.

The unfair and deceptive trade practices claim (Claim Four) turns on whether the NCAA’s conduct—coercing young athletes to perpetually waive their rights and relying on those invalid waivers to use athletes’ images for advertising and other commercial purposes without compensating them—is an unfair trade practice. That question is entirely removed from the elements of a copyright infringement claim.

The claim for misappropriation of Plaintiffs’ likenesses (Claim Five) turns on whether the NCAA used Plaintiffs’ likenesses for advertising or other commercial purposes and whether it had valid consent to do so. The use of likenesses is outside the scope of copyright infringement, and the issue of consent is a state-law question; thus, this claim plainly requires proof of elements beyond those at issue in a copyright claim. See, e.g., *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001) and additional cases discussed below.

The claim for unjust enrichment (Claim Six) also turns on issues separate from and additional to the copyright infringement elements, including whether the NCAA and its co-conspirators obtained an unjust benefit by exploiting their unequal

bargaining power to deprive Plaintiffs of any share of the billions of dollars in broadcasting rights, fees, and other commercial revenue the NCAA has received from the advertising and other commercial use of footage and images of Plaintiffs. Those questions are also state-law issues wholly unrelated to the Copyright Act. See discussion below.

As with most of the NCAA's other claims in support of this motion, its preemption claim was correctly rejected by the court in *O'Bannon*, which noted that “[t]he rights Plaintiffs seek to assert in the present case are fundamentally different from those protected by the Copyright Act. Plaintiffs . . . do not seek to protect their copyrights in th[e] footage.” *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1008 (N.D. Cal. 2013). Plaintiffs here, like the plaintiffs in *O'Bannon*, do not assert copyright infringement. Rather, they seek to vindicate their right not to be damaged by the NCAA's continued acts to profit, at Plaintiffs' expense, from the NCAA's coercion and continued unauthorized use of their images and likenesses in advertising and for other commercial purposes.

Nor do Plaintiffs' claims here implicate the interests served by the Copyright Act. The Copyright Act is intended “to stimulate artistic creativity for the general public good” by ensuring that creators are compensated for their work. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The interests implicated here, by contrast, include the protection of citizens of this State from being forced or tricked into giving up valuable rights; the regulation of trade, including the regulation of advertisements; equitable property rights arising from state law; and the rights of

citizens to control how their images or likenesses (which are not copyrightable) are used.

The NCAA's preemption argument also fails on its own terms. The NCAA implies that Plaintiffs' causes of action turn on the NCAA's simple act of airing copyrighted broadcasts. Def.'s Br. 24. It then argues that airing copyrighted broadcasts is protected conduct and that Plaintiffs' claims are, therefore, preempted by the Federal Copyright Act. Def.'s Br. 25. But Plaintiffs do not challenge the broadcasts themselves; they challenge the use of their likenesses *in advertisements* without their consent and without compensation, as well as the NCAA's refusal to compensate them for the use of their images. Am. Compl. ¶ 183 ("The NCAA and its members, affiliates, and co-conspirators have used videos and images of Plaintiffs—without Plaintiffs' consent and without compensating Plaintiffs—in *commercial advertising* throughout the last four decades, up to and including this year.") (emphasis added).

In the *Dryer* cases, upon which the NCAA relies (Def. Br. 24, 25), both the trial and appellate courts drew a sharp distinction for copyright preemption purposes between "the *expressive, non-commercial* use of a copyrighted work" and the "*advertising use*" of plaintiffs' images. *Dryer v. Nat'l Football League*, 814 F.3d 938, 943 (8th Cir. 2016) (cleaned up) (emphasis added). As the trial court correctly noted, "when defendant uses a work 'for the purposes of trade' 'such as in an advertisement' . . . publicity claims [are] *not* preempted by copyright." *Dryer v. Nat'l Football League*, 55 F. Supp. 3d 1181, 1202 (D. Minn. 2014) (internal citations

omitted). This same demarcation is supported by numerous other cases relied on by the NCAA and otherwise. For example, in *Ray v. ESPN*, the court explained,

[W]hen defendants use a work “for the purposes of trade,” “such as in an advertisement,” plaintiffs’ right-of-publicity claims have not been held to be preempted.” . . . “The rationale is that state law has a role in regulating practices of trade, including advertising. But limiting the way that material can be used in expressive works extends beyond the purview of state law and into the domain of copyright law.”

No. 13-1179-CV-W-SOW, 2014 WL 2766187, at *5 (W.D. Mo. Apr. 8, 2014), *aff’d*, 783 F.3d 1140 (8th Cir. 2015) (quoting *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1029 (3rd Cir. 2008) (citing Nimmer on Copyright § 1.01[B][3][b][iv][l] at 1–88.2(9)–(11))). Similarly, the court in *Maloney v. T3Media, Inc.*, held that the court “strikes the right balance” with respect to copyright preemption “by permitting athletes to control the use of their names or likenesses on merchandise or in advertising, while permitting photographers, the visual content licensing industry, art print services, the media, and the public, to use these culturally important images for expressive purposes.” 853 F.3d 1004, 1019 (9th Cir. 2017).

A particularly instructive case on this issue is *Downing v. Abercrombie & Fitch*, where the court held that copyright preemption did not apply to a state-law right to publicity violation for unauthorized use of a photograph of the plaintiff in advertising. There, the defendant corporation used copyrighted photographs of the plaintiff in a product catalog. 265 F.3d. at 1000. Although the corporation had purchased the photographs, it did not ask the plaintiff’s permission for the commercial use. As the court explained, a plaintiff’s “likeness is not a work of authorship within the meaning of 17 U.S.C. § 102,” even though plaintiffs’ “likenesses are embodied in a

copyrightable photograph.” *Id.* at 1004. Because the plaintiffs’ likenesses were not copyrightable, the issue in his right to publicity action was not the same as the issue in a copyright infringement claim—and, therefore, copyright preemption did not apply. *Id.* at 1003–05.

The same is true here. The NCAA is alleged to have used Plaintiffs’ likenesses—which are not copyrightable—in advertisements without Plaintiffs’ valid consent. So copyright preemption does not apply. *See id.*

The NCAA also agrees that copyright preemption does not apply if the complaint alleges the NCAA’s “use[] [of] the plaintiffs’ identity or likenesses to support a product that was independent from the copyrighted work itself.” Def.’s Br. at 25 (citing *Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294, 306 (2d Cir. 2022)). The Amended Complaint alleges that the NCAA did just that: used images of Plaintiffs to advertise not for the sale of the footage itself, but for the sale of other products, including all of the NCAA’s products generally, as well as tournament tickets, viewership, and merchandise related to future NCAA tournaments. *Cf. Melendez*, 50 F.4th at 304 (noting that if “[t]he challenged advertisement[] [was] for a separate product or show on which [Plaintiff] ha[d] never performed or with which he otherwise has no connection” his claim would not be preempted).

Finally, numerous cases explain that copyright claims by entertainers against copyright holders are not preempted, even if the entertainer’s claim against a third-party broadcasting company that licensed the copyrighted material would be. For example, in *Laws v. Sony Music Entertainment, Inc.*, the Ninth Circuit held that

Laws's claim against Sony, which licensed from Laws's record label an audio clip of Laws to use as a "sample" in another song, was preempted because it constituted a claim for damages based entirely on Sony's use of copyrighted material. 448 F.3d 1134, 1146 (9th Cir. 2006). However, the court noted, Laws could bring a state-law claim against her record label, for its breach of its duties under Laws's recording contract in licensing the clip without informing her, as allegedly required by that agreement. *Id.* at 1144.

Similarly, here, Plaintiffs allege that the NCAA (like the record label) breached Plaintiffs' state-law rights, both in the process of obtaining the copyright in question and by continuing to use the wrongfully obtained footage for advertising and other commercial purposes without compensating Plaintiffs. Am. Compl. ¶¶ 230, 234–37. The fact that the NCAA owns (at least partially) the copyright to Plaintiffs' footage does not give it a free pass to violate other rights unrelated to copyright and to continue to profit from such violations.

Further, Plaintiffs' allegations support a conclusion that, because they are not employees subject to the work-for-hire doctrine and because the waivers they signed were coerced and are thus unenforceable, they are equitable owners of the copyrighted material. In *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, the Seventh Circuit noted that copyright in Major League Baseball telecasts was presumed to belong to the Clubs because the Players were employees of the Clubs, making the telecasts "works made for hire within the meaning of [Copyright Act] § 201(b)." 805 F.3d 663, 670 (7th Cir. 1986). But, as the NCAA

repeatedly argues, student-athletes are *not* employees of the NCAA or of its member institutions, and thus the NCAA cannot be presumed to be the sole owner of the copyright in game footage. Consequently, “in the absence of an agreement to the contrary,” *id.*, copyright rests, at least partly, in the student-athletes whose performance the footage captures.

“A co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright.” *Oddo v. Ries*, 743 F.2d 630, 632–33 (9th Cir. 1984). However, co-owners of copyrighted material must provide an accounting and appropriate payments to the other co-owners. *See id.* at 633. Those duties “do[] not derive from the copyright law’s proscription of infringement. Rather, [they] come[] from equitable doctrines relating to unjust enrichment and general principles of law governing the rights of co-owners.” *Id.*; *accord*, *Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. KG*, 510 F.3d 77, 81 n.1 (1st Cir. 2007) (citing and discussing relevant cases); *Brown-Thomas v. Hynie*, 441 F. Supp. 3d 180, 209 (D.S.C. 2019) (noting that a federal court lacks jurisdiction under the Copyright Act if “the complaints sought to adjudicate the ownership of a copyright or invalidate an agreement on state law grounds, including for insufficient consideration, fraud, or an invalid assignment, [issues] which [do not have] implications for the Copyright Act”). “Consequently a suit to bring the co-owner of a copyright to account does not fall within the district court’s jurisdiction over actions arising under the copyright law.” *Oddo*, 743 F.2d at 633 n.2. For this reason as well, Plaintiffs’ claims are not preempted.

Ultimately, copyright preemption is not applicable here because, as in *O'Bannon*, “the rights Plaintiffs seek to assert . . . are fundamentally different from those protected by the Copyright Act.” *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. at 1008. Thus, the NCAA’s motion to dismiss based on copyright preemption should be denied.

C. The NCAA’s claim that Plaintiffs alleged that they consented to the NCAA’s appropriation is absurd.

The NCAA’s consent defense is patently absurd. The NCAA claims that the Amended Complaint facially alleges that Plaintiffs *consented* to the appropriation of their images. Def.’s Br. 26–27. But the Complaint repeatedly alleges the opposite—that is, that the NCAA’s consent forms are invalid as a matter of law because they were contracts of adhesion, signed in coercive circumstances, and were the product of illegal antitrust agreements. Am. Compl. 63–73, 217–18. The NCAA’s argument that the Complaint can only be read as alleging valid, enforceable consent to the perpetual appropriation of Plaintiffs’ images and likenesses is therefore meritless.

III. PLAINTIFFS’ INJUNCTIVE CLAIMS ARE NOT PRECLUDED BY O’BANNON.

Contrary to Defendant’s argument, Plaintiffs’ injunctive claims are not precluded by the *O'Bannon* judgment.

“The preclusive effect of a federal-court judgment is determined by federal common law.” *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). The principles of claim preclusion apply to class actions as much as to any other action:

A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the

defendant extinguishes the claim, barring a subsequent action on that claim. A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874 (1984). Generally, this application of preclusion is intended to allow the class action structure to accomplish its aims with regard to judicial economy and finality.

However, the preclusive effect of class action judgments providing injunctive relief is not entirely settled. First, preclusion does not extend to claims unique to individual class members or to absent class members. *See, e.g., Cooper*, 467 U.S. at 878–80 (court's ruling on unique issues raised by claims of class representatives was not preclusive as to individual claims of absent class members).

Second, enforcing claim preclusion against absent class members may implicate those members' due process rights. To ensure that the rights of absent class members are protected, the U.S. Supreme Court required that absent class members be provided notice and an opportunity to opt out. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). But that decision was limited to suits brought under Rule 23(b)(3), which governs class actions seeking money damages. *Id.* at 811–12 n.3. Similar rules have not been applied to suits for injunctive relief. *Id.* The Supreme Court has commented in dicta that due process may demand similar notice and opt-out requirements for injunctive judgments. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362–63 (2011).

Defendant is correct that, on its face, the *O'Bannon* class includes Plaintiffs in this action. However, the injunctive judgment was not subject to notice or opt-out

rules, so Plaintiffs had no opportunity to assert their specific claims regarding Defendant's uses of their images and likenesses for commercial gain. To enforce claim preclusion under these circumstances would raise critical questions regarding Plaintiffs' federal and state due process rights.

Furthermore, the claims Plaintiffs raise in this case are not on the same causes of action as those decided in the *O'Bannon* judgment. Although *O'Bannon* and its companion cases arose from the use of their image in videogames created by EA and licensed by the NCAA, the judgment in that case did not address those ongoing uses. Rather, the judgment considered only the NCAA's conduct toward student-athletes during their eligibility. Thus, the claims regarding post-eligibility use of student-athletes' NIL by the NCAA and its co-conspirators and licensees were *not* litigated to a final decision on the merits, and Plaintiffs claims with regard to the NCAA's continuing appropriation of their NIL after their eligibility lapsed are not precluded.

The claims in *O'Bannon* are relevant to Plaintiffs' claims here, but not determinative. Plaintiffs' claims arise from a different set of transactions—the ongoing misappropriation of Plaintiffs' images and Defendant's continuing failure to compensate Plaintiffs for those images after their collegiate playing days had ended. Thus, the remedy provided by the *O'Bannon* judgment does not compensate Plaintiffs for the harm done to them beginning in 1983 and continuing to the present.

This Court should not disregard the extraordinarily complex history of *O'Bannon*, which was first consolidated with another case then deconsolidated, with all of its claims for money damages—and injunctive claims associated with them—

either settled or dismissed. This evolution is evident in the injunction itself, which addresses only the NCAA's conduct toward student-athletes during their eligibility. As to continuing conduct before the suit was brought, the judgment is silent. Thus, the *O'Bannon* judgment does not provide a final judgment on the merits with regard to Plaintiffs' claims, which rest on the NCAA's conduct *after* their eligibility had ended. To the extent those claims were or could have been part of the *O'Bannon* suit, they were largely dismissed or settled before a final judgment on the merits.

Because the *O'Bannon* judgment does not arise from the same series of transactions or a common nucleus of operative fact, and because applying claim preclusion against Plaintiffs would implicate their due process rights, Plaintiffs' injunctive claims here are not precluded.

CONCLUSION

Ultimately, all of the NCAA's arguments for dismissal must fail. Plaintiffs' claims are timely, and Plaintiffs have alleged cognizable legal injuries that are neither preempted by the Copyright Act nor precluded by the *O'Bannon* judgment. The NCAA's assertion of a consent defense rests on a misreading of the Amended Complaint and is thus without merit.

Respectfully submitted, this 6th day of November 2024.

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CERTIFICATE OF COMPLIANCE

As required by Rule 7.8 of the North Carolina Business Court Rules, I certify that this brief was prepared in compliance with Rule 7 and contains approximately 6,981 words (excluding covers, captions, index and table of authorities, certificate of service, this certificate of compliance, and counsel's signature block), as reported by the word-processing software.

This the 6th day of November 2024.

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I certify that this brief was electronically filed and a copy was served on counsel of record by email, as follows:

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