UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION aka "NCAA"; BIG TEN NETWORK aka "BTN"; and BIG TEN CONFERNECE,

Defendants.

Hon. Terrence G. Berg

Magistrate Judge Kimberly G. Altman

Case No. 2:24-12355-TGB-KGA

ORAL ARGUMENT REQUESTED

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss ("Opp'n"), ECF No. 42, fails to cure the fundamental problems with their case.

ARGUMENT

I. Plaintiffs' Claims Are Time-Barred.

The procedural posture of this case poses no bar to Defendants' statute of limitations argument. *See* Opp'n, ECF No. 42, PageID.554-55. Where a complaint's allegations "affirmatively show that the claim is time-barred . . . dismissing the claim under Rule 12(b)(6) is appropriate." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012); *see also Jones v. Bock*, 549 U.S. 199, 215 (2007). That is the case here because Plaintiffs' own allegations make clear that their entire case rests on alleged conduct well outside the limitations period, and they do not plausibly plead entitlement to any exceptions.

Plaintiffs also fail to carry their "burden to prove that the continuing violation doctrine applies." *Holmes v. Novo Nordisk Inc.,* No. 2:21-CV-1194, 2022 WL 950015, at *3 (S.D. Ohio Mar. 30, 2022). Relying on the Ninth Circuit's *Alston* decision, Plaintiffs contend that "'[c]ontinuing contracts in restraint of trade,' are 'typically subject to continuing re-examination.'" Opp'n, ECF No. 42, PageID.556 (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1253 (9th Cir. 2020)). But the Ninth Circuit never addressed the continuing violation

doctrine; it held only that prior judgments do not always *preclude* later suits based on *new*, *timely* allegations of conduct within the limitations period.

Plaintiffs make no such allegations. They allege a "present, ongoing, evolving, and systematic regime of anti-competitive NCAA rules, bylaws, practices, and agreements" depriving them of compensation they would otherwise receive. Opp'n, ECF No. 42, PageID.557. But an act restarts the limitations period only if it (1) is "a new and independent act that is not merely a reaffirmation of a previous act" and (2) "inflict[s] new and accumulating injury on the plaintiff." *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-68 (6th Cir. 1996). The "mere[] unabated inertial consequences (of a single act)" do not suffice. *Id*. Here, the alleged wrongs are consequences of terms that Plaintiffs agreed to more than a decade ago.

Plaintiffs counter that those original alleged agreements are "a mere manifestation of the underlying anticompetitive problem" and that "each unauthorized use, or invasion, of Plaintiffs' NIL constitutes a fresh and independent violation, restarting the limitations period." Opp'n, ECF No. 42, PageID.560-61. But even if Plaintiffs had NIL rights barring Defendants' use of, for example, archival footage, *but see* Mot. to Dismiss ("MTD"), ECF No. 40, PageID.536-538, NCAA rules have not precluded Plaintiffs from *any* attempted negotiations since they left college. So any lack of compensation is merely the effect of their choices, many years ago, to enroll under rules *then* forbidding them from negotiating NIL

payments. That is in no way a new antitrust violation restarting the limitations period.

As for equitable tolling, that doctrine "is used sparingly by federal courts," and a plaintiff "bears the burden of proving he is entitled to it." *Robertson v. Simpson,* 624 F.3d 781, 784 (6th Cir. 2010). Plaintiffs have not met that burden either. Plaintiffs blame their lateness on a supposed "culture of secrecy and misinformation" regarding NIL. Opp'n, ECF No. 42, PageID.561. But a "fraudulent concealment" theory supports tolling only where "the defendant concealed the conduct that constitutes the cause of action," that "concealment prevented plaintiff from discovering the cause of action within the limitations period," and "until discovery plaintiff exercised due diligence in trying to find out about the cause of action." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988). Plaintiffs cannot make this showing. Defendants' NIL rules were well-known, and Plaintiffs knew of a possible cause of action, as evidenced by their past participation in class actions challenging those rules.

Nor were Plaintiffs diligent. On the contrary, they admit waiting to file suit to take advantage of "[c]hanges in the legal landscape." Opp'n, ECF No. 42, PageID.561. Plaintiffs' delay thus "is precisely the type of conduct that the statute of limitations is designed to prevent—parties sleeping on their rights." *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 603 (6th Cir. 2014); *see also Fiesel v. Bd. of*

Educ., 675 F.2d 522, 524-25 (2d Cir. 1982) ("[A litigant] cannot toll . . . the statute by relying upon the uncertainties of controlling law." (citation omitted)).

II. Plaintiffs' Claims Are Barred By Res Judicata.

The *Keller* settlement forecloses any claims premised on purported NIL or publicity rights in NCAA-branded videogames. MTD, ECF No. 40, PageID.530-531. Plaintiffs essentially concede the point. Despite repeated references to supposedly lost revenue from such videogames in the First Amended Complaint, *see, e.g.*, Am. Compl., ECF No. 24, PageID.241, ¶¶ 51, 81, 190(d), (k), Plaintiffs now abandon those claims. *See* Opp'n, ECF No. 42, PageID.563.

Two Plaintiffs were also members of the *Alston* damages settlement class, MTD, ECF No. 40, PageID.529, which precludes their damages claims here. Plaintiffs half-heartedly assert that the *Alston* release, despite its broad and clear language, does not apply to them because "*the alleged underlying injuries are not identical*" to those in *Alston*. Opp'n, ECF No. 42, PageID.569. But a release need not "overlap perfectly" with later-pleaded claims, so long as the two share a "factual predicate." *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009). That requirement is satisfied: the *Alston* plaintiffs challenged NCAA rules limiting compensation for student-athletes generally, meaning that they also released similar, though not identical claims, such as Plaintiffs' here. MTD, ECF No. 40, PageID.530.

Finally, while Plaintiffs dance around whether they and their proposed class members were *O'Bannon* class members, *see* Opp'n, ECF No. 42, PageID.564, they offer no reason to doubt their class membership and fit squarely within the *O'Bannon* class definition, *see* MTD, ECF No. 40, PageID.531. And while Plaintiffs assert their "liability theory is much broader" than *O'Bannon*'s, Opp'n, ECF No. 42, PageID.565, that ignores reality. *O'Bannon* broadly challenged "the NCAA's amateurism rules" barring NIL compensation for players. *O'Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

Plaintiffs also contend that because the Ninth Circuit partially reversed the District Court, "only that part of the *O'Bannon* injunction that addresses education-related benefits has preclusive effect." Opp'n, ECF No. 42, PageID.566. But *O'Bannon* resolved the plaintiffs' challenge *generally*, and what matters is the claim resolved, not the remedy given. *See Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529 (6th Cir. 2006) ("assert[ing] alternative theories of recovery and seek[ing] a different remedy does not allow [plaintiff] to avoid claim preclusion, when those other theories could have been asserted . . . in the earlier action." (cleaned up)).

III. Plaintiffs Have Not Plausibly Pleaded Injury.

An antitrust plaintiff has no antitrust injury without any "legal right to receive the benefit it allegedly lost due to the defendant's conduct." *Antitrust Law Developments* 802 (9th ed. 2022) (citing cases); *Marshall v. ESPN*, 668 F. App'x

155, 157 (6th Cir. 2016). Plaintiffs offer no reason to reject on-point, in-circuit decisions establishing they have no relevant right of publicity—and thus, no injury. *See* MTD, ECF No. 40, PageID. 534-35.

Plaintiffs do not, and cannot, assert copyright rights in game footage. See *NBA v. Motorola, Inc*., 105 F.3d 841 (2d Cir. 1997). They allege a violation of their publicity rights, *see* Opp'n, ECF No. 42, PageID.573, but cite no cases recognizing athletes' right of publicity in athletic broadcasts. That is because state law uniformly grants promoters or producers of such events exclusive licensing rights.

Plaintiffs' citation to MCL § 390.1732, *see* Opp'n, ECF No. 42, PageID.574, changes nothing. That statute *creates* no rights of publicity; it merely forbids athletic associations from barring students from participation "based upon the student earning compensation as a result of the student's use of his or her [NIL] rights." That has nothing to do with Plaintiffs, who stopped competing long ago.

Plaintiffs also fail to show that a claim based on infringement of a nonexistent right of publicity would survive copyright preemption and thus form a valid basis for antitrust injury. Courts have held repeatedly that the Copyright Act preempts publicity claims based on the reproduction of copyrighted works—including those depicting athletes' in-game performances. *See* MTD, ECF No. 40, PageID.538-39.

Plaintiffs respond with a non-sequitur that their antitrust claims "are grounded in a separate legal framework untethered to the Copyright Act." Opp'n, ECF No. 42,

PageID.576. But the point is not the Copyright Act preempts the *antitrust* claims. It is that, under *Marshall*, Plaintiffs state an antitrust claim only if they plead a violation of a right of publicity. They cannot, because any right of publicity claim based on their appearance in broadcasts would be preempted by the Copyright Act.

IV. Plaintiffs' Unjust Enrichment Claim Fails.

Plaintiffs still refuse to provide the legal basis for their unjust enrichment claim. Regardless, the claim is untimely for the same reason their antitrust claims are not timely. And a plaintiff cannot revive failed antitrust claims by relabeling them unjust enrichment claims. *See* MTD, ECF No. 40, PageID.539-40; *In re Auto. Parts Antitrust Litig.*, No. 13-CV-2005, 2021 WL 148004 (E.D. Mich. Jan. 15, 2021).

CONCLUSION

The Complaint should be dismissed in its entirety.

Dated: April 14, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2025, I electronically filed the foregoing Reply Brief In Support of Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system which will send notification on of such filing to all parties and counsel of record.

Dated: April 14, 2025

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