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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LAUREN ANDERSON, et al., Plaintiffs, vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a/k/a the NCAA, et al.; Defendants.	Civil Action No. 1:14-CV-1710 WTL-MJD

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND STRIKE

As described in the Amended Complaint, the case for student athlete employee status under the FLSA is simple by comparison to student participants in work study programs. Both work study participants, and student athletes, are students, *first*. Both engage in performance that

is non-academic in nature and not for academic credit, supervised full-time by university staff and from which universities derive immediate and meaningful advantage. Both maintain daily timesheets, recording up to 20 hours per week of performance supervised full-time by university staff. But, as compared to work study participants, student athletes are more strictly supervised, and controlled, by university staff due to the greater rigors of participation in NCAA regulated sports and of compliance with the myriad of byzantine NCAA Bylaws regulating student athlete eligibility. Moreover, as compared to work study programs, universities derive more substantial benefits from the marketing of NCAA competition – from sales of tickets and team and mascot-related apparel and merchandise, to shares of broadcasting and sponsorship rights, and in promotional and fundraising appeals to prospective students, alumni, donors and boosters.

The job duties of student athletes to Defendants, Defendants' shared responsibilities of control of student athlete employment, and Defendants' shared benefits derived therefrom are further highlighted by NCAA Bylaws and Rule Books and by indisputable facts regarding the joint enterprise that the Supreme Court recognized the NCAA and its members have entered into for the purpose of marketing, and benefitting from, competition between student athletes. *See NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101-2, 117 (1984).

Defendants' position is that student athletes are less deserving of employee status and pay, under the FLSA, than work study participants, "who work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories." *See* U.S. Department of Labor Field Operations Handbook § 10b24(b) (10/20/93).

As discussed herein, Defendants, throughout their motions, inexcusably fail to discuss and disclose material that is potentially dispositive of their contentions, going so far as to feign ignorance of their own NCAA Bylaws and Rule Books and of the operation of their joint

enterprise to market competition between student athletes. *Cf. Cedar Crest Health Ctr., Inc. v. Bowen*, 129 F.R.D. 519, 525 (S.D. Ind. 1989) ("Disclosing and discussing potentially dispositive cases is not a 'burden' on the court …. Rather, it is a duty of every practitioner …. At a minimum, [potentially dispositive cases] should have been fully analyzed in the respondents' briefs. This did not occur. Notably, to this date [counsel] have failed to discuss why [a potentially dispositive case] was not addressed."); *also Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989) ("The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless …. the word 'potentially' deliberately included those cases arguably dispositive. Counsel is certainly under obligation to cite adverse cases which are ostensibly controlling and then may argue their merits or inapplicability. But counsel may not hide from virtually controlling cases, only later to argue that the omission was due to a scintilla of difference between already decided cases and the one being litigated.") In their zeal to protect the NCAA *status quo*, the Defendants cannot disregard their "duty to screen allegations and arguments and assert only those supported by honest facts …." *U.S. v. Bush*, IP 91-806-C, 1992 U.S. Dist. LEXIS 15634 at *49-50 (S.D. Ind. Sept. 23, 1992).

For example, as defense counsel well know, in April 2010, the U.S. Department of Labor issued federal guidance differentiating mere educational experiences from work under the FLSA: DOL Fact Sheet #71. In September 2011, DOL Fact Sheet #71 became the basis for a case of first impression regarding the employee status of student interns: *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013). Prior to *Glatt*, it was assumed, without analysis, that student interns were principally beneficiaries of only educational experiences and thereby not employees under the FLSA. That unsupported conclusion, however, was rejected when the

unpaid student interns' motions for summary judgment arguing that they had been employees under the FLSA, based on criteria set forth in DOL Fact Sheet #71, were *granted*. 293 F.R.D. 516 (S.D.N.Y. 2013). This is a case of first impression, too, applying the criteria set forth in DOL Fact Sheet #71 to the question of student athlete employee status for the first time. As in *Glatt*, student athletes, like student interns, are not principally beneficiaries of only educational experiences, but rather are properly classified as employees under the FLSA.

For the reasons discussed herein, Defendants' arguments and conduct cannot stand, and their motions to dismiss and/or strike must be denied.

I. DEFENDANTS' RULE 12(b)(6) MOTIONS MUST BE DENIED BECAUSE PLAINTIFFS HAVE SUFFICIENTLY PLEAD, AND GIVEN NOTICE OF, A CLAIM UPON WHICH RELIEF MAY BE GRANTED

In order to survive Defendants' motions under Fed. R. Civ. P. 12(b)(6), the Amended Complaint must provide enough factual information to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face if, "'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Lucerco v. Leona's Pizzeria, Inc.*, No. 14 C 5612, 2015 U.S. Dist. LEXIS 3378, at *2 (N.D. Ill. Jan. 13, 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Indeed, when considering a motion to dismiss under Rule 12(b)(6), the court accepts the complaint's well-pleaded allegations as true and construes them in the light most favorable to the plaintiffs. *Twombly*, 550 U.S. at 555; *Ashcroft*, 556 U.S. at 679.

Moreover, to comply with Fed R. Civ. P. 8(a)(2), a complaint need only provide a short and plain statement of the claim, that gives the defendant fair notice of the claim and its basis. *U.S. ex rel. Sandstrom v. Bd. of Educ.*, No. 12 C 0622, 2015 U.S. Dist. LEXIS 54439, at *15-16 (N.D. Ill. Apr. 27, 2015). "The standard does not imply that the district court should decide whose version to believe, or which version is more likely than not. Rather, the plaintiff must

give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself could these things have happened, not did they happen." *Lucerco*, at *5-6 (omitting internal citations).[1]

A. U.S. Department of Labor Field Operations Handbook § 10b03(e) (10/20/93) Is Not Relevant Because It Does Not Speak to NCAA Regulated Sports

In the Amended Complaint, Plaintiffs disclose and discuss the U.S. Department of Labor Field Operations Handbook (10/20/93) ("DOL FOH"). *See, e.g.*, Am. Compl. at ¶¶ 61-65.

DOL FOH § 10b03(e) states, in pertinent part:

> 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 other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not "work" of the kind contemplated by Sec 3(g) of the Act and do not result in an employee-employer relationship between the student and the school or institution.

In their 12(b)(6) motions, Defendants heavily rely upon the lone reference in DOL FOH § 10b03(e) to "intramural and interscholastic athletics" to argue that NCAA regulated sports have *conclusively* been ruled out as "work." But, on its face, the DOL FOH *neither* mentions NCAA regulated sports in name, *nor* by example, although NCAA regulated sports were inarguably sufficiently popular, and well-recognized, in 1993 to bear such mentioning if intended. In fact, deductive reasoning suggests that NCAA regulated sports were clearly *not*

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[1] The district court may also consider documents quoted or cited in, and integral to, the Amended Complaint, or subject to judicial notice as public documents. *See, e.g., ABN Amro, Inc. v. Capital Int'l Ltd.*, No. 04 C 3123, 2007 U.S. Dist. LEXIS 19601 at * 10-11, (N.D. Ill. Mar. 16, 2007) (in evaluating a Rule 12(b)6) motion to dismiss, a district court may consider documents referred to in the complaint and central to plaintiff's claim, and take judicial notice of matters of public record); *see also Bannon v. Edgewater Med. Ctr.*, 406 F. Supp. 2d 907, 919 n.16 (N.D. Ill. 2005) (in resolving a motion to dismiss, a district court is entitled to take judicial notice of matters in the public record, including, for example, newspaper and magazine articles).

intended to be covered by the DOL FOH and Defendants have offered no evidence to contradict that fact as alleged in the Amended Complaint.

Most activities listed in DOL FOH § 10b03(e) relate to, or supplement, academic degrees. Dramatics relates to drama degrees; student publications to journalism degrees; glee clubs, bands and choirs to music degrees; and radio stations to broadcasting and communications degrees. In fact, academic credit is sometimes offered for participation in such activities. By contrast, NCAA regulated sports are not related to any degree, and no academic credit is offered for participating in NCAA regulated sports.

The following are further distinctions between *all* of the activities listed in DOL FOH § 10b03(e) and sports regulated by the NCAA:

1. Each of the activities listed in DOL FOH § 10b03(e) is organized as a student group, and run by students.

   By contrast, NCAA regulated sports are neither.

   For example, the University of Pennsylvania has "[m]ore than 450 student-run clubs," *see* http://www.admissions.upenn.edu/life-at-penn/student-activities, listed in Groups Online @ Penn, including: 82 Arts (*e.g.*, dramatics, glee clubs, bands and choirs); 25 Media & Publication (*e.g.*, publications and radio stations); 2 Instructional & Competitive debate teams; and 59 Sports & Recreational counting intramural and Club teams. But, *no* NCAA regulated sports.

2. Each of the activities listed in DOL FOH § 10b03(e) is subsidized, in part, by student activity fees and/or participant fees.

   By contrast, NCAA regulated sports are not subsidized by any student activity or

participant fees, but rather are fully integrated into university operating budgets and treated as a department for accounting purposes.

3. Full-time university employees are not hired, and paid salaries, for the sole purpose of supervising activities listed in DOL FOH § 10b03(e). If there is faculty involvement (and there often is not), the faculty role is advisory rather than supervisory, is not part of regular duties, and can impede performance of regular duties because it is an additional burden undertaken voluntarily.

   By contrast, NCAA regulated sports are supervised full-time by well-paid coaches and athletics department staff hired expressly to do so, and as part of their duties.

4. None of the activities listed in DOL FOH § 10b03(e) is as regulated as NCAA sports. There is *no* student group analog to the 434-page NCAA Division I Manual, setting forth a myriad of rules for participant recruitment, eligibility and financial aid, and conduct and employment of coaching staff, including penalties for noncompliance. *See* NCAA Division I Manual.

5. Participation in the activities listed in DOL FOH § 10b03(e) cannot be compelled. By contrast, participation in NCAA regulated sports can be compelled under signed agreement, subject to loss of activity eligibility or scholarship, and monitored by daily timesheets.

6. Universities do not maintain timesheets related to activities listed in DOL FOH § 10b03(e) because there is no university supervision, or compelled attendance. By contrast, as required by NCAA Bylaws, universities maintain daily timesheets related to student athlete performance, akin to those maintained for work study.

Thus, intramural athletics are not the same as NCAA regulated sports, and neither are interscholastic athletics, which, in the context of all the activities listed in DOL FOH § 10b03(e), are student-organized and –run Club Sports.

For example, the University of Pennsylvania lists Sports & Recreational intramural and Club teams in its directory of student-run clubs, including among others: Club Golf, Club Tennis, Coed Club Swimming, Latin and Ballroom Dance, Men's Club Lacrosse, Men's Club Soccer, Men's Club Volleyball, Men's Ultimate Frisbee, Penn Badminton, Penn Boxing Club, Penn Club Gymnastics, Penn Cycling, Penn Ping Pong, Penn Sailing, Penn Squash Club, Roller Hockey Club, Women's Club Lacrosse, Women's Club Soccer, Women's Club Volleyball, Women's Club Water Polo, and assorted Martial Arts clubs. But, the University of Pennsylvania does *not* count any NCAA regulated sports among the more than 450 student-run clubs listed in Groups Online @ Penn.

THE NEW YORK TIMES' description of the "Rise of College Club Teams" is further instructive of the differences between Club Sports and NCAA regulated sports:

> In intercollegiate club sports, there are no athletic scholarships, no adoring crowds and minimal adult leadership.
>
> Institutional financing is meager and hard work abundant, with dozens of volunteer hours required from the athletes just to put on a single game or match.
>
> It's college athletics without the pageantry or prerogative, and that's the way athletes in club sports like it. They devise the practices, make the team rules, decide whom to play and when, raise the money for uniforms and game officials, schedule the hotel and travel arrangements and manage the paperwork ….
>
> The less restrictive nature of club teams has also been a magnet for the thriving nontraditional sports market. While many N.C.A.A. athletic departments are cutting varsity sports, club teams are competing for national championships in bass fishing, ballroom dancing and Brazilian martial arts.

> Because of this independent and inclusive spirit, competitive club sports have emerged as an alternative to the semiprofessional, regulated, commercial environment of modern, elite college athletics ….
>
> The ability to balance one's academic, athletic and social life is an apparent draw to the club sports model. Chip Spear, a volunteer coach for the Yale water polo team, said that one of his players was a member of the Whiffenpoofs, Yale's celebrated a cappella group.
>
> "He misses some practices for their engagements," said Spear, who played water polo at Yale when it was still a varsity sport. "The team works it out because all practices are not mandatory. I'm not sure how that would have worked on a varsity team." Students say they sometimes choose a club sport (like sailing) for cultural or lifestyle reasons or because it was not available in high school (like Ultimate Frisbee).
>
> In either case, the students shape and influence the makeup and philosophy of the team, and tailor their commitment to it.
>
> College administrators said they put club sports in the same category as student development.

Bill Pennington, "Rise of College Club Teams Creates a Whole New Level of Success," N.Y. TIMES, Dec. 2, 2008.

Plaintiffs' counsel directed Defendants' attention to the differences between activities listed in DOL FOH § 10b03(e) and NCAA regulated sports on several occasions – prior to, and during, this litigation.

Defendants cannot pretend that such information, potentially dispositive of their defense, does not exist. But, Defendants fail to discuss any differences between activities listed in DOL FOH § 10b03(e) and NCAA regulated sports because these are indisputable.

In fact, it is not credible that Defendants *ever* rationally believed that NCAA regulated sports, which generate billions in revenue for Defendants' joint enterprise, are no different than activities listed in DOL FOH § 10b03(e), and the Defendants have offered no evidence of any such belief. Defendants' contention, here, is nothing more than insincere posturing devoid of honest facts.

Thus, there is sufficient evidence to conclude that DOL FOH § 10b03(e) is not relevant because it does not speak to NCAA regulated sports. Even if, *arguendo*, this is debatable, such debate precludes grant of a 12(b)(6) motion relying upon DOL FOH § 10b03(e) before further development of facts.

B. U.S. Department of Labor Fact Sheet #71 (Apr. 2010) Is the Relevant Standard for Determining Employee Status in an Educational Setting, and Plaintiffs Sufficiently Meet It At This Stage

Defendants inexcusably fail to disclose and discuss federal guidance that is relevant here, U.S. Department of Labor Fact Sheet #71 (Apr. 2010) ("DOL Fact Sheet #71"), and such failure is striking for a number of reasons.

First, on the face of the Amended Complaint, DOL Fact Sheet #71 is the clear basis for Plaintiffs' claim of student athlete employee status under the FLSA. DOL Fact Sheet #71 is referenced as the source of criteria that establish that both student participants in work study programs, and student athletes, are employees under the FLSA. *See, e.g.*, Am. Compl. at ¶¶ 47 n.13, 49-54.

Second, DOL Fact Sheet #71 (Apr. 2010) is more recent, and instructive of current thinking and trends differentiating mere educational experiences from work than any of the dated cases cited by Defendants. DOL Fact Sheet #71 (Apr. 2010) has been the basis for a "rising tide" of litigation since unpaid, student interns, who performed tasks during filming of "Black Swan," sued Fox Searchlight for back pay in September 2011. *See, e.g.*, Stephen Suen and Kara Brandeisky, "Tracking Intern Lawsuits," ProPublica, Apr. 15, 2014.

Glatt v. Fox Searchlight Pictures Inc. was a case of first impression. Prior to *Glatt*, it was assumed, without searching analysis, that student interns were principally beneficiaries of educational experiences and not employees under the FLSA.

That all changed after Judge Pauley of the Southern District of New York applied the criteria set forth in DOL Fact Sheet #71 to grant plaintiffs' motions for summary judgment asserting that they had been employees under the FLSA.

> Glatt and Footman understood they would not be paid. But this factor adds little, because the FLSA does not allow employees to waive their entitlement to wages ….
>
> Considering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are "employees" covered by the FLSA …. They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received – such as knowledge of how a production or accounting office functions or references for future jobs – are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer.

293 F.R.D. 516, 534 (S.D.N.Y. 2013).

This is a case of first impression, too, applying the criteria set forth in DOL Fact Sheet #71 to the question of student athlete employee status for the first time. *None* of the dated cases cited by Defendants applies the criteria set forth in DOL Fact Sheet #71 to the question of student athlete employee status, let alone do so against the backdrop of NCAA Bylaws and today's big business of NCAA regulated sports.[2]

Third, considering criteria enumerated in DOL Fact Sheet #71, there is sufficient evidence to conclude that student athletes, like student participants in work study programs, are properly classified as employees covered by the FLSA.

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[2] Defense counsel, here, are seemingly familiar with DOL Fact Sheet #71 and its reflection of current thinking and trends differentiating mere educational experiences from work. Indeed, most defense counsel, here, have issued guidance to their clients regarding compliance. *See, e.g.*, Paul DeCamp and Richard I. Greenberg, "Beware of the Unpaid Interns (including Summer Interns)," Jackson Lewis, Mar. 12, 2012; Christopher Kaczmarek and Ryan Crosswell, "Internship Programs Present Potential Wage and Hour Risks for Employers," Littler Mendelson, Apr. 19, 2012; and Diane M. Saunders, "Three Tips on Avoiding Summer Intern Headaches," Ogletree Deakins, Apr. 10, 2015. But, inexplicably, no defense counsel deemed it necessary to similarly disclose and discuss the impact of DOL Fact Sheet #71 with this Court.

DOL Fact Sheet #71 states that "if *all* of the factors listed [below] are met, an employment relationship does *not* exist under the FLSA …. exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of 'employ' is very broad." (emphasis supplied).

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Because activities listed in DOL FOH § 10b03(e) are organized and run by students, rather than by university staff, there can be no employer-employee relationship arising from those activities, and DOL Fact Sheet #71 is not applicable to those activities. DOL Fact Sheet #71 can be applied to teaching assistants ("TAs"), residential advisors ("RAs"), work study participants, and student athletes supervised by university staff.

Regarding the first and second criteria, DOL Fact Sheet #71 further elaborates:

> In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit).

Both TAs and RAs perform tasks integral to the educational objectives of universities. TAs assist professors in administrative tasks, perhaps for academic credit. RAs assist freshmen

in acclimating to university life, communicate academic and social policies to freshmen, and point freshmen in the right direction for additional assistance, often for room and board. So, the first and second criteria cut *against* employee status for TAs and RAs.

The first and second criteria cut *in favor of* employee status for work study participants and student athletes. Neither work student participants, nor student athletes, are integral to educational objectives of the university as TAs and RAs are.

Neither work student participant, nor student athlete, performance outside the classroom is related to, promotes, or facilitates academic studies, or is for academic credit.

To the contrary, NCAA Bylaws, like federal regulation of work study programs, recognize that participation in the respective programs could "interfere[] with [participant] opportunities for acquiring a quality education in a manner consistent with that afforded the general student body," regulate hours of participation to minimize such interference, and restrict class time missed. *See, e.g.*, Am. Compl. at ¶¶ 46-47, 49-50 (citing NCAA Division I Constitution Article 2.14; NCAA Division I Bylaws 17.1.7.1, 17.1.7.2, 17.1.7.6.1 and 17.1.7.6.2; and U.S. Department of Education Federal Student Aid Handbook, 6-39, 6-42, and 6-46).

In fact, in spite of NCAA Bylaws restricting the number of hours supervised by coaches to 20 hours per week, the NCAA *Growth, Opportunities, Aspirations and Learning of Students (GOALS) Study (2010)* documents that, when *non*-supervised hours of athletic participation are included, the true total time commitment to NCAA sports is nearly 40 hours per week for student athletes, akin to a full-time job. Am. Compl. at ¶ 52. Such athletic participation, which NCAA Bylaws and NCAA studies recognize can impede acquiring a quality education, cannot also be integral to educational objectives.

In *O'Bannon v. NCAA*– a case relevant to these proceedings, but conspicuously absent from Defendants' motions – Judge Wilken questioned the NCAA's alleged focus on education:

> Dr. Emmert [NCAA President] testified that "the rules over the hundred-year history of the NCAA around amateurism have focused on, first of all, making sure that any resources that are provided to a student-athlete are only those that are focused on his or her getting an education."
>
> The historical evidence presented at trial, however, demonstrates that the association's amateurism rules have not been nearly as consistent as Dr. Emmert represents. In fact, these rules have changed numerous times ….
>
> The amateurism provision in the NCAA's current constitution states that student-athletes "shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived …." This conception of amateurism stands in stark contrast to the definition set forth in the NCAA's early bylaws. Indeed, education -- which the NCAA now considers the primary motivation for participating in intercollegiate athletics -- was not even a recognized motivation for amateur athletes during the years when the NCAA prohibited athletic scholarships.

7 F. Supp. 3d 955, 973-75 (N.D. Cal. 2014).

Regarding the fourth criterion, DOL Fact Sheet #71 further elaborates:

> [I]f the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience.

The TA position is, in effect, a "job shadowing opportunity" for an aspiring grad student or academician. Because faculty are hired to teach classes, and training a TA is not required but rather is an additional burden undertaken voluntarily, TAs might impede regular duties and operations of faculty. Both TAs and RAs perform the sort of "minimal work" contemplated under DOL Fact Sheet #71, as described above. In fact, much of RA work revolves around merely being available in the event a freshmen has a question about academic or social policies that the RA can either answer, or point the freshmen in the right direction to get an answer. So, the fourth criterion cuts *against* employee status for TAs and RAs.

The fourth criterion cuts *in favor of* employee status for work study participants and student athletes. Universities derive immediate and meaningful advantage from the part-time employment of work study participants, and operations are not impeded because work study participants are supervised full-time by university staff hired expressly to do so, for example the manager of a campus dining hall or bookstore. This is inarguably *truer* in the case of student athletes. Universities derive *unparalleled* advantages from marketing NCAA regulated competition between student athletes – from sales of tickets and team and mascot-related apparel and merchandise, to shares of broadcasting and sponsorship rights, and in promotional and fundraising appeals to prospective students, alumni, donors and boosters. *See, e.g.*, Am. Compl. at ¶¶ 21 and 54. *Defendants cannot credibly compare such advantages, which generate billions in revenue for Defendants' joint enterprise, to advantages accruing from TA or RA programs.*

Student athlete performance is certainly not minimal. It is arguably the most exhausting and time-consuming performance of any student supervised by university staff, and it approaches a full-time, 40 hours per week, job commitment. *Defendants cannot credibly claim otherwise.*

Student athletes are supervised full-time by well-paid university staff hired expressly to do so, i.e., coaches, athletics department personnel and NCAA compliance officers. In fact, student athletes are more strictly supervised, and controlled, than any other students due to the substantial rigors of participation in NCAA regulated sports and of compliance with the myriad of byzantine NCAA Bylaws regulating student athlete eligibility. *See, e.g.*, Am. Compl. at ¶ 53, and Section II.B.1. of this opposition to Defendants' motions – NCAA Bylaws Demonstrate That Defendants Share the Responsibilities of Control of the Student Athlete Employment Market, and of the Terms and Conditions of Student Athlete Employment – below. *Defendants cannot credibly claim otherwise.*

Regarding the fifth and sixth criteria, as the court in *Glatt* concluded, the mere facts that a program participant was not entitled to a job at the end of the program, and that a program participant understood that he would not be paid, do not preclude a finding of employee status under the FLSA, because, again, "the FLSA does not allow employees to waive their entitlement to wages." 293 F.R.D. at 534.

So, contrary to Defendants' contention, the fact that NCAA custom and tradition has suppressed student athlete understanding of their employee status, and expectations of pay, does not, in some circular fashion, preclude employee status and pay.

There is, again, sufficient evidence to conclude that student athletes, like student participants in work study programs, are properly classified as employees covered by the FLSA. Even if, *arguendo*, this is debatable, such debate precludes grant of a 12(b)(6) motion before further development of facts.

Lastly, the Defendants' feigned ignorance of the operation of work study programs, and of their joint enterprise to market NCAA regulated sports, is perhaps more disturbing than their failure to disclose and discuss DOL Fact Sheet #71.

Defendants' tired refrain that student athletes cannot be employees because they are also students ignores the obvious: work study participants – including work study participants receiving financial aid or academic scholarships, *and those not* – are *both* students and employees. Many, if not most, student athletes do not even receive financial aid or scholarships. *See, e.g.*, NCAA Division I Bylaw 15.5. Maximum Institutional Grant-In-Aid Limitations by Sport. But, Defendants repeatedly claim that receipt of financial aid or a scholarship by some student athletes precludes all student athletes from being employees – although receipt of financial aid or a scholarship does not preclude any work study participant from being both student and employee.

Moreover, Defendants' feigned ignorance of the job duties of student athletes, and Defendants' control over student athletes, is entirely disingenuous as both are laid bare, in far more explicit detail than any work study program, in NCAA materials drafted, adopted, relied upon and enforced by Defendants, including, for example:

- the 434-page NCAA Division I Manual; Rule Books for each NCAA regulated sport, together totaling more than 2,200 pages; and Research Reports published at http://www.ncaapublications.com/;
- Compliance materials published at http://www.ncaa.org/compliance?division=d1;
- Enforcement materials published at http://www.ncaa.org/enforcement?division=d1; and
- a Legislative Services Database tool for looking up NCAA legislation, legislative proposals, and infractions cases, available at https://web1.ncaa.org/LSDBi/exec/homepage.

C. The NCAA's "Amateurism Rule" Cannot Trump Requirements of Federal Law

Defendants' self-defined, and self-serving "amateurism rule" – that student athletes cannot be paid any amount at all – is not law, is not entitled to legal deference, and cannot trump requirements of federal law. If student athletes meet criteria for employee status under the FLSA, applying DOL Fact Sheet #71, Defendants are bound to comply. There is no "amateurism" exception in the statute.

Nonetheless, Defendants attempt to confer the imprimatur of law on their "amateurism rule" by misrepresenting the Supreme Court's opinion in *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984) and quoting a passage out of context. *Cf., e.g., In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 531 n.37 (N.D. Ill. 2007) (the New Jersey Department of the Treasury, Division of Investment "quotes this fragment of a sentence from *[a case]* out of context and thus indeed misstates the law by mischaracterizing that case as standing for something it does not.")

Defendants represent to this Court:

- "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." Certain Defs.' Mem. in Supp. of Mot. to Dismiss Compl. and Mot. to Strike Certain Allegations, at 5.

- "'In order to preserve the character and quality of the [college sports]' product,' the Court continued, "***athletes must not be paid***, must be required to attend class, and the like.' *Id.* at 102 (emphasis added)." Mem. in Supp. of Mot. by the Misjoined Defs. to Dismiss Plaintiffs' Am. Compl., at 14.

It is clear, from the passage placed in context, that the Supreme Court merely listed examples of "rules on which the competitors agreed to create and define the competition to be marketed."

> As Judge Bork has noted: "[Some] activities can only be carried out jointly. Perhaps the leading example is league sports …." What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football -- college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.

468 U.S. at 101-2.

Contrary to Defendants' misrepresentation to this Court, the Supreme Court never found any NCAA rule to be sacrosanct, let alone well-tailored to its purported purpose. Quite the opposite. In *NCAA v. Bd. of Regents of Univ. of Oklahoma*, the Supreme Court affirmed the Tenth Circuit's holding that a NCAA restriction on television broadcasts of football games

violated law, and did not defer to the NCAA's purported interest in maintaining a competitive balance, finding "[t]he television plan is not even arguably tailored to serve such an interest." *Id.* at 118-19. This is the extent of the Supreme Court's comments about the propriety of any NCAA regulation, as no other NCAA regulation or "amateurism rule" was before it.

The most charitable reading of the passage in context suggests no more than the plain fact that Defendants are "members of a joint enterprise," *Id.* at 117, requiring uniform rules – and not permitting unilateral choice – to insure that there is a level playing field. For example, if all schools mutually agreed to pay student athletes, or had to in order to comply with federal law, then there would be no anti-competitive consequences. But, if an institution adopted a restriction on student athlete pay unilaterally, and other schools did not join in such restriction, the institution adopting the restriction unilaterally might see "its effectiveness as a competitor on the playing field … destroyed," because of its self-imposed recruiting impediment. Instead, all schools mutually agreed to the current restriction on student athlete pay.

O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), further proves the point and is a case relevant to these proceedings, but conspicuously absent from Defendants' motions. If, as Defendants assert, the Supreme Court had concluded that "athletes must not be paid," then the Complaint in *O'Bannon*, challenging the same NCAA rules prohibiting student athlete pay that are implicated in this case, should have suffered the fate urged by Defendants in this case. But, of course, it did not.

In issuing an injunction against the NCAA's enforcement of such rules to prohibit pay related to the use of student athlete names, images and likenesses, Judge Wilken criticized the NCAA's purported purposes.

Regarding the NCAA's contention that its restrictions on student athlete pay "promote the integration of academics and athletics," Judge Wilken noted:

> The only evidence that the NCAA has presented that suggests that its challenged rules might be necessary to promote the integration of academics and athletics is the testimony of university administrators, who asserted that paying student-athletes large sums of money would potentially "create a wedge" between student-athletes and others on campus. These administrators noted that, depending on how much compensation was ultimately awarded, some student-athletes might receive more money from the school than their professors. Student-athletes might also be inclined to separate themselves from the broader campus community by living and socializing off campus.
>
> It is not clear that any of the potential problems identified by the NCAA's witnesses would be unique to student-athletes. In fact, when the Court asked Dr. Emmert whether other wealthy students -- such as those who come from rich families or start successful businesses during school -- raise all of the same problems for campus relations, he replied that they did.

7 F. Supp. 3d at 980. Of course, in this case, "large sums of money" are not even implicated, but rather the same federal minimum wage scale applicable to student participants in work study programs under the FLSA.

Judge Wilken continued:

> It is also not clear why paying student-athletes would be any more problematic for campus relations than paying other students who provide services to the university ….

Id.

Regarding the NCAA's contention that its restrictions on student athlete pay "preserv[e] its tradition of amateurism," Judge Wilken noted that NCAA's amateurism rules have not been consistent in content or application. For example, in 1956, NCAA amateurism rules permitted cash for incidental expenses as part of a full grant-in-aid. *Id.* at 974. In 1975, the NCAA removed cash for incidental expenses from the full grant-in-aid. *Id.* In 2013, the NCAA amended its amateurism rules to permit different levels of compensation for recruits in different sports:

> The new rules permit Division I tennis recruits to earn up to ten thousand dollars per year in prize money from athletic events before they enroll in college. Other Division I recruits, in contrast, remain barred from receiving any prize money in excess of their actual and necessary costs of competing in an event.

Id.[3]

Judge Wilken concluded, "the NCAA's current restrictions on student-athlete compensation … are not justified by the definition of amateurism set forth in its current bylaws." 7 F. Supp. 3d at 975.

This is particularly true in this case regarding a federal minimum wage scale under the FLSA that cannot credibly be likened to professional athletic levels of compensation.

II. DEFENDANTS' RULE 12(B)(1) STANDING MOTIONS, AND TO STRIKE COLLECTIVE ACTION ALLEGATIONS, MUST BE DENIED BECAUSE PLAINTIFFS HAVE SUFFICIENTLY SHOWN, *BEFORE DISCOVERY*, THAT THE DEFENDANTS' JOINT ENTERPRISE RAISES PRESUMPTIONS OF JOINT EMPLOYMENT, JOINTLY CAUSED INJURIES, AND A SIMILARLY SITUATED COLLECTIVE

As with a motion to dismiss under Fed. R. Civ. P. 12(b)(6), in considering a motion to dismiss pursuant to Rule 12(b)(1), the court "must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in plaintiff's favor." *Mason v. Gates Auto. Holdings, Inc.*, 1:14-cv-00426, 2015 U.S. Dist. LEXIS 2410, at *2 (S.D. Ind. Jan. 9, 2015). Indeed, with a facial challenge to subject matter jurisdiction, "the Court provides the Plaintiff the same benefit she receives under a section 12(b)(6) analysis: her allegations are presumed truthful and reasonable inferences drawn in her favors. So, in the end, if Plaintiff has pled her Complaint in a manner sufficient to establish jurisdiction under the

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[3] In this case, it has also been noted that NCAA amateurism rules permit some student athletes to be paid to work as counselors in Defendants' sports camps or clinics. *See, e.g.*, Am. Compl. ¶ 57, citing NCAA Division I Bylaw 12.4.3. Camp/Clinic Employment, General Rule ("A student-athlete may be employed by his or her institution, by another institution, or by a private organization to work in a camp or clinic as a counselor, unless otherwise restricted by NCAA legislation (see Bylaw 13.12 for regulations relating to camps and clinics). Out-of-season playing and practice limitations may restrict the number of student-athletes from the same institution who may be employed in that institution's camp (see the specific sport in Bylaw 17 for these employment restrictions and Bylaw 13.12).")

pleading standard of *Bell Atlantic* and *Ashcroft*, she survives the facial challenge to subject-matter jurisdiction contained in the Defendants' motions to dismiss." *White v. Classic Dining Acquisition Corp.*, 1:11-cv-712, 2012 U.S. Dist. LEXIS 522125, at *4 (S.D. Ind. Apr. 13, 2012).

A. The Supreme Court Has Taken Judicial Notice of Defendants' Joint Enterprise to Market Competition between Student Athletes

Defendants not only *misrepresent* the Supreme Court's findings in *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101-2, 117 (1984), as described above, but, disturbingly, also fail to disclose and discuss the most salient lesson from that case that applies in this case: the Supreme Court took judicial notice of the joint enterprise that the NCAA and its members are engaged in to market competition between student athletes.

The Supreme Court recognized the regulatory controls of the NCAA as "defining the conditions of the contest, the eligibility of participants [and] **the manner in which members of a joint enterprise shall share the responsibilities and benefits of the total venture**." 468 U.S. at 117 (emphasis supplied).

It bears repeating that the Supreme Court noted about Defendants' joint enterprise:

> As Judge Bork has noted: "[Some] activities can only be carried out jointly. Perhaps the leading example is league sports …." What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules … all must be agreed upon, and all restrain the manner in which institutions compete …. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.

Id. at 101-2.

B. Defendants' Joint Enterprise to Market Competition between Student Athletes Raises the Presumption of Student Athlete Joint Employment

Defendants simply cannot feign ignorance of fundamental facts of their joint enterprise.

As discussed below, there is sufficient evidence to conclude that the manner in which members of Defendants' joint enterprise share the responsibilities and benefits of the total venture establishes joint employment. Even if, *arguendo*, this is debatable, such debate precludes grant of a 12(b)(1) motion before further development of facts, because "determination of whether employment by a group of employers is to be considered joint employment or separate and distinct employment for purposes of the FLSA … **depends upon all the facts in the particular case**." *See, e.g., Villareal v. El Chile, Inc.*, 776 F. Supp. 2d. 778, 794 (N.D. Ill. Mar. 9, 2011) (citing 29 C.F.R. § 791.2). (emphasis supplied)

In fact, defense counsel are well aware that the relief sought by Defendants is *premature*, at best. For example, in a client alert, the lead defense counsel firm advises:

> Even though the *Enterprise* test for joint-employer status under the FLSA is easier for a plaintiff to satisfy than is the test for joint employer status under other statutes, and the *Enterprise* test presents a **fact-bound inquiry**, the outcome in *Enterprise Holdings* suggests that **summary judgment** is a realistic possibility even for companies that exercise some control over the primary employer.

Martha Keon and Matthew Hank, "The Third Circuit Sets Forth New Test for Joint-Employer Status Under the FLSA," Littler Mendelson, July 12, 2012. (emphasis supplied).

1. NCAA Bylaws Demonstrate That Defendants Share Responsibilities of Control of the Student Athlete Employment Market, and of the Terms and Conditions of Student Athlete Employment

The operation of Defendants' joint enterprise depends upon sharing the responsibilities of control of the student athlete employment market, and of terms and conditions of student athlete employment. By mutual agreement, each Defendant has forfeited, in kind and degree, the sort of unilateral discretion that a separate and distinct employer otherwise exercises in recruiting, hiring, *paying*, supervising, retaining, and suspending or terminating employees.

a. NCAA Restrictions on Unilateral Discretion in Recruiting Talent

Separate and distinct employers do not, and arguably cannot, restrict each other's activities related to recruiting talent. Each separate and distinct employer acts unilaterally, except, perhaps, joining others in participation in job fairs. Defendants, by mutual agreement, impose upon each other restrictions on permissible recruiting contacts and periods.

For example, Contacts, defined as "any face-to-face encounter" with a prospective student athlete "regardless of whether any conversation occurs," are strictly limited. *See* NCAA Division I Bylaws 13.02.4 and 13.1.5. So too are Evaluations, defined as "any off-campus activity designed to assess the academic qualifications or athletics ability of a prospective student-athlete." *See* NCAA Division I Bylaws 13.02.7 and 13.1.7. Even telephone calls. *See, e.g.*, NCAA Division I Bylaw 13.1.3.1.8 ("Once an institution reaches the applicable limit on telephone calls to a prospective student-athlete [] for a particular time period [], the institution may not initiate an additional telephone call during the same time period, even if no direct conversation occurs during the additional call (e.g., voicemail message).")

Contacts, Evaluations and telephone calls are further restricted by, or to, agreed upon "Periods of Recruiting Activities":

> **Contact Period**. A contact period is a period of time when it is permissible for authorized athletics department staff members to make in-person, off-campus recruiting contacts and evaluations.
>
> **Evaluation Period**. An evaluation period is a period of time when it is permissible for authorized athletics department staff members to be involved in off-campus activities designed to assess the academic qualifications and playing ability of prospective student-athletes. No in-person, off-campus recruiting contacts shall be made with the prospective student-athlete during an evaluation period.

> **Quiet Period**. A quiet period is a period of time when it is permissible to make in-person recruiting contacts only on the institution's campus. No in-person, off-campus recruiting contacts or evaluations may be made during the quiet period.
>
> **Dead Period**. A dead period is a period of time when it is not permissible to make in-person recruiting contacts or evaluations on or off the institution's campus or to permit official or unofficial visits by prospective student-athletes to the institution's campus. It remains permissible, however, for an institutional staff member to write or telephone a prospective student-athlete during a dead period.

NCAA Division I Bylaw 13.02.5.

NCAA student athlete transfer rules further highlight Defendants' shared control of the recruitment of talent. Other than non-compete or non-disclosure, there are no restrictions preventing a separate and distinct employer from recruiting lateral talent from another, and immediately deploying that talent. But, Defendants, by mutual agreement, impose upon each other unique restrictions on pursuit of lateral talent:

> An athletics staff member or other representative of the institution's athletics interests shall not make contact with the student-athlete of another NCAA or NAIA four-year collegiate institution, directly or indirectly, without first obtaining the written permission of the first institution's athletics director (or an athletics administrator designated by the athletics director) to do so, regardless of who makes the initial contact.

See NCAA Division I Bylaws 14.5.5 and 13.1.1.3.

Moreover, if a student athlete does transfer, the "lateral" Defendant institution ordinarily cannot deploy his, or her, talent in NCAA competition for one full academic year. NCAA Division I Bylaw 14.5.5.1.

b. NCAA Restrictions on Unilateral Discretion in Determining Eligibility for Hire

In separate and distinct employment, eligibility for hire is a matter of unilateral discretion, other than certification of immigration status and, perhaps, license requirements. Defendants have forfeited such discretion, mutually agreeing to uniform NCAA Bylaws by which the

eligibility of any student athlete, to become a member of any Defendant's NCAA team roster, is to be determined.

Moreover, Defendants are required to share information and report discrepancies that could impact the eligibility of any student athlete, including such material as it applies to prospective student athletes not yet enrolled at any institution, *see* NCAA Division I Bylaw 12.1.1.1.2.2 (regarding member obligations to cooperate with the NCAA Eligibility Center), and enrolled student athletes qualified to transfer to another institution. *See* NCAA Division I Bylaws 12.7.2.1 and 12.7.2.2 (regarding annual Student-Athlete Statement, including "information related to eligibility, recruitment, financial aid, amateur status, previous positive-drug tests … and involvement in organized gambling activities," to be administered to each student athlete at an institution and kept on file and made available for examination upon request by the NCAA.)

c. NCAA Restrictions on Unilateral Discretion in Compensation

In separate and distinct employment, there is unilateral discretion in compensation, subject to applicable statutes. Defendants, by mutual agreement, impose upon each other the strict prohibition on student athlete compensation at issue in *O'Bannon* and in this case.

d. NCAA Restrictions on Unilateral Discretion in Supervision

In separate and distinct employment, there is unilateral discretion in supervision, subject to applicable statutes. Defendants, by mutual agreement, impose upon each other restrictions on Countable Athletically Related Activities ("CARA"), defined as "any required activity with an athletics purpose involving student-athletes and at the direction of, or supervised by, one or more of an institution's coaching staff." NCAA Division I Bylaw 17.02.1. In playing season, CARA is limited to 4 hours per day and 20 hours per week; in off-season, CARA is limited to a maximum of 8 hours per week with no more than 2 hours per week spent on skill-related

workouts. *See* NCAA Division I Bylaws 17.1.7.1 and 17.1.7.2. Moreover, Defendants are required to record CARA hours daily, much like timesheets in work study programs. *See* NCAA Division I Bylaw 17.1.7.3.4.

e. NCAA Restrictions on Unilateral Discretion in the Term of Employment

In separate and distinct employment, the term of employment is a matter of unilateral discretion, subject to applicable statutes.

Defendants, by mutual agreement, impose upon each other restrictions that, among other things, require suspension of a student athlete for infraction of agreed upon NCAA rules, *see* NCAA Division I Bylaw 12.11; set a Five-Year Rule expiration date for eligibility, *see* NCAA Division I Bylaw 12.8.1 ("a student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered"); and restrict the permitted grounds for reduction or cancellation of institutional financial aid based in any degree on athletics ability, which reduction or cancellation effectively diminishes or terminates a position on the team roster. *See* NCAA Division I Bylaw 15.3.4.3.

f. NCAA Restrictions on Unilateral Discretion in Discipline of Employees

In separate and distinct employment, discipline is assessed through internal compliance or human resources processes.

Defendants, by mutual agreement, subject "home team" student athletes to the disciplinary processes of the NCAA Committee on Infractions and NCAA Infractions Appeals Committee, which committees include representatives from peer, competing institutions and prohibit participation, in adjudication, by anyone "directly connected with an institution under investigation." *See, e.g.*, NCAA Division I Bylaws 19.3.1, 19.3.4, 19.4.1 and 19.4.3.

g. Enforcement of NCAA Restrictions on Unilateral Discretion in Student Athlete Employment

Importantly, no Defendant has unilateral discretion to "opt out" of NCAA mutual agreements. Instead, in order to obtain an exemption from, or waiver of, any NCAA Bylaws governing the terms and conditions of student athlete employment, a Defendant must apply to a committee including representatives from peer, competing institutions. *See, e.g.*, the Initial-Eligibility Waivers Committee, NCAA Division I Bylaw 21.7.5.1.3.1, and Committee on Student-Athlete Reinstatement, NCAA Division I Bylaw 21.7.7.3.

Infractions of any NCAA Bylaw could subject Defendants to substantial competition and financial penalties, including, but not limited to, suspension or termination of student athlete eligibility, suspension of coaching staff, and/or disqualification from regular season competition and/or post-season and championship segments. *See, e.g.*, NCAA Division I Bylaws 19.9.5, 19.9.7 and 19.9.8.

Moreover, the NCAA Infractions Program establishes, under "Expectations and Shared Responsibility," that each Defendant "has an affirmative obligation to report all instances of noncompliance," and "to cooperate fully with and assist," investigations, regarding *any* student athlete, including prospective student athletes not yet enrolled at any institution, or student athletes enrolled in another institution. *See, e.g.*, NCAA Division I Bylaws 19.2.2 and 19.2.3. In fact, "failure to cooperate in an NCAA enforcement investigation" is considered a Severe Breach of Conduct (Level I Violation). NCAA Division I Bylaw 19.1.1(c).

2. In Order to Market Competition and Share Benefits of the Total Venture, Defendants Require Performance by Rival Student Athletes As Much As "Home Team" Student Athletes

The operation of Defendants' joint enterprise further requires that student athlete performance "simultaneously benefit two or more employers." *See, e.g., Villareal v. El Chile,*

Inc., 776 F. Supp. 2d. 778, 793-95 (N.D. Ill. Mar. 9, 2011) (citing 29 C.F.R. § 791.2). Separate and distinct employers neither require the performance of a competitor's labor force, nor desire it as evidenced by the need for restrictions on the pursuit of monopoly and market power.

Defendants' joint enterprise markets competition between competing student athletes. The performance of rival student athletes, as much as "home team" student athletes, is necessary for Defendants to "share … benefits of the total venture," for example, share ticket proceeds "at the gate;" sell and share billions in NCAA athletic licensing, broadcasting and sponsorship rights; and use NCAA athletics in their promotional and fundraising appeals to prospective students, alumni, donors and boosters.

It is indisputable that none of the Defendants benefit if *only* their respective teams take the field. There is no purpose to, consumer demand for, or benefit from, an athletic league, conference, tournament, or contest of one. *Defendants cannot credibly claim otherwise, and have offered no evidence to support such claim.*

C. Plaintiffs' Injuries Are Jointly Caused by the Defendants Because the Defendants' Mutual Agreements, Not Unilateral Discretion, Prohibit Student Athlete Classification and Pay As Employees under the FLSA

In *NCAA v. Bd. of Regents of Univ. of Oklahoma*, the Supreme Court noted that Defendants' joint enterprise to market competition between student athletes requires that:

> A myriad of rules … all must be agreed upon, and all restrain the manner in which institutions compete …. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.

468 U.S. at 101-2.

Conversely, consider if an institution had unilateral discretion to classify and pay student athletes as employees. Its effectiveness as a competitor might soon be improved, enjoying recruiting advantages over institutions refusing to follow suit. No Defendant has such unilateral

discretion because Defendants have mutually agreed to "restrain the manner in which institutions compete," by prohibiting, and severely punishing, such classification and pay of student athletes.

In fact, were a Defendant to unilaterally classify and pay student athletes as employees, that Defendant likely would be adjudged guilty, by the NCAA Infractions Committee, of a **Severe Breach of Conduct (Level I Violation)**:

> A severe breach of conduct is one or more violations that seriously undermine or threaten the integrity of the NCAA Collegiate Model, as set forth in the constitution and bylaws, including **any violation that provides or is intended to provide a substantial or extensive recruiting, competitive or other advantage**, or a substantial or extensive impermissible benefit. Among other examples, the following, in appropriate circumstances, may constitute a severe breach of conduct …
>
> (f) Cash payment or other benefits provided by a coach, administrator or representative of the institution's athletics interests intended to secure, or which resulted in, enrollment of a prospective student-athlete …
>
> (h) Intentional violations or reckless indifference to the NCAA constitution and bylaws …

NCAA Division I Bylaw 19.1.1. (emphasis supplied).

Plaintiffs, here, were not properly classified and paid as employees under the FLSA because Defendants, *jointly*, refuse to allow it. *No* university – let alone the University of Pennsylvania – had unilateral discretion in the matter. *Defendants cannot credibly claim otherwise, and have offered no evidence to support such claim.*

D. Plaintiffs and the Proposed Student Athlete Collective Are Sufficiently Similarly Situated, under the FLSA, At This Stage

Rule 23 class action certification standards do not apply to a FLSA collective action such as this. No showing of numerosity, typicality, commonality and representativeness is required in a FLSA collective action. *See, e.g., Clugston v. Shamrock Cartage & Spotting Servs.*, No. 1:13-cv-01047-TWP-MJD, 2014 U.S. Dist. LEXIS 154547 at * 3-4 (S.D. Ind. Oct. 30, 2014). Defendants Duke University and Wake Forest University's reference to *DuRocher v. NCAA*,

1:13-cv-01570, 2015 U.S. Dist. LEXIS 41110 (S.D. Ind. Mar. 31, 2015) is irrelevant, both because *DuRocher* applies Rule 23 and it relates to concussions, a medical condition that is individualized by nature and not easily attributable to operation of a common policy or plan.

When certifying a FLSA collective action, a court need only determine whether members of the proposed class are similarly situated. District courts within this Circuit have held that similarly situated neither requires identical positions of the putative class members, nor common supervisor or workplace; instead it requires that common questions predominate. *Clugston*, 2014 U.S. Dist. LEXIS 154547 at * 6; *Kurgan v. Chiro One Wellness Ctrs. LLC*, No. 10-cv-1899, 2014 U.S. Dist. LEXIS 20255 at * 13 (N.D. Ill. Feb. 19, 2014).

Within the Seventh Circuit, courts typically use a two-step inquiry in determining whether a FLSA collective action should be conditionally certified. *Clugston*, 2014 U.S. Dist. LEXIS 154547 at * 4. In the first step, before discovery, the court considers pleadings, declarations and other documentation to determine if a class should be conditionally certified, to allow for class members to be identified and notified of opportunity to opt-in. "This first step does not impose a high burden on the plaintiff, who is only required to make a 'modest factual showing' that the class members were 'victims of a common policy or plan that violated the law.'" Id. at * 5. *See, also*, *Kurgan*, 2014 U.S. Dist. LEXIS 20255 at * 14 ("Where an apparent company-wide policy is behind the alleged FLSA violations, the plaintiff seeking certification for a company-wide class action should not be required to collect specific violations from each location or from each state before seeking authorization to provide notice to employees from all locations.") Moreover, "[a]t this stage, the court must accept as true the plaintiff's allegations and does not reach the merits of the plaintiff's FLSA claims." *Clugston*, 2014 U.S. Dist. LEXIS 154547 at * 5.

The second step occurs after discovery, and allows defendants the opportunity to seek decertification of the class, or restrict the class. If defendants so move, at this later stage, courts undertake a more stringent analysis on the record developed, considering: "(1) whether plaintiffs share similar or disparate factual and employment settings; (2) whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff; and (3) fairness and procedural concerns." *Id.* at * 5-6.

At this first stage, before discovery, Plaintiffs have more than met the lenient burden for conditional certification. It is indisputable that Plaintiffs, and all student athletes representing the Defendants, are "victims of a common policy or plan" to prohibit proper classification, and pay, as employees under the FLSA, as a function of the Defendants' mutual agreements and their uniform application of NCAA Bylaws. *Defendants cannot credibly claim otherwise, and have offered no evidence to support such claim.*

Plaintiffs, and the Proposed Student Athlete Collective, are similarly situated for purposes of this initial inquiry, before discovery. Defense counsel are well aware that the relief sought by Defendants is *premature*, at best.

Even under the more stringent Rule 23 class action certification standards, the district court in *O'Bannon* certified a broad class composed of student athletes across multiple NCAA members and sports, for purposes of injunctive relief. The *O'Bannon* court concluded that there is a single set of NCAA rules that prohibit compensation of student athletes for their names, images and likenesses, and a NCAA member school has no discretion to "opt-out," or fail to comply. The same, uniform application of NCAA Bylaws that prohibited compensation to student athletes in *O'Bannon* is implicated here.

In *O'Bannon*, the district court certified a class for purposes of injunctive relief only, in the absence of a manageable means to calculate representative damages taking into account the individualized valuation of name, image and likeness license rights. But, *here*, ultimate calculation of representative damages, i.e., back pay, is straightforward. Because NCAA Bylaws standardize the supervised hours of student athlete labor – i.e. Countable Athletically Related Activities, or CARA, hours – to 20 hours per week in playing season and to 8 hours per week in offseason, all that needs to be determined is an equitable hourly rate. *See, e.g., Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773 (7th Cir. 2013) ("when 'it appear[s] that the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program … the district court can award that relief without terminating the class action and leaving the class members to their own devices.")

III. DEFENDANTS' MOTION TO STRIKE CERTAIN ALLEGATIONS PURSUANT TO FED.R.EVID. 408 MUST BE DENIED BECAUSE DEFENDANTS *REJECTED* ANY SETTLEMENT DISCUSSIONS AND CONTINUE TO CLAIM DEFENSES THAT PLAINTIFFS HAVE A RIGHT TO REFUTE

Fed. R. Civ. P. 12 (f) provides that a court may strike "any redundant, immaterial, impertinent, or scandalous matter." Such motions strongly disfavored and infrequently granted by federal courts because of their potential to delay. *See* 5C Charles Wright & Arthur Miller, Federal Practice and Procedure §1380 (2004). Indeed, such motions "should be denied unless the challenge allegations have no possible relation or logical connection to the subject matter of the controversy and may cause some form of significant prejudice to one or more of the parties of the action." *Ormond v. Anthem, Inc.*, 1:05-cv-1908, 2009 U.S. Dist. LEXIS 1919, at *9-10 (S.D. Ind. Jan. 12, 2009).

Defendants' motion to strike certain allegations pursuant to Fed. R. Evid. 408 falls short on two counts.

First, the NCAA *rejected* the offer of pre-litigation settlement discussions, so *no* Fed. R. Evid. 408 settlement privilege ever attached. Indeed, there is *no* communication between the parties asserting or confirming that any communication, during the pre-litigation period, is to be covered by any such privilege.

Second, Defendants cannot claim prejudice, immateriality, or redundancy related to the Plaintiffs' refutation of DOL FOH § 10b03(e) in the Amended Complaint. In their 12(b)(6) motions, Defendants continue to heavily rely upon the lone reference in DOL FOH § 10b03(e) to "intramural and interscholastic athletics" to argue that NCAA regulated sports have *conclusively* been ruled out as "work." Of course, the Defendants cannot *bar* Plaintiffs from refuting this.

Thus, Defendants' motion to strike should be denied.

IV. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that Defendants' Motions to Dismiss and Strike be denied in their entirety.

Dated: June 11, 2015

Respectfully submitted,

By: s/Paul L. McDonald

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2015, I served the foregoing document on counsel by filing via the District Court CM/ECF system, which will send an email notice to all registered parties.

By: s/Paul L. McDonald (*pro hac vice*)

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