UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LAUREN ANDERSON, GILLIAN BERGER, and TAYLOR HENNIG, on their own behalf and on behalf of similarly situated persons, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	Civ. No. 1:14-CV-1710-WTL-MJD

CERTAIN DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT AND MOTION TO STRIKE CERTAIN ALLEGATIONS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6),[1] Defendants National Collegiate Athletic Association ("NCAA") and certain named Division I Member Schools (collectively, "Moving Defendants") represented by undersigned counsel respectfully request that this Court dismiss with prejudice Plaintiffs' Amended Complaint in its entirety.[2] Moving Defendants also request that Paragraphs 11 and 59-67 be stricken pursuant to Rule 12(f) because they are immaterial and prejudicial to Moving Defendants.

[1] "By agreement of the parties, and with the approval of the Court," dispositive motions practice has been sequenced such that Defendants may "file motions to dismiss that do not include a motion pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, without such operating as a waiver of that defense." Dkt. 141.

[2] In addition to the NCAA, the Division I Member Schools joining in this motion are identified in Exhibit 1.

I. INTRODUCTION

This action raises the question of whether college students participating in intercollegiate athletic competitions are employees who must be paid to practice and play under federal wage and hour law. Plaintiffs Lauren Anderson, Gillian Berger, and Taylor Hennig, current or former University of Pennsylvania women's track team members, allege that they and other student-athletes participating in Division I intercollegiate athletic programs were "employed" by the educational institutions they attend. Plaintiffs further claim that under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206(a), they are entitled to be paid at least the minimum wage for all hours spent participating in intercollegiate athletics, but were not paid because the Division I Member Schools adopted Bylaws prohibiting such payment to student-athletes. *See* Am. Compl., ¶¶ 12, 18, 26, 30, 34, 40, 68, 72, 76, 83.

While Plaintiffs' Amended Complaint is sweeping in its breadth, naming the NCAA and 127 Division I Member Schools,[3] it is lacking in substance and depth on both the facts and the law. The basic premise of the Amended Complaint – that student-athletes are "employees" of universities – has not only repeatedly been rejected by courts across the country,[4] but also by the United States Department of Labor, the federal agency charged with interpreting and enforcing the FLSA. Significantly, the United States Department of Labor has concluded that activities in

[3] The original Complaint named 351 Division I Member Schools, but 222 were dismissed with the filing of the Amended Complaint. *See* Dkt. 120. In addition, the three federal military academies were dismissed on January 5, 2015. *See* Dkt. 57.

[4] *See, e.g.*, *Kemether v. Pennsylvania Interscholastic Athletics Ass'n*, 15 F. Supp. 2d 740, 759 n.11 (E.D. Pa. 1998) ("No federal court has defied common sense by holding student-athletes to be Title VII employees of their schools or an athletic association.") (citations omitted); *Rensing v. Indiana State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1174 (Ind. 1983) ("Scholarship recipients are considered to be students seeking advanced educational opportunities and are not considered to be professional athletes, musicians or artists employed by the University for their skills in their respective areas."); *Shephard v. Loyola Marymount Univ.*, 102 Cal. App. 4th 837, 843-47 (Cal. App. 2d Dist. 2002) (student-athlete not an "employee" under California Fair Employment and Housing Act).

interscholastic athletic programs "are not 'work' of the kind contemplated by [the Fair Labor Standards Act, 29 U.S.C. § 203(g)] and do not result in an employee-employer relationship between the student and the school or institution." U.S. Department of Labor, Wage and Hour Division, Field Operations Handbook § 10b03(e) (Oct. 20, 1993) ("FOH") (relevant excerpts attached hereto as Exhibit 2). Even if Plaintiffs could overcome this fundamental flaw in their legal theory, their Amended Complaint is subject to dismissal for other reasons.

First, Plaintiffs lack Article III constitutional standing to sue the NCAA or schools that they did not attend, on behalf of other student-athletes, because they have not suffered any injury (*i.e.*, failure to receive any alleged minimum wage) that is fairly traceable to those entities. While the FLSA recognizes collective actions brought on behalf of employees of the same employer, actions brought on behalf of employees holding similar positions with different employers have been rejected by the courts. *See, e.g., Cavallaro v. UMass Mem. Health Care, Inc.*, 971 F. Supp. 2d 139, 147 (D. Mass. 2013). Thus, with the exception of the University of Pennsylvania, the NCAA and each school represented by undersigned counsel should be dismissed with prejudice pursuant to Rule 12(b)(1) for lack of standing.

Second, notwithstanding the liberal pleading requirements of Rule 8, Plaintiffs fail to state a claim to relief that is plausible on its face. Plaintiffs' Amended Complaint relies exclusively on conclusory statements, including that their athletic activities were "work" and that Defendants conspired to violate the FLSA, but these allegations cannot satisfy even the liberal pleading standard of Rule 8(a)(2). Plaintiffs repeatedly offer only legal conclusions that student-athletes were "employed" by their educational institutions and that they were "suffered or permitted to work," but they allege no facts supporting their contention that their own activities, let alone those of the vast and differing putative class, are actually "work." Rather, Plaintiffs

make the spurious and wholly conclusory argument that, because college work-study participants are "employees" under the FLSA, then so too are student-athletes. They also conclude, without any factual allegations, that the NCAA and hundreds of its Member Schools jointly conspired not to pay student-athletes in violation of the FLSA. Under clear Supreme Court precedent set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007), these "labels and conclusions" or "formulaic recitation of the elements of a cause of action will not do." Plaintiffs similarly fail to allege in their 22-page Amended Complaint that the NCAA was their employer. Consequently, their claim against all Defendants, including the University of Pennsylvania and the NCAA, should be dismissed with prejudice pursuant to Rule 12(b)(6).

Finally, Plaintiffs include numerous allegations regarding their counsel's pre-litigation attempts to settle the claims of the original Named Plaintiff, Samantha Sackos, and the putative class members. Such settlement communications are inadmissible under Fed. R. Evid. Rule 408, and are immaterial to the present dispute. Accordingly, those allegations should be stricken under Rule 12(f).

II. BACKGROUND

A. The NCAA And The Role Of Intercollegiate Athletics

The NCAA is a voluntary membership-driven organization of over 1,200 colleges, universities, and athletic conferences across the country dedicated to equipping student-athletes with the skills to succeed in the classroom, on the playing field, and throughout life. "Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports." *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 88 (1984). "One of the NCAA's fundamental policies 'is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing,

retain a clear line of demarcation between college athletics and professional sports.'" *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 183 (1988). The Supreme Court has recognized that, "[i]n order to preserve the character and quality" of collegiate sports, "athletes must not be paid." *Board of Regents*, 468 U.S. at 102. Indeed, the Supreme Court has recognized that the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question . . . that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics." *Id.* at 120; *see also id.* at 123 (White, J., dissenting) (recognizing NCAA regulations "represents a desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives overshadow educational objectives.'") (citation omitted). To that end, Article 2.9 of the NCAA Constitution provides: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and the physical, mental, and social benefits to be derived." *See Adidas Am. Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1285 n.7 (D. Kan. 1999); *see also McCormack v. National Collegiate Athletics Ass'n.*, 845 F.2d 1338, 1345 (5th Cir. 1988) ("The goal of the NCAA is to integrate athletics with academics."); *Association for Intercollegiate Athletics for Women v. National Collegiate Athletics Ass'n*, 588 F. Supp. 487, 494 (D.D.C. 1983) (Organizations like NCAA "exist primarily to enhance the contributions made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity"), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984); *Justice v. National Collegiate Athletics Ass'n*, 577 F. Supp. 356, 372 (D. Ariz. 1983) (recognizing NCAA's "interests in maintaining intercollegiate athletics as an integral part of the educational program and preserving the amateur nature of the college sport.").

Not surprisingly, athletics has long been considered an integral part of the American collegiate education. *See, e.g.,* W.L. Dudley, *Athletic Control in School and College*, 11 The Sch. Rev. 95, 95 (1903) ("The principal object of education" is to prepare students "to be better citizens," and "athletic sport" is "a powerful factor in the physical and moral development of youth."). Much learning in college occurs outside the classroom, through participation in extracurricular activities such as dramatics, student publications, glee clubs, bands, choirs, debating teams, and radio stations, as well as intercollegiate athletics, and such opportunities help students prepare for life's work. *See, e.g.,* Robert J. Sternberg, *College Athletics: Necessary, Not Just Nice to Have*, NACUBO Business Officer Magazine (Sept. 1, 2011) ("done right, participation in competitive athletics is leadership development. . . . Students can learn as many lessons about leadership and life from a great coach as they can from a great professor.").

B. Summary Of Amended Complaint

Each Plaintiff alleges that she is or was "employed by the University of Pennsylvania ("Penn") as an unpaid student-athlete on the Women's Track and Field roster." Am. Compl., ¶¶ 26, 30, 34. Each Plaintiff further alleges that she is a "covered employee" under the FLSA, 29 U.S.C. §§ 201 *et seq.*, and, citing Section 10b24(b) of the U.S. Department of Labor's Field Operations Handbook, that she qualifies as a "temporary employee" under the FLSA and should have been paid the federal minimum wage of $7.25 per hour. *Id.* at ¶¶ 1, 4 & n.1, 7, 27, 31, 35.

Plaintiffs seek to "bring this action on their own behalf and on behalf of all NCAA Division I student athletes participating in women's and men's sports at any time within the statute of limitations." *Id.* at ¶ 40. Plaintiffs name as Defendants the NCAA and 130 Division I Member Schools. *Id.* at ¶ 1. In addition to unpaid wages, liquidated damages, pre-judgment interest, and reasonable attorney's fees and costs, Plaintiffs seek a "Declaration that NCAA

bylaws aid and abet unlawful conduct complained of, and of the employment rights and legal relations of student athletes vis-à-vis Defendants." *Id.* at ¶ 14 & Prayer for Relief, ¶ E.

III. ARGUMENT

A. Plaintiffs Lack Standing To Sue Any Division I Member School That They Did Not Personally Attend.

"Jurisdiction is the first question in every case." *Tisza v. Communication Workers of Am.*, 953 F.2d 298, 300 (7th Cir. 1992). The Supreme Court has ruled that standing is an essential element of subject matter jurisdiction that cannot be waived. *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *id.* at 358 (the elements of standing "are not mere pleading requirements, but rather an indispensable part of the plaintiff's case") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *see also Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988) ("Standing is a threshold question in every federal case because if the litigants do not have standing to raise their claims the court is without authority to consider the merits of the action.").

"[I]t is the plaintiff's burden to establish her standing or the existence of subject-matter jurisdiction." *White v. Classic Dining Acquisition Corp.*, No. 1:11-cv-712-JMS-MJD, 2012 U.S. Dist. LEXIS 52215, *5 (S.D. Ind. Apr. 13, 2012) (Magnus-Stinson, J.) (citing *Scanlan v. Eisenberg*, 669 F.3d 838, 841-42 (7th Cir. 2012)). To satisfy this burden, Plaintiffs must show that they have alleged: "(i) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (ii) a causal relationship between the injury and the challenged conduct, such that the injury can

be fairly traced to the challenged action of the defendant; and (iii) a likelihood that the injury will be redressed by a favorable decision." *Scanlan*, 669 F.3d at 842 (internal quotation omitted).[5]

Here, in order to establish standing under the FLSA, Plaintiffs must also show that each Defendant (*i.e.*, the NCAA and all Member School Defendants) was their "employer" to recover damages for their alleged unpaid minimum wages. *See* 29 U.S.C. § 206(a) ("Every employer shall pay to each of his employees . . ."); *see also id.* at § 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."). The FLSA "makes it clear that standing to pursue an action for employer liability is limited to employees only. In other words, liability under the FLSA is predicated upon an employer-employee relationship." *White*, 2012 U.S. Dist. LEXIS 52215 at *6; *see also Cavallaro v. UMass Mem. Health Care, Inc.*, 971 F. Supp. 2d 139, 147 (D. Mass. 2013) ("Liability under the FLSA is thus predicated upon the existence of an employer-employee relationship"); *Martin*, 2010 U.S. Dist. LEXIS 66050 at *15 n.8 ("FLSA liability is predicated only on an employee-employer relationship, not on defendants' involvement in a common enterprise."). "Accordingly, plaintiff's injuries are only traceable to, and redressable by, those defendants who are deemed by law to have employed her." *Cavallaro*, 971 F. Supp. 2d at 146.

[5] Other courts have routinely dismissed claims against defendants for lack of standing where there are no facts pled to show that the plaintiff was caused harm by the particular defendant. *See, e.g., Martin v. BMS Enters.*, No. 3:09-CV-2159-D, 2010 U.S. Dist. LEXIS 66050, *16 (N.D. Tex. July 1, 2010) (dismissing named plaintiffs' FLSA claims for lack of standing due to failure to allege facts demonstrating injury by conduct of certain defendants); *Chuy v. Hilton Mgmt., LLC*, No. 6:10-cv-178-Orl-31DAB, 2010 U.S. Dist. LEXIS 45680, at *9 (M.D. Fla. May 10, 2010) (dismissing wage claims for lack of standing against defendant because no named plaintiff alleged they were employed by that defendant.); *Daughery v. I-Flow, Inc.*, No. 3:09-CV-2120-P, 2010 U.S. Dist. LEXIS 49038, at *8 (N.D. Tex. Apr. 28, 2010) (dismissing plaintiff's direct and class claims because he failed to plead allegations sufficient or specific enough to show a causal connection between his injury and the conduct of any particular defendants).

Plaintiffs cannot circumvent these standing requirements by reliance on potential opt-in class members. This tactic has been expressly rejected by courts. *White*, 2012 U.S. Dist. LEXIS 52215 at *7 ("[S]tanding may not be acquired by a named Plaintiff in a class action by asserting the rights of putative class members.") (citing *Lewis v. Casey*, 518 U.S. 343, 357 (1996) & *Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir. 1999)); *see also Cavallaro*, 971 F. Supp. 2d at 146 ("Inclusion of class allegations does not relieve a plaintiff of the requirement that she allege that she personally has suffered an injury, fairly traceable to the challenged action of the defendants.") (citing *Warth v. Seldin*, 422 U.S. 490, 502 (1975)); *Martin*, 2010 U.S. Dist. LEXIS 66050 at *6 ("The requirement of standing is not lessened for an individual plaintiff where that plaintiff files a class action complaint.") (citing *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981)); *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev. 2004) ("[T]o establish Article III standing in a class action, at least one named plaintiff must have standing in his own right to assert a claim against each named defendant before he may purport to represent a class claim against that defendant.") (emphasis added). Moreover, courts have specifically held that the type of FLSA collective action pled by Plaintiffs is subject to the same standing requirements. *Hageman v. Accenture LLP*, No. 10-1759 (RHK/FLN), 2010 U.S. Dist. LEXIS 99374, *9 (D. Minn. Sept. 21, 2010) ("[T]he Constitutional requirement of standing is no less stringent for [FLSA] collective actions than it is for Rule-23 class actions."); *Martin*, 2010 U.S. Dist. LEXIS 66050 at *10-11 ("The standing requirement is no different in a collective action suit. . . . The court therefore holds that a named plaintiff in a collective action has adequately pleaded standing against a particular defendant only if the plaintiff has alleged an injury that the defendant caused to him."); *see also Roman v. Guapos III, Inc.*, 970 F. Supp. 2d 407, 416 (D. Md. 2013) (noting " requirement that Plaintiffs *currently* demonstrate standing against all

defendants" and stating "Plaintiffs cannot use putative plaintiffs to bring in Defendants that are not the employer of the named Plaintiffs under the prediction that a future collective of uncertain composition will include employees of these Defendant employers.") (emphasis in original); *Davis v. Abington Mem'l Hosp.*, 817 F. Supp. 2d 556, 563 (E.D. Pa. 2011) ("The basic prerequisite for any FLSA lawsuit is an employment relationship between the plaintiffs and defendant. Thus, in a FLSA collective action, every defendant must have been the employer of at least one named plaintiff.") (footnote omitted).

This Court's decision in *White v. Classic Dining Acquisition Corp.*, is directly on point. In *White*, the plaintiff brought a putative FLSA collective action and state law class action for minimum wage violations on behalf of servers who worked for 28 corporate defendant-restaurants, 26 of which she admitted did not employ her. *White*, 2012 U.S. Dist. LEXIS 52215 at *2. This Court accordingly dismissed with prejudice the plaintiff's claims against the non-employing entities, concluding that plaintiff "could not have suffered an injury at the hands of those Defendants" and that it "ha[d] no subject matter jurisdiction to entertain the claims [plaintiff] makes against them." *Id.* at *7, *18.

Similarly, in *Cavallaro*, a plaintiff filed a putative FLSA collective action against various related hospitals and health-care providers, including the medical center where she worked and the parent company of all the other corporate defendants. 971 F. Supp. 2d at 142-44. The plaintiff alleged she was directly employed by only one defendant, but alleged that the seven corporate defendants were engaged in the operation of a health-care system as a single, integrated enterprise and, thus, they constituted a "joint employer." *Id.* at 146. Defendants moved to dismiss her complaint against all of the corporate defendants except the medical center at which she worked on the grounds that she had failed to plead employer status, standing, or any

claims on behalf of the putative class members. *Id.* at 145. The court first rejected the plaintiff's reliance on "single enterprise" authority because those cases related to FLSA coverage, which is "separate and distinct from the question of liability as joint employers." *Id.* at 148 (citations omitted). Next, the court found the complaint provided "no basis for finding that an employer-employee relationship existed" between plaintiff and any of the corporate defendants except the one which directly employed her and possibly the parent corporation.[6] The court noted, "[a]bsent such a relationship, there is no allegation that plaintiff's injuries are fairly traceable to those defendants, nor is there any allegation that a favorable decision against those defendants would redress her alleged injuries." *Id.* at 150. Finally, the court granted the motion to dismiss collective action allegations as to those putative class members employed by defendants other than plaintiff's direct employer.[7] *Id.* at 153.

The logic and holdings of *White* and *Cavallaro* are fatal to Plaintiffs' lawsuit. Plaintiffs specifically allege that they are or were "employed" only by the University of Pennsylvania. *See* Am. Compl. at ¶¶ 26, 30, 34. Notably, the Amended Complaint explicitly alleges that "Plaintiffs and members of the Student Athlete Collective have been, and continue to be employees of their respective Defendant NCAA Division I Member Schools within the meaning of 29 U.S.C. § 203," and that the "Defendant NCAA Division I Member Schools have employed, and continue to employ, Plaintiffs and members of the Student Athlete Collective participating in their respective athletics programs within the meaning of 29 U.S.C. § 203(g)." *See id.* ¶¶ 83-84

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[6] The district court subsequently found that the parent corporation was not a joint employer of the plaintiff and dismissed claims against that defendant. *Id.* at 150.

[7] Plaintiffs have moved for conditional certification (Dkt. 144), but the Moving Defendants contend that this motion is premature in light of this Motion to Dismiss challenging Plaintiffs' standing to sue any entity other than the school they attended and challenging the sufficiency of the Amended Complaint. The Court has set a May 1 status conference to discuss further the briefing schedule of Plaintiffs' Motion for Conditional Certification.

(emphasis added). In short, the Amended Complaint alleges that each Division I Member School employs only its own student-athletes. Because Plaintiffs have not alleged "an employer-employee relationship" between themselves and any of the Division I Member Schools that they did not attend or the NCAA, Plaintiffs lack standing to pursue either individual or collective FLSA claims against those schools or the NCAA.[8] *See, e.g., White, supra*.

For the same reason, Plaintiffs' request for a "Declaration that NCAA bylaws aid and abet unlawful conduct complained of, and of the employment rights and legal relations of student athletes vis-à-vis Defendants" must fail with respect to all named Defendant Division I Member Schools that they did not attend. *See* Am. Compl. ¶ 14. The Declaratory Judgment Act only enlarges the range of remedies available in federal court and does not extend the jurisdiction of federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (internal quotation and citation omitted). In other words, "because the Declaratory Judgment Act is not an independent source of federal subject matter jurisdiction, the district court must possess an independent basis for jurisdiction." *GNB Battery Techs., Inc. v. Gould, Inc.*, 65 F.3d 615, 619 (7th Cir. 1995) (citing *Skelly Oil*).[9] Thus, "[b]efore a court can decide whether a declaratory judgment is appropriate, . . . it 'must first determine whether the court has subject matter jurisdiction, *i.e.*, whether the case presents an actual controversy between the parties.'" *Marion T, LLC v. Thermoforming Mach. & Equip., Inc.*, No. 1:12-CV-456, 2014 U.S. Dist. LEXIS 97540,*18 (N.D. Ind. July 17, 2014) (quoting *Basic v. Fitzro Eng'g, Ltd.*, 949 F. Supp. 1333,

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[8] Plaintiffs also cannot plausibly allege an employment relationship with any Division I Member School that they did not attend. Plaintiffs have also failed to allege a joint employer relationship between the NCAA and any Division I Member School. *See* Section III.C, *supra*.

[9] *See also Ceres Terminals, Inc. v. Industrial Comm'n*, 53 F.3d 183, 185 (7th Cir. 1995) ("the Declaratory Judgment Act does not authorize litigation of cases that otherwise fall outside federal jurisdiction.") (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937)); *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1387 (7th Cir. 1992) ("The declaratory judgment act does not give subject matter jurisdiction.") (citing *Skelly Oil*).

1337 (N.D. Ill. 1996)). Here, because Plaintiffs did not attend any other school than the University of Pennsylvania, there is no actual controversy between them and the other Division I Member Schools named in the Amended Complaint. *Harris Trust & Sav. Bank v. E-II Holdings, Inc.*, 926 F.2d 636, 639-40 (7th Cir. 1991) ("The often unspoken, but yet obvious, corollary of the 'actual controversy' predicate is that the dispute must exist *between the parties to the declaratory judgment action*.") (emphasis in original).

Faced with this obvious standing defect, Plaintiffs hope that conclusory allegations of a nationwide conspiracy are sufficient to confer standing to bring claims against Division I Member Schools. They are not. Such allegations have no bearing on the determination of standing under the FLSA, which is limited to whether a plaintiff is employed by a defendant. In any event, Plaintiffs' allegations of a joint conspiracy among the NCAA and the Member Schools are not enough to satisfy the *Iqbal*/*Twombly* pleading standard. *See Puma v. Hall*, No. 1:08-cv-1451-LJM-JMS, 2009 U.S. Dist. LEXIS 117801, *5 n.1, 12-14 (S.D. Ind. Dec. 17, 2009) (McKinney, J.) (finding allegation that defendant was a "coconspirator" was a "conclusory legal statement" without any "legal significance" for the purposes of deciding a Rule 12 motion and dismissing FLSA claims against putative employer). Morever, Plaintiffs' allegations not only fail the *Iqbal/Twombly* pleading standard for vagueness, but are further undermined by contradictory allegations that make Plaintiffs' claims all the more implausible. On the one hand, Plaintiffs allege the Defendant Division I Member Schools have "jointly agreed, and conspired" to deprive student-athletes of FLSA wages, while at the same time they assert that these schools were "compelled" to participate in the conspiracy "under the threat of competition and financial penalties." *See* Am. Compl. ¶ 56.

Accordingly, Plaintiffs' claims and collective action allegations against the NCAA and all the Defendant Division I Member Schools represented by undersigned counsel other than the University of Pennsylvania should be dismissed with prejudice under Rule 12(b)(1) due to a lack of subject matter jurisdiction. *See, e.g., Pollack v. U.S. Dep't of Justice*, 577 F.3d 736, 737-38 (7th Cir. 2009) (affirming dismissal under Rule 12(b)(1) based on lack of standing).

B. Plaintiffs Have Failed To Plead Sufficient Facts To Raise A Plausible Inference That An Employer-Employee Relationship Existed Between Them And Any Defendant.

"[L]iability under the FLSA is predicated upon an employer-employee relationship." *White*, 2012 U.S. Dist. LEXIS 52215 at *6.[10] (S.D. Ind. Apr. 13, 2012) (Magnus-Stinson, J.). Under the FLSA, Plaintiffs bear the burden of proving they performed "work" for which they were not properly compensated. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 173 (7th Cir. 2011). The FLSA tautologically "defines an employee simply as 'any individual employed by an employer.' 29 U.S.C. § 203(e)(1). An 'employer' is defined to include 'any person acting directly or indirectly in the interest of an employer in relation to an employee.' 29 U.S.C. § 203(d). To 'employ includes to suffer or permit to work.' 29 U.S.C. § 203(g)." *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1534 n.5 (7th Cir. 1987).[11] In other words, absent "work," there can be no employer-employee relationship.

Here, the Amended Complaint utterly fails to set forth a claim on which relief may be

[10] *See also Scott v. Now Courier, Inc.*, No. 1:10-cv-971-SEB-TAB, 2012 U.S. Dist. LEXIS 43710, *19 (S.D. Ind. Mar. 29, 2012) (Barker, J.) ("Only employer-employee relationships fall under the FLSA."); 29 C.F.R. § 785.5 ("Section 6 requires the payment of a minimum wage by an employer to his employees who are subject to the Act."); U.S. Department of Labor, Wage and Hour Division, FOH § 10b00 (Oct. 20, 1993) ("In order for the FLSA to apply there must be an employee-employer relationship. This requires an 'employer' and 'employee' and the act or condition of employment.").

[11] To establish that a defendant "suffered or permitted work," a plaintiff must show that the defendant had "actual or constructive knowledge" of her work. *Kellar*, 664 F.3d at 177.

granted. Under Rule 12(b)(6), "[a] complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show that plaintiff is not entitled to relief." *Jones v. Bock*, 549 U.S. 199, 215 (2007). "To survive dismissal under federal pleading standards, [the] complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *see also Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) ("courts must accept a plaintiff's factual allegations as true, but some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim."). "Merely alleging legal theories without supporting factual allegations is not sufficient." *Grund v. Ind. Dep't of Corr.*, No. 2:12-cv-00038-WTL-MJD, 2014 U.S. Dist. LEXIS 110400, *3 (S.D. Ind. Aug. 11, 2014) (Lawrence, J.) (citing *Iqbal*, 556 U.S. at 678 ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.") (internal quotations omitted)). Further, a plaintiff may plead himself out of court if the complaint includes allegations that show she cannot possibly be entitled to the relief sought. *McCready v. eBay, Inc.*, 453 F. 3d 882, 888 (7th Cir. 2006).

1. Student-Athletes Have Not Been Considered Employees For Virtually Any Purpose Under State And Federal Statutes.

It is not surprising that Plaintiffs have failed to plead plausible facts showing that they performed "work" for any of the Moving Defendants. Virtually every forum to consider the question has concluded that student-athletes are not employees. Plaintiffs' makeshift theory of FLSA liability is premised on the notion that NCAA Division I Member Schools afford student participants in work-study part-time employment programs "different, and better, treatment" than

student-athletes. *See* Am. Compl. ¶ 2 (emphasis in original); *see also id.* ¶ 54. In other words, Plaintiffs contend that because "'students who work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories,' are recognized, and paid, as temporary employees of NCAA Division I Member Schools under the FLSA,"[12] then so too must student-athletes be paid. *See id.* ¶ 4 (quoting FOH § 10b24(b) (Oct. 20, 1993). Plaintiffs' analogy is illogical and, in a variety of circumstances, almost every court and agency to address this issue—including the U.S. Department of Labor—has concluded that student-athletes are not employees.[13]

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[12] The term "temporary employee" has no legal significance under the FLSA, which simply covers "employees" and does not distinguish between "temporary" and "regular" employees.

The concept of temporary employees has some significance in federal labor law, where the National Labor Relations Board has contemplated whether temporary employees who are jointly employed by a "user" employer and a "supplier" employer may be included without consent of both employers in the same bargaining unit with employees who are solely employed by the user employer. *See, e.g., M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298, 1305 (2000) ("Separating 'regular" employees--i.e., the solely employed--from the 'temporaries' who may (as in the instant cases) share the same classifications, skills, duties, and supervision, creates an artificial division that is not required by the statute.") (overruling *Lee Hosp.*, 300 N.L.R.B. 947) (1990), *overruled by Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004); *Gourmet Award Foods*, 336 N.L.R.B. 872, 873-74 (2001) (finding that employer was joint employer of newly supplied temporary employees and had duty to bargain with such temporary employees because they were included in the bargaining unit described in the parties' collective bargaining agreement).

[13] In March 2014, a National Labor Relations Board Regional Director concluded that scholarship football players at Northwestern University are "employees" under the National Labor Relations Act. *See Northwestern Univ.*, 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014). Northwestern requested review at the national level by the National Labor Relations Board, which has not yet issued its decision. Among other things, the Regional Director's decision is inconsistent with prior Board precedent finding that enrolled students who receive financial aid to cover educational costs are not employees. *See Brown Univ.*, 342 N.L.R.B. 483 (2004) (finding that graduate assistants enrolled in the university were not employees under the NLRA); *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999) (finding that hospital residents, interns, and fellows were "employees" in part because they were not enrolled in the medical school and because they received compensation in the form of stipends for their services since "[t]here is no exclusion under the Internal Revenue Code for such stipends.").

Here, Plaintiffs do not allege that scholarships received by some student-athletes are compensation for their athletic activities; in fact, they explicitly allege the opposite. *See* Am. Compl., ¶ 10(i); *see also* 26 U.S.C. §§ 117(a) ("gross income does not include any amount

a. The DOL does not regard college student-athletes as "employees" under the FLSA.

The U.S. Department of Labor is the federal agency charged with administering and enforcing the FLSA. In connection with its oversight of the FLSA, the DOL has issued a Field Operations Handbook that, among other things, "provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions…" *See* http://www.dol.gov/whd/FOH (accessed Apr. 30, 2015). In their Amended Complaint, Plaintiffs rely on the DOL's Field Operations Handbook. *See* Am. Compl. ¶ 4 n.1. This reliance is most curious given that the Handbook expressly states that student-athletes are not employees under the FLSA and that their participation in interscholastic athletics does not constitute work under the FLSA. Section 10b24(a) provides:

> University or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the Act. In addition to the examples listed in FOH 10b03(e), students serving as residence hall assistants or dormitory counselors, who are participants in a bona fide educational program, and who receive remuneration in the form of reduced room or board charges, free use of telephones, tuition credits, and the like, are not employees under the Act.
>
> (b) On the other hand, an employment relationship will generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation. Thus, for example, students who work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act.

FOH §10b24(a) (emphasis added). Section 10b03(e), in turn, provides:

> As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and

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received as a qualified scholarship by an individual who is a candidate for a degree at an educational organization."); Rev. Rul. 77-263, 1977-2 C.B. 47 (athletic scholarships are not considered taxable income to student-athlete).

> other similar endeavors. Activities in such programs, conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school or institution, are not "work" of the kind contemplated by [29 U.S.C. § 203(g)] and do not result in an employee-employer relationship between the student and the school or institution. Also, the fact that a student may receive a minimal payment for participation in such activities would not necessarily create an employment relationship.

FOH §10b03(e) (emphasis added). Thus, the same DOL source that validates the activities of work-study participants as "work" specifically excludes "activities in connection with . . . interscholastic athletics" from the definition of "work."[14]

The DOL's interpretation of its own interpretive regulation (29 C.F.R. § 785.7) is entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and is "controlling unless plainly erroneous or inconsistent with the regulation." *See Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 876 (8th Cir. 2011) (according *Auer* deference to interpretation of "dual jobs" regulation contained in FOH). Accordingly, this Court should follow the DOL's interpretation of its own "Hours Worked" regulation, which gives "specificity to a statutory scheme the Secretary of Labor [is] charged with enforcing and reflect[]s the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act." *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006).[15]

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[14] Plaintiffs' interpretation of "interscholastic" as referring to only "student run Club Sports" cannot withstand serious scrutiny. *See Townsend v. State of Cal.*, 191 Cal. App. 3d 1530, 1536 (Cal. App. 2d Dist. 1987) ("Whether on scholarship or not, the athlete is not 'hired' by the school to participate in interscholastic competition."); *Shepard v. Loyola Marymount Univ.*, 102 Cal. App. 4th 837, 845 (Cal. App. 2002) (NCAA rules incorporated into scholarship agreement "clearly provide that plaintiff was not a school employee.").

[15] The Seventh Circuit and district courts within the Circuit have cited the FOH as an authoritative source for interpreting the FLSA. *See, e.g.*, *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007); *Schaefer v. Walker Bros. Enters., Inc.*, No. 10 CV 6366, 2014 U.S. Dist. LEXIS 177157, *8 (N.D. Ill. Dec. 17, 2014) (stating "Courts give deference to the agency's interpretation" and finding FOH's interpretation "governs this case."); *Kim v. Park*, No. 08 CV 5499, 2009 U.S. Dist. LEXIS 51591, *6 n.2 (N.D. Ill. June 16, 2009) ("Although not entitled to *Chevron*

b. In a variety of contexts, federal and state courts have consistently held that student-athletes are not "employees."

The DOL's interpretation that no employer-employee relationship exists between student-athletes and their universities under the FLSA is fully consistent with state and federal decisions in both the FLSA and other contexts.

For example, in *Marshall v. Regis Educational Corp.*, 666 F.2d 1324, 1328 (10th Cir. 1981), the Tenth Circuit found that student residence-hall assistants ("RA's") were not employees within the meaning of the FLSA, a ruling that the DOL has since incorporated in FOH § 10b24(a), *supra*. Relying on the Supreme Court's "economic reality" test, the Tenth Circuit considered the "circumstances of the whole activity" to determine whether an employment relationship existed. *Regis*, 666 F.2d at 1326. The DOL initially contended RA's were "employees" because the college derived an "immediate economic benefit from their services" which had an impact on the "business" of operating a college. *Id.* at 1326, 1327. Plaintiffs make a similar argument here. *See, e.g.*, Am. Compl., ¶ 21 ("The NCAA has entered into multi-billion dollar agreements . . . to broadcast athletic competitions nationally, including within the District, and multi-million dollar agreements with other corporate partners and sponsors, through which the NCAA receives funds that it then distributes, from within this District, to NCAA Division I Member Schools in direct dollars, championships or services.").

In rejecting the DOL's position, the *Regis* Court found that it "ignore[d] not only the broad educational purpose of this private liberal arts college, but also the expressed educational objectives of the resident assistant program," and that "the total program [] must be considered within the full educational context." *Regis*, 666 F.2d at 1327. The Tenth Circuit concluded that "the mere fact that the College may have derived some economic value from the RA program

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deference, the Department of Labor's Field Operations Handbook has been held to be persuasive and entitled to some weight in judicial interpretations of the FLSA.").

does not override the educational benefits of the program and is not dispositive of the 'employee' issue," and noted that "RA's did not displace other employees whom the College would otherwise have been required to hire." *Id.* Finally, the Tenth Circuit agreed with the district court's analysis that

> [the plaintiffs] did not come to Regis to take jobs. They enrolled as full-time students seeking growth and development from adolescents into mature human beings and desiring to earn the recognition of an academic degree. The opportunity to reduce the cost of college by being helpful to other students and to the administration in assisting the residence hall program is only one circumstance in the whole activity of the college program. It does not differ from credits granted to student athletes and leaders in student government.

Id. at 1328 (quoting district court opinion). Thus, the Tenth Circuit found that RA's "were legally indistinguishable from athletes and leaders in student government who received financial aid" and held that they were not "employees" under the FLSA. *Id.*; *see also Kemether*, 15 F. Supp. 2d at 759 ("[n]o federal court has defied common sense by holding student-athletes to be Title VII employees of their schools or an athletic association.").

Numerous courts have also found that student-athletes are not covered "employees" under workers compensation statutes. For example, in *Rensing v. Indiana State University Board of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983), the Supreme Court of Indiana rejected a scholarship student-athlete's workers compensation claim because the athlete was a student and not an employee. The court noted that "[a] fundamental policy of the NCAA, which is stated in its constitution, is that intercollegiate sports are viewed as part of the education system and are clearly distinguished from the professional sports business. . . . The fundamental concerns behind the policies of the NCAA are that intercollegiate athletics must be maintained as a part of the educational program and student-athletes are integral parts of the institution's student body. An athlete receiving financial aid is still first and foremost a student." *Id.* It further reasoned:

> [Plaintiff] was not working at a regular job for the University. The scholarship benefits he received were not given him in lieu of pay for remuneration for his services in playing football any more than academic scholarship benefits were given to other students for their high scores on tests or class assignments. Rather, in both cases, the students received benefits based upon their past demonstrated ability in various areas to enable them to pursue opportunities for higher education as well as to further progress in their own fields of endeavor.
>
> Scholarships are given to students in a wide range of artistic, academic and athletic areas. None of these recipients is covered under *Ind. Code § 22-4-6-2*, *supra,* unless the student holds a regular job for the institution in addition to the scholarship. . . . Scholarship recipients are considered to be students seeking advanced educational opportunities and are not considered to be professional athletes, musicians or artists employed by the University for their skills in their respective areas.

Id. at 1174 (emphasis added).[16]

Further, finding that scholarships are not "wages" that establish an employment relationship, the Supreme Judicial Court of Massachusetts held that vicarious liability under the doctrine of respondeat superior did not apply to a school's student-athletes. *Kavanagh v. Trustees of Boston Univ.*, 440 Mass. 195 (Mass. 2003). There, a student-athlete on an opposing team sued Boston University in tort after he was punched in a game by one of the school's players. The court observed:

> The fact that a college or university has facilitated a student's ability to attend that institution by providing a scholarship or other financial assistance does not transform the relationship between the academic institution and the student into any form of employment relationship. While scholarships may introduce some element of "payment" into the relationship, scholarships are not wages. Rather, scholarships pay specific forms of expenses that the student would incur in attending school -- tuition, books, room and board -- and thereby provide the

[16] *See also State Compensation Ins. Fund v. Industrial Comm'n*, 135 Colo. 570 (1957) (rejecting workers compensation claim, reasoning that a student-athlete is not an "employee"); *Waldrep v. Texas Employers Ins. Assoc.*, 21 S.W.3d 692, 701 (Tex. App. 2000) (affirming jury verdict that student-athlete was not an "employee" for workers compensation claim and noting that many college students receive financial aid based on their abilities in areas such as music, academics, art and athletics and "[s]ometimes these students are required to participate in certain programs or activities in return for this aid."); *Coleman v. Western Mich. Univ.*, 125 Mich. App. 35, 42-44 (1983) (applying "economic realities" test to find scholarship football player injured in practice was not an "employee" for purposes of workers compensation claim) (following *Rensing*).

> student with an education. Nor does a scholarship student "work for" the school in exchange for that scholarship.

Id. at 199-200 (emphasis added) (citation to *Rensing* omitted). Similarly, a full-scholarship student-athlete alleged to have attacked a food delivery person was found not to be a state university "employee" for purposes of asserting personal immunity under an Ohio statute covering state employees. *See Korellas v. Ohio State Univ.*, 121 Ohio Misc.2d 16 (Ohio Ct. Cl. 2002); *see also Townsend,* 191 Cal. App. 3d at 1534-37.[17]

2. Plaintiffs Have Failed To Plead Sufficient Facts To Raise A Plausible Inference That They Performed "Work" For Any Of The Defendants.

Although the prerequisite employment relationship is defined in terms of "work", "the meaning of the term 'work' is not defined by the Act." *Sehie v. City of Aurora*, 432 F.3d 749, 751 (7th Cir. 2005) (citations omitted). The regulations make clear, however, that "work" must be "'controlled and required by the employer, and pursued necessarily and primarily for the benefit of the employer and his business.'" 29 C.F.R. § 785.7 (26 Fed. Reg. 190, Jan. 11, 1961, as amended at 76 Fed. Reg. 18859, Apr. 5, 2011) (quoting *Tennessee Coal, Iron, & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)) (emphasis added); *see also Sehie*, 432 F.3d at 751. In this case, the Amended Complaint contains no factual allegations concerning either the "primary benefit" or "required by the employer" elements of work.

Plaintiffs' "work" allegations are long on "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" (*e.g.*, "work," "unpaid labor," "suffered or

[17] Courts have also found that, unlike employment, "participation in intercollegiate athletics is not a property right, but [instead] a privilege not protected by Constitutional due process safeguards." *Equity in Athletics, Inc., v. Dep't of Educ.*, 675 F. Supp. 2d 660, 681 (W.D. Va. 2009); *see also Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1352 (9th Cir. Ariz. 1981); *Colorado Seminary (University of Denver) v. National Collegiate Athletic Ass'n.*, 570 F.2d 320, 321 (10th Cir. 1978); *Gardner v. Wansart*, No. 05 Civ. 3351 (SHS), 2006 U.S. Dist. LEXIS 69491, *17 (S.D.N.Y. Sept. 25, 2006); *see also NCAA v. Yeo*, 171 S.W.3d 863, 865-70 (Tex. 2005) (finding student-athlete did not have property or liberty interest under due process clause of Texas Constitution to participate in intercollegiate athletics).

permitted"), and short on alleged "facts" showing student-athletes' voluntary sports activities meet the *Tennessee Coal* definition of "work." *Iqbal*, 556 U.S. at 678. Most notably, while Plaintiffs contend that Defendants "benefitted from [] the unpaid labor of Plaintiff and/or members of the Student Athlete Collective" (Am. Compl., ¶ 39), they do not allege that their time spent on track and field-related activities was "pursued necessarily and primarily for the benefit of" the NCAA, the University of Pennsylvania, or any other of the Moving Defendants. *See Tenn. Coal, Iron, & R.R. Co.*, 321 U.S. at 598 (emphasis added). Plaintiffs do not even allege that each Defendant Division I Member School participates in intercollegiate women's track and field. Nor do Plaintiffs allege that the time spent on athletic-related activities by members of the proposed class of Division I student-athletes was "pursued necessarily and primarily for the benefit of" the NCAA or the schools they attended. Nor could they plausibly allege so, particularly with respect to those putative class members who were "walk-ons" or who, like Plaintiffs, have attended Ivy League schools that do not even provide athletic scholarships.

In the alternative, Plaintiffs fail to allege that their activities were "required" by the University of Pennsylvania (or any other Defendant, including the FLSA). *See id*. The FLSA's "purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (emphasis added). "The definition of 'employ' is not so broad as to include those individuals 'who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.'" *Emanuel v. Rolling in the Dough, Inc.* No. 10 C 2270, 2012 U.S. Dist. LEXIS

166206, *10-11 (N.D. Ill. Nov. 21, 2012) (quoting *Walling*).[18] By any objective measure,[19] Plaintiffs have not alleged and cannot allege that they "contemplated compensation" under the FLSA (*i.e.*, minimum wage) when they joined the Women's Track and Field team at the University of Pennsylvania. Indeed, at the time Plaintiffs joined the team, they were fully aware that they would not be paid for their participation.

In summary, there are no factual allegations supporting each Plaintiff's conclusory statement that she "worked as an unpaid student athlete on the Penn Women's Track and Field roster." Am. Compl. ¶¶ 68, 72, 76. Absent such facts, this Court cannot "infer more than the mere possibility of misconduct," *Iqbal*, 556 U.S. at 679. The Amended Complaint stops well "short of the line between possibility and plausibility of 'entitlement to relief,'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). *See also Ceja-Corona v. CVS Pharm., Inc.*, No. 1:12-CV-01868-AWI-DLB, 2013 U.S. Dist. LEXIS 29153, *17-18 (C.D. Cal. Mar. 4, 2013) (Plaintiff failed to allege sufficient facts to show donning was "necessary to the principal work performed" under Portal-to-Portal Act), *motion for reconsideration granted on other claim*, 2013 U.S. Dist. LEXIS 90805 (E.D. Cal. June 26, 2013).

C. Plaintiffs Fail To Allege That Defendant NCAA Is An "Employer" or "Joint Employer."

Plaintiffs allege that they have been or were employed only by the University of Pennsylvania. *See* Am. Compl. at ¶¶ 26, 30, 34. Notably, Plaintiffs do not allege that the NCAA

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[18] *See, e.g., Hallisey v. Am. Online, Inc.,* No. 99-CIV-3785 (KTD), 2006 U.S. Dist. LEXIS 12964, *16 (S.D.N.Y. Mar. 10, 2006) ("Whether Plaintiffs had an express or implied expectation of compensation is a crucial inquiry" into volunteer status).

[19] *See Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421, 428 (4th Cir. 2011) ("we review the objective facts surrounding the services performed to determine whether the totality of the circumstances establish volunteer status, or whether, instead, the facts and circumstances, objectively viewed, are rationally indicative of employee status") (internal quotation and citation omitted).

is their employer or joint employer under the FLSA. Instead, the Amended Complaint clearly alleges only that "Plaintiffs and members of the Student Athlete Collective have been, and continue to be employees of their respective Defendant NCAA Division I Member Schools within the meaning of 29 U.S.C. § 203," and the "Defendant NCAA Division I Member Schools have employed, and continue to employ, Plaintiffs and members of the Student Athlete Collective participating in their respective athletics programs within the meaning of 29 U.S.C. § 203(g)." *See id.* ¶¶ 83-84 (emphasis added). Nor do Plaintiffs allege that they performed any "work" that was "required by" the NCAA and "pursued necessarily and primarily for the benefit" of the NCAA, as opposed to their own educational or personal interests. *See* 29 C.F.R. § 785.7. Put another way, Plaintiffs allege no facts that would support an inference they performed any "work" for the NCAA as defined by the Supreme Court in *Tennessee Coal*. Without alleging any employment relationship with—or "work" performed for—the NCAA, Plaintiffs' claim against the NCAA for unpaid wages is not "plausible on its face," and must be dismissed with prejudice. *Iqbal*, 556 U.S. at 678 (citation omitted).

D. Plaintiff's Allegations Concerning Pre-Litigation Settlement Discussions Should Be Stricken.

A party may move to strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Such motions may be granted if the allegations have no bearing on the litigation subject matter or will prejudice the objecting party. *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir. 1992). "When allegations appear to bear no relation to the controversy or may cause the objecting party undue prejudice, they may be stricken." *FTC v. Image Sales & Consultants, Inc.*, No. 1:97-CV-131, 1997 U.S. Dist. LEXIS 18942, *3 (N.D. Ind. Sept. 17, 1997) (citing *Talbot*, 961 F.2d at 664).

Courts have often used Rule 12(f) to strike allegations that "detail settlement negotiations within the ambit of [Federal] Rule [of Evidence] 408." *Berry v. Lee*, 428 F. Supp. 2d 546, 563 (N.D. Tex. 2006) (citations omitted).[20] For example, in *Braman v. Woodfield Gardens Associates*, 715 F. Supp. 226, 230 (N.D. Ill. 1989), the court struck two paragraphs of the complaint involving settlement negotiations."

Here, Plaintiffs' Amended Complaint contains numerous improper allegations related to the self-described efforts by Plaintiffs' counsel to "engage in pre-litigation efforts to resolve claims." *See* Am. Compl., ¶¶ 11, 59-67. None of these allegations is admissible under Rule 408. The conversations between Plaintiffs' counsel and Defendants are immaterial and merely serve as "unnecessary clutter" that should be removed from the case. *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). In addition, the publication of these allegations may prejudice Defendants and undermine the purpose of Rule 408, which "is to encourage settlements," *Central Soya Co. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982), and "might chill voluntary efforts at dispute resolution." *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 689 (7th Cir. 2005) (citation omitted). Accordingly, Paragraphs 11 and 59-67 should be stricken under Rule 12(f).

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[20] *See, e.g., Thompson v. Root Rents, Inc.*, No. CV-05-245-S-BLW, 2005 U.S. Dist. LEXIS 37553, *3 (D. Idaho Aug. 31, 2005) ("although Rule 408 is a rule of evidence, courts have routinely granted motions to strike allegations in pleadings that fall within the rule as immaterial.") (citations omitted); *Philadelphia's Church of Our Savior v. Concord Twp.*, No. Civ. A. 03-1766, 2004 U.S. Dist. LEXIS 15400, *8-9 (E.D. Pa. July 27, 2004) ("While Rule 408 does not apply to pleadings directly, repeated decisions from this Court have held that allegations in a complaint may be stricken, under Rule 12(f), as violative of these policies"); *United States ex rel. Alasker v. CentraCare Health Sys., Inc.*, Civ. A. No. 99-106, 2002 U.S. Dist. LEXIS 10180, *7 (D. Minn. June 5, 2002) ("Although this is a rule of evidence, courts have routinely granted motions to strike allegations in pleadings that fall within the scope of Rule 408."); *Walsh v. City of Auburn*, 942 F. Supp. 788, 797 n.5 (N.D.N.Y. 1996); *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 40 (S.D.N.Y. 1992) (granting defendant's motion to strike portions of a complaint that referenced settlement discussions under Rule 408 as immaterial and potentially prejudicial).

IV. CONCLUSION

For the reasons stated herein, the Court should dismiss with prejudice Plaintiffs' Amended Complaint in its entirety for failure to state a claim upon which relief can be granted and a lack of subject matter jurisdiction due to lack of standing, and strike Paragraphs 11 and 59-67.

Dated: April 30, 2015

Respectfully submitted,

/ s / Alan L. McLaughlin

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Attorneys for Defendant, National Collegiate Athletic Association and Certain Division I Member School Defendants (see Exhibit 1)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2015, a copy of the foregoing *Certain Defendants' Memorandum in Support of Motion to Dismiss Complaint and Motion to Strike Certain Allegations* was filed electronically. Service of this filing will be made on all ECF-registered counsel in this matter by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/ s / Alan L. McLaughlin
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