

No. 15-5753

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JAVON MARSHALL, STEVEN CLARKE, CHRIS CONNER, PATRICK MILLER, BYRON
MOORE, CHAZ MOORE, SEAN PARKER, ERIC SAMUELS, MARLON WALLS, AND
ROD WILKS,

INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

ESPN INC.; CBS BROADCASTING, INC., NATIONAL BROADCASTING COMPANY INC.;
ABC, INC.; FOX, INC.; IMG COLLEGE, LLC; ATLANTIC COAST CONFERENCE; BIG
TEN CONFERENCE; BIG 12 CONFERENCE; PACIFIC-12 CONFERENCE; SOUTHEASTERN
CONFERENCE; CONFERENCE USA; OHIO VALLEY CONFERENCE; BIG EAST
CONFERENCE; IMG WORLDWIDE, INC.; IMG COLLEGE, LLC; BIG TEN NETWORK
SERVICES, LLC; CBS COLLEGIATE SPORTS PROPERTIES, INC.; JMI SPORTS LLC;
TELESOUTH COMMUNICATIONS, INC., T3 MEDIA, INC.; ESPN INC. D/B/A SEC
NETWORK; SOUTHEASTERN CONFERENCE D/B/A SEC NETWORK; ESPN INC. D/B/A
LONGHORN NETWORK; IMG COLLEGE, LLC D/B/A LONGHORN NETWORK;
LEARFIELD SPORTS LLC; WILLIAM MORRIS ENDEAVORS, LLC,

Defendants-Appellees.

On Appeal from the United State District Court
for the Middle District of Tennessee

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument because it will afford the parties the opportunity to address any questions the Court may have about the voluminous record.

JURISDICTIONAL STATEMENT

The underlying Complaint alleges Defendants' unlawful use of Plaintiffs' names, images, and likenesses gives rise to violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 43 of the Lanham Act (15 U.S.C. § 1125(a)). The lower court enjoys subject matter jurisdiction over all federal claims pursuant to 28 U.S.C. §§ 1331 (federal question), 1337 (commerce and antitrust regulation), and 28 U.S.C. § 1338 (unfair competition regulation). The Complaint further asserted claims in excess of \$5 million for the unlawful use of Plaintiffs' NILs in national telecasts, in violation of Plaintiffs' rights under the Tennessee Personal Rights Protection Act and common law rights of publicity, as well as other claims for Civil Conspiracy, Unjust Enrichment, and for an Accounting under Tennessee law. So, the lower court had subject matter jurisdiction to hear the pendent state law claims under 28 U.S.C. § 1367 and 28 U.S.C. § 1332(d).

This appeal involves claims asserted by Plaintiffs under the Sherman Act, the Lanham Act, common law rights of publicity, TPRPA, and other Tennessee claims listed above. This Court enjoys subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1332(d), 1337, 1338, and 1367.

The Plaintiffs timely filed a notice of appeal on July 1, 2015. The court has jurisdiction to entertain this appeal of the lower court's final order dismissing the Complaint with prejudice. 28 U.S.C. § 1291.

INTRODUCTION

Plaintiffs, ten former college athletes, filed this lawsuit against the changing backdrop of collegiate athletics and rights of publicity. In filing this putative class action, Plaintiffs named the primary economic beneficiaries of the current college football and basketball business model: the broadcasting networks, major collegiate athletic conferences and licensing entities. While Defendants profit billions of dollars from college sports, Plaintiffs and thousands of other similarly situated college athletes are left to struggle near the poverty line. The commercialization of big-time college athletics has eroded the concept of the “student athlete,” and has, consequently, created a massive profit-making industry. The nature of college athletics has evolved from a system focused on the promotion of education and athletics to a multi-billion dollar enterprise. At the center of this enterprise are the names, images, and likenesses (“NILs”) of Plaintiffs and other college athletes.

Defendants cannot deny that the billions of dollars they make every year would be impossible without the commercial exploitation of Plaintiffs’ and other college athletes’ NILs. Plaintiffs and college athletes are left powerless to benefit from their own NILs due to Defendants’ conspiracy to set the amount college athletes are paid for their NILs at zero. Defendants’ unauthorized exploitation is exactly what the right of publicity protects against, as embodied in Tennessee’s

common law and the Tennessee Personal Rights Protection Act (“TPRPA”).

Given the fundamental shift in the essence of college sports, the implications of this case are far too important to warrant dismissal at the Rule 12(b)(6) stage.

In erroneously holding that the TPRPA has “supplanted” Tennessee’s common law Right of Publicity (“ROP”), the lower court has unintentionally harmed celebrities (and not just college athletes) who rely on Tennessee’s common law to protect their ROP in contexts beyond mere advertisements. As set forth below, Tennessee’s common law ROP historically has provided robust protection to entertainers and other celebrities, guarding against the unauthorized commercial exploitation of their NILs not only in advertisements but also in underlying products and services. Unless reversed, the lower court’s decision will destroy important safeguards that exist under Tennessee common law, leaving many individuals without any means of protecting against unauthorized use of their NILs in underlying products or services.

The lower court prematurely adopted the fair use sports broadcast defense found in the TPRPA, as urged by Defendants. As set forth below, this defense involves mixed questions of fact and law that are often better left for a jury, and certainly are not ripe for review at the motion to dismiss stage.

In erroneously dismissing Plaintiffs’ false endorsement claim, the lower court ignored facts pleaded in the Complaint that, if proved, would entitle Plaintiffs

to relief under the Lanham Act. Further, the lower court inserted its own opinion on consumer confusion – the ultimate question of fact in all Lanham Act false endorsement claims.

Defendants' unauthorized commercial exploitation of Plaintiffs' NILs has deprived Plaintiffs of the power to benefit from their own ROPs due to Defendants' conspiracy to set at zero the amount college athletes are paid for use of their NILs. The Ninth Circuit's recent decision in O'Bannon v. National Collegiate Athletic Ass'n, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015), held the NCAA's rules, which prohibit student athletes from receiving commercial compensation while participating in intercollegiate athletics, are subject to the Sherman Act. Defendants' agreements with the NCAA, which take advantage of the NCAA rules prohibiting compensation and do not compensate Plaintiffs for the value of their NILs, are similarly subject to antitrust scrutiny.

Finally, the lower court erroneously held that, in light of the foregoing claims being dismissed, Plaintiffs' remaining claims also must be dismissed. As set forth below, it was error for the lower court to dismiss Plaintiffs' claims of civil conspiracy, unjust enrichment and accounting.

STATEMENT OF THE ISSUES

1. Did the lower court apply the incorrect legal standard in dismissing the Complaint?

2. Did the lower court err in concluding that the Tennessee Personal Rights Protection Act supplants the right of publicity existing under Tennessee common law?

3. Did the lower court err in concluding that Plaintiffs failed to state a right of publicity claim under both Tennessee's common law and the TPRPA?

4. Did the lower court err in concluding that Plaintiffs failed to state a claim for false endorsement under the Lanham Act?

5. Did the lower court err in concluding that Plaintiffs fails to state a claim for the remaining causes of action?

6. Did the lower court err in not allowing Plaintiffs to amend their Complaint?

STATEMENT OF THE CASE

On October 3, 2014, Plaintiffs filed this class action lawsuit against Defendants for infringement of their rights of publicity under Tennessee law, false endorsement under the Lanham Act, antitrust violations, and other related causes of action. In filing suit, Plaintiffs grouped Defendants into three categories: Broadcast Defendants, Conference Defendants, and Licensing Defendants.¹ On December 10, 2014, each of the three Defendant groups filed a motion to dismiss, asserting that Plaintiffs failed to state a claim upon which relief could be granted.

¹ Plaintiffs did not sue the NCAA.

With respect to Plaintiffs' ROP claims, the motions to dismiss hinged primarily upon Defendants' arguments that they have not violated Plaintiffs' ROPS because: (1) the TPRPA has supplanted Tennessee's common law right of publicity; and (2) the sports broadcast defense protects them from liability under the TPRPA. Plaintiffs demanded a jury.

Also on December 10, 2014, Defendants collectively filed a motion to stay discovery pending resolution of Defendants' Motions to Dismiss. (RE224, Motion to Stay, PID#1269). Plaintiffs opposed the motion to stay, arguing among other things that the motions to dismiss contained questions of fact that would prejudice Plaintiffs without an opportunity to conduct discovery. (RE243, Response to Motion to Stay, PID#1667-75). After a hearing on the motion to stay at the initial case management conference, the lower court granted the motion and stayed discovery. (RE255, Order Granting Stay, PID#1865-66).

On February 20, 2015, Plaintiffs filed a timely response in opposition to Defendants' motions to dismiss. (RE 257-259). On April 13, 2015, the matter came before the lower court for oral argument. (RE 255, Order, PID#1865). At the hearing, Plaintiffs' counsel played a portion of a Defendant's telecast that captured a college athlete preparing to shoot a free-throw during the NCAA basketball tournament, in which an advertisement for an upcoming prime-time television show appeared at the bottom of the screen. (RE280, Transcript, PID#2554). On

June 4, 2015, the lower court entered an Order granting Defendants' Motions to Dismiss, adopting Defendants' arguments and dismissing all seven causes of action with prejudice. (RE 285, Order, PID#2660). In connection with the Order, the lower court issued a Memorandum. (RE 288, Memorandum, PID#2663-2695). On July 1, 2015, Plaintiffs timely filed a Notice of Appeal. (RE 289, Notice of Appeal, PID#2696).

The Complaint alleges facts that, if proved true, entitle Plaintiffs to relief under the causes of action asserted. As set forth in the Complaint, Defendants commercially exploit Plaintiffs' NILs without permission. (RE1, Complaint, PID#2). The most obvious use of Plaintiffs' NILs is the telecast of Plaintiffs' games in their entirety. (Id. at ¶1). Defendants' misappropriation of Plaintiffs' NILs also extends to advertisement for both upcoming games, non-collegiate sporting events (e.g., NASCAR, PGA events and NFL games) and non-sports related products. For example, the Complaint states certain Defendants use college athletes' NILs "to promote and advertise each other's programming, including even programming that is non-sports related (such as prime-time television shows)." (Id. at ¶ 33). The Complaint also alleges the telecasts of specific nationally televised games in which the named Plaintiffs have played. (Id. at ¶¶ 11-20).

In dismissing this action, the lower court failed to read these factual allegations of the Complaint in the light most favorable to Plaintiffs. Instead, the lower court read them in the light *least* favorable to Plaintiffs and substituted its own opinion on ultimate issues of fact, such as consumer confusion. As demonstrated below, the Complaint sets forth adequate and plausible factual allegations – allegations that the lower court ignored. The lower court’s dismissal of the Complaint therefore runs afoul to the well-established legal standard that all factual allegations in a complaint “*must* be presumed to be true, and reasonable inferences *must* be made in favor of the non-moving party.” Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, 552 F.3d 430, 434 (6th Cir. 2008) (emphasis added). The lower court also erred in prematurely determining mixed questions of law and fact, specifically whether Defendants’ conduct falls within the scope of the First Amendment defense and the sports broadcast defense. Plaintiffs, having pleaded sufficient facts entitling them to relief, are entitled to move past the motion to dismiss stage. Therefore, the lower court must be reversed.

STANDARD OF REVIEW

This Court applies a *de novo* standard when reviewing orders dismissing a case under Rule 12(b)(6). See, e.g., Tackett v. M&G Polymers USA, LLC, 561 F.3d 478, 481 (6th Cir. 2009); Gunasekera v. Irwin, 551 F.3d 461, 465-66 (6th Cir.

2009). “When a court reviews an issue under a *de novo* standard of review, the court is determining questions of fact and law as though the reviewing court was the original trial court” Bd. of County Comm’rs v. L. Robert Kimball & Assocs., 860 F.2d 683, 686 (6th Cir. 1988).

On a motion to dismiss, the reviewing court must liberally construe the Complaint, presume that all factual allegations therein are true, and make reasonable inferences in favor of the non-moving party. Total Benefits Planning Agency, Inc., 552 F.3d at 434. The Complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level,” and must “state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). Nevertheless, “[t]he plausibility standard is not akin to a ‘probability requirement. . . .’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556). Furthermore, a court may use its “judicial experience and common sense” to draw reasonable inferences from a complaint. Keys v. Humana, Inc., 684 F.3d 605, 610 (6th Cir. 2012) (quoting Iqbal, 556 U.S. at 678).

To survive a motion to dismiss, a complaint simply need only allege a “short and plain statement” of the claims to demonstrate that a plaintiff is “entitled to relief.” Gunasekera, 551 F.3d at 466 (citing Erickson v. Pardus, 551 U.S. 89, 93 (2007)). In cautioning against reading Twombly and Iqbal “so narrowly as to be

the death of notice pleading,” this Court has recognized “the continuing viability of the ‘short and plain’ language of Federal Rule of Civil Procedure 8.” HDC, LLC v. City of Ann Arbor, 675 F.3d 608, 614 (6th Cir. 2012). Post Twombly/Iqbal, this Court has held “[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the ground upon which it rests.” Keys, 684 F.3d at 608. Notably, where a district court has required a plaintiff to plead detailed factual content, such as dates and names, this Court has held that such a requirement wrongly disregards the continuing viability of Rule 8’s “short and plain” language requirement and constitutes error. See Rhodes v. R & L Carriers, Inc., 491 F. App’x 579, 583-84 (6th Cir. 2012).

SUMMARY OF THE ARGUMENT

The lower court not only failed to adhere to the standards prescribed under Rules 8 and 12 of the Federal Rules of Civil Procedure, but it also misinterpreted and misapplied the statutory and case authorities applicable to Plaintiffs’ claims. The Plaintiffs properly pleaded claims for violations of the common law right of publicity and TPRPA, but the court ignored key allegations in the Complaint and well established rules of statutory construction prescribed by the Tennessee Supreme Court. In doing so, the court, *sua sponte*, eliminated the common law right of publicity in Tennessee, and in the process, set into motion unintended consequences that will have effects beyond college sports. In dismissing

Plaintiffs' Lanham Act claim, the Court not only failed to apply the proper Rule 12 standard, but also substituted its own judgment for the jury as finder of fact to reach a conclusion on a key element of that claim. The lower court also conferred on Defendants a First Amendment defense to the Lanham Act, a holding which was premature at the Rule 12 stage and based on a misreading of applicable First Amendment precedent. Finally, the court improperly dismissed Plaintiffs' antitrust claim under the Sherman Act. Reversal of the lower court is warranted.

ARGUMENT

I. PLAINTIFFS' COMPLAINT STATES A CLAIM FOR RIGHT OF PUBLICITY VIOLATIONS UNDER BOTH TENNESSEE COMMON LAW AND THE TPRPA.

A. The Scope of the ROP In Tennessee.

Only the law of Tennessee controls questions involving the Tennessee common law ROP. See State ex rel. Elvis Presley Int'l Mem. Foundation v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987). Tennessee has long recognized both a common law and a statutory right of publicity. Tennessee's statutory right of publicity is embodied in the TPRPA and is narrower than its common law counterpart, confined to protecting against unauthorized use of NILs in the *context of advertisements*. See Polygram Records, Inc. v. Legacy Entertainment Group, LLC, 205 S.W.3d 439, 447 (Tenn. Ct. App. 2006). Not codified until 1984, the TPRPA grants every individual a "property right in the use of that person's name, photograph, or likeness in any medium in any manner." Tenn. Code Ann. § 47-25-

1103(a). To state a right of publicity claim under the TPRPA, a Plaintiff must plead that the Defendant has knowingly used the Plaintiff's "name, photograph, or likeness in any medium, in any manner directed to any person other than [plaintiff], as an item of commerce for purposes of advertising products, merchandise, goods, or services . . . without [plaintiff's] consent." Tenn. Code Ann. § 47-25-1105(a). Here, Plaintiffs do not contest the scope of Tennessee's statutory right of publicity; its application, by its own terms, is limited to advertisements. As alleged in the Complaint, Defendants exploit Plaintiffs' NILs in traditional advertisements; Defendants' telecasts, themselves, are also used as advertisements. (RE1, Complaint, PID#30).

On the other hand, the Tennessee common law right of publicity is a well-recognized and longstanding property right that, unlike its statutory counterpart, is not limited to advertisements. See Polygram Records, 205 S.W.3d at 447.

Tennessee's common law right of publicity existed *before* the enactment of the TPRPA. See Crowell, 733 S.W.2d at 95-99 (explaining that courts in Tennessee had "recognized the existence of [a] right of publicity" under Tennessee common law by at least 1977, seven years earlier than the enactment of the TPRPA).

Further, the TPRPA's *express terms* reveal the Tennessee General Assembly's intent to preserve the preexisting common law right of publicity as a separate cause of action, as the TPRPA states: "the remedies provided for in this section *are*

cumulative and shall be in addition to any other provided for by law.” Tenn. Code Ann. § 47-25-1106(e) (emphasis added).

As demonstrated in Polygram Records, the common law right of publicity is not limited to advertisements, but rather extends protection to all types of unauthorized commercial use. See 205 S.W.3d at 447 (holding that the Tennessee common law right of publicity extends to protect individuals against unauthorized commercial exploitation of performances and thus belonged to the heirs of Hank Williams). Like Hank Williams’ performances in the music studio, Plaintiffs’ performances on the field of play are themselves exploited. As expressed in Polygram Records, the common law right of publicity is intended to provide individuals, such as Plaintiffs, with a legal avenue by which they can protect the value of their NILs from being exploited without their consent. As alleged in the Complaint, Defendants infringed Plaintiffs’ ROPs under Tennessee common law by airing games that exploit Plaintiffs’ NILs without their permission.

Courts have concluded that Tennessee’s common law protects against the unauthorized exploitation of NILs in both advertisements and underlying products. The first Elvis Presley right of publicity case originating in Tennessee held that Tennessee’s common law right of publicity protects individuals from infringement of NILs beyond the context of advertisements. Memphis Development Foundation v. Factors, Etc. Inc., 441 F. Supp. 1323, 1330 (W.D. Tenn. 1977), rev’d on other

grounds, 616 F.2d 956, 958 (6th Cir. 1980). In that case, the Western District of Tennessee, operating under Tennessee's common law right of publicity, issued an injunction prohibiting the unauthorized manufacturing, selling or distribution of any statuette bearing the NIL of Elvis Presley. Id.

A leading ROP case in Tennessee, State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell, also lends support to the conclusion that the protection afforded by Tennessee's common law right of publicity is not confined to use in advertisements. 733 S.W.2d 89 (Tenn. Ct. App. 1987). In that case, the Tennessee Court of Appeals held that Tennessee's common law ROP is descendible. Id. There, where the underlying use was Presley's NIL in a foundation's name, the court recognized that Tennessee's common law ROP empowers individuals to control the commercial use of their NILs beyond advertisements, as the use at issue in that case was Elvis Presley's NIL in a corporate name, not an advertisement. Id.

B. The Lower Court Erred In Dismissing The Common Law ROP CLAIM And In Holding That The Common Law Has Been Supplanted By The TPRPA.

1. Tennessee's Common Law ROP is Broader than the TPRPA.

As explained above, Tennessee's common law right of publicity provides Plaintiffs with broader protection than its statutory counterpart and is not limited to advertisements. See Polygram Records, 205 S.W.3d at 445. Under the common

law, Tennessee “recognizes the property right in the use of one’s name, photograph or likeness.” Id. The Tennessee Court of Appeals has explained the broad nature of the common law right of publicity, stating:

[T]he recognition of individual property rights is deeply embedded in our jurisprudence. These rights are recognized in Article I, Section 8 of the Tennessee Constitution and have been called ‘absolute’ by the Tennessee Supreme Court...In its broadest sense, property includes all rights that have value. It embodies all the interest a person has in land and chattels that are capable of being possessed and controlled to the exclusion of others. Chattels include intangible personal property such as choses in action or other enforceable rights of possession ...*Tennessee’s common law thus embodies an expansive view of property.* Unquestionably, a celebrity’s right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible property.

Crowell, 733 S.W.2d at 96-97 (emphasis added).

Here, throughout the Complaint, Plaintiffs allege that Defendants have exploited Plaintiffs’ and college athletes’ ROPs through the broadcasting and licensing of Plaintiffs’ and college athletes’ NILs without their consent in both advertisements and the telecasts of underlying games. To establish violation of the ROP under Tennessee common law, a plaintiff need only show that the defendant has commercially exploited his or her NIL without permission. Id. at 81. There are no cases that even mention any sports broadcast defense to the expansive ROP under Tennessee common law. Therefore, Plaintiffs have sufficiently pleaded violations under the Tennessee common law to survive dismissal at the Rule 12 stage.

2. The Guy Test Articulated by the Tennessee Supreme Court.

In Tennessee, a later-enacted statute does not replace or narrow preexisting common law unless that statute expressly states so. In finding that TPRPA *implicitly* supplanted Tennessee's common law, the lower court ignored centuries of Tennessee law precedent governing the relationship between pre-existing common law rights and subsequently-passed statutes. Leach et al. v. Rich, 196 S.W. 138, 140 (Tenn. 1917) (“a statute creating a new remedy without expressly repealing the old remedy is merely *cumulative*, and will not deprive a court of its jurisdiction to enforce the old remedy”) (emphasis added).

The Tennessee Supreme Court has continuously held that Tennessee common law cannot be supplanted or abrogated by implication. Guy v. Mutual of Omaha Ins., Co., 79 S.W.3d 528, 536 (Tenn. 2002). In Tennessee, where a common law right exists and a statutory remedy is subsequently created, the statutory remedy is cumulative “absent language showing that [it is] intended to be exclusive.” Id. “While the General Assembly possesses the authority to abrogate the common law by statute, . . . the ‘rules of the common law are not repealed by implication, and if a statute does not include and cover such a case, it leaves the law as it was before its enactment.’” Id. (quoting Lavin v. Jordon, 16 S.W.3d 362, 368 (Tenn. 2000)). Moreover, where “key distinctions” exist between the common

law and statute, such facts “further indicat[e] the cumulative, rather than the preemptive, nature of the statutory remedy.” Id. at 537.

In 2015, the Tennessee Supreme Court reaffirmed and implemented the instructions it set forth in Guy for determining whether preexisting common law has been supplanted by statute. See Haynes v. Formac Stables, 463 S.W.3d 34, 37 (Tenn. 2015). There the General Assembly amended the whistleblower statute to expressly state that it abrogates and supersedes the common law tort of retaliatory discharge. As the Tennessee Supreme Court explained:

In 2014, the General Assembly added the following provision to the [Tennessee Public Protection Act]: “This section abrogates and supersedes the common law with respect to any claim that could have been brought under this section.” Tenn. Code Ann. § 50-1-304(g). This provision “appl[ies] to all actions accruing on or after [July 1, 2014].”

Id. at n.2. Until the common law was expressly abrogated by statute, however, the statute and common existed side by side, with separate elements, defenses and remedies. See id. at 37. Read together, Guy and Haynes reaffirm that only the General Assembly can abrogate common law.

In Tennessee, the ROP under Tennessee common law preexisted enactment of the TPRPA. By at least 1977, courts in Tennessee had “recognized the existence of [a] right of publicity” under Tennessee common law. See Crowell, 733 S.W.2d at 95-97. Despite its presumed awareness under the law of the pre-existing common law right of publicity, Guy, 79 S.W.3d at 536, the General

Assembly included no express language abrogating the common law when it enacted the TPRPA seven years later in 1984. In fact, the TPRPA states that the remedies it provides “are cumulative and shall be in addition to any others provided for by law.” Tenn. Code Ann. § 47-25-1106(e).

In contrast with the TPRPA, other Tennessee statutes include express abrogation language. See, e.g., Tenn. Code Ann. § 50-1-304(g) (“This section abrogates and supersedes the common law with respect to any claim that could have been brought under this section”); Tenn. Code Ann. § 66-1-207 (“This part supersedes the common law rule against perpetuities in this state”). No similar language exists in the TPRPA.

3. The Lower Court Failed to Follow the Tennessee Supreme Court.

Instead of conducting the analysis required by Guy, the court decided the common law had been supplanted by the TPRPA. It cited two reasons. First, it pointed to *dicta* in two *federal* cases as authority that the ROP under Tennessee common law and under the TPRPA are “co-extensive,” determining that “co-extensive” means “supplant” rather than “co-exist.” (RE288, Memorandum, PID#2670-71) (citing Gauck v. Karamaian, 805 F. Supp. 2d 495, 500 n.5 (W.D. Tenn. 2011) and Moore v. Weinstein Co., LLC, No. 3:09-CV-00166, 2012 WL 1884758, at *30 (M.D. Tenn. May 23, 2012) (unpublished)). Neither undertook the analysis required by Guy and both are in error in narrowing the common law.

Furthermore, the issue of whether the common law right of publicity was supplanted by the TPRPA was not an issue in either case.

Second, the lower court implied that a conflict exists between the TPRPA and the common law, but never articulated the reason. (Id. at 9). Presumably, it is because the TPRPA includes a sports broadcast defense and the common law does not. The lower court cited House v. Edmondson, 245 S.W.3d 372, 380 n.7 (Tenn. 2008), for the proposition that “[w]hen there is a conflict between the common law and a statute, the provision[s] of the statute must prevail.” (RE288, Memorandum, PID#2671). But House lends no support to the lower court’s finding because statutory abrogation of the common law in question there “was explicit and intended by the legislature.” Id. at 380 n.7.

Had the lower court undertaken the Guy analysis, it would have reached the only possible conclusion here: that Tennessee’s preexisting common law ROP has not been supplanted by the TPRPA.

Here, the express terms of the TPRPA reveal the legislature’s intent to preserve the common law right of publicity. The statute includes no express abrogation language. Instead, it states that “the remedies provided for in this section *are cumulative and shall be in addition to* any others provided for by law.” Tenn. Code Ann. § 47-25-1106(e) (emphasis added). No further analysis is

required on this point, as “[the] primary task in construing a statute is to give effect to the intent and purpose of the General Assembly” Guy, 79 S.W.3d at 536.

Moreover, key distinctions between a common law right and a corresponding statute further support the conclusion that the common law survives enactment of a statute. Id. Here key distinctions exist. For example, the TPRPA explicitly provides renewable 10-year periods after the individual’s death during which the right of publicity can remain exclusive to the individual’s heirs and assigns, whereas the common law does not. See Tenn. Code Ann. § 47-25-1104. The TPRPA explicitly provides a mechanism for terminating the exclusive right to commercially exploit an individual’s NIL after death, while the common law does not. Id. at § 47-25-1104(b). Unlike the common law, the TPRPA provides criminal penalties for violations, in addition to civil remedies. Id. at § 47-25-1105(b). The TPRPA specifies that successful plaintiffs who are members of the armed forces are entitled to recover treble damages and attorneys’ fees, whereas no similar enhancement is found in the common law. Id. at § 47-25-1106(d)(2). Still another key distinction between the common law and the TPRPA is that the TPRPA includes a sports broadcast defense, while Tennessee common law does not. Id. at § 47-25-1107(a). The legislative intent to create an independent statutory right of publicity is even clearer here than it was in Guy because the

statute itself declares that it is cumulative to the common law, which explains why key differences exist here. Id. at § 47-25-1106(e).

The lower court criticized Plaintiffs for failing to cite “authority for the proposition that participants in sporting events have a right to publicity under the common law.” (RE288, District Court Memorandum, PID #2672). But the absence of a prior case dealing with college athletes’ rights of publicity is not grounds for dismissal. See Hodge v. Craig, 382 S.W.3d 325, 337 (Tenn. 2012).

“While the law must be stable it cannot stand still.” Id. (citation omitted).

“Accordingly, the common law is evolutionary[;] . . . [and it is] flexible enough to adapt to the emerging conditions of society.” Id. Explaining the foundations of Tennessee’s common law right of publicity, the Tennessee Court of Appeals has noted that “Tennessee’s common law tradition, far from being static, continues to grow and to accommodate the emerging needs of modern society.” Crowell, 733 S.W.2d at 93. Tracing the right of publicity to its roots in the right of privacy and to the “now famous 1890 law review article” written by Samuel Warren and Louis Brandeis, the court explained:

Writing in 1890, Warren and Brandeis could not have foreseen today’s commercial exploitation of celebrities. They did not anticipate the changes that would be brought about by the growth of the advertising, motion picture, television and radio industries. American culture outgrew their concept of the right of privacy and soon began to push the common law to recognize and protect new and different rights and interests.

Id. at 94.

The lower court's criticism of Plaintiffs' inability to cite prior case law with the exact same fact pattern is contrary to the governing principles of common law, as Tennessee courts "should not and must not close their doors to changing conditions." Hodge, 382 S.W.3d at 337 (quoting Metropolitan Gov't of Nashville & Davidson Cnty. v. Poe, 383 S.W.2d 265, 277 (Tenn. 1964)). Under such flawed rationale, if a prior case does not contain the precise facts at issue in a later case, then all common law claims brought in later cases would fail. This logic runs counter to the very purpose and bedrock principles of common law.

Finally, the lower court's decision improperly narrows Tennessee's broad common law ROP, which for decades has protected against unauthorized commercial exploitation of celebrities' NILs in underlying products and services, not just advertisements. In 1987, the Tennessee Court of Appeals noted the importance of Tennessee's robust common law ROP to celebrities and entertainers. In doing so, it provided multiple examples, all of which focus on protecting celebrities' ROPs in the context of the underlying product:

It would be difficult for any court today, especially one sitting in Music City U.S.A. practically in the shadow of the Grand Ole Opry, to be unaware of the manner in which celebrities exploit the public's recognition of their name and image. The stores selling Elvis Presley tee shirts, Hank Williams, Jr. bandannas or Barbara Mandrell satin jackets are not selling clothing as much as they are selling the celebrities themselves. We are asked to buy the shortening that makes Loretta Lynn's pie crusts flakier or to buy the same insurance that

Tennessee Ernie Ford has or to eat the sausage that Jimmy Dean makes.

Crowell, 733 S.W.2d at 94. Many of the above examples involve the common law ROP in the context of underlying products and services, in addition to in the context of advertisements.

Unless reversed, the lower court's decision would strip celebrities of important rights to prevent and limit their ability to recover for the unauthorized use of their NILs, similar to the above examples. Imagine the following example: a country music star's image is being offered for sale on bootlegged/counterfeit merchandise in Tennessee without the celebrity's permission. There are no related advertisements, just the merchandise itself. The image was created by a third party, and the celebrity has no rights to the image as the author or assignee, and therefore lacks standing to sue for copyright infringement. See Warner/Chappell Music, Inc. v. Blue Moon Ventures, No. 3:10-1160, 2011 WL 662691, at *3 (M.D. Tenn. Feb. 14, 2011) (unpublished) (explaining that "a party must have some ownership rights over at least part of the exclusive right for which he wishes to sue" under copyright); ATC Distribution Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 705 (6th Cir. 2005) (citing 17 U.S.C. §§ 106 & 501(b)). Similarly, "as a general rule, [since] a person's image or likeness cannot function as a trademark," he cannot use the Trademark Act to sue for counterfeit goods or trademark infringement. See ETW Corp. v. Jireh Pub., Inc.,

332 F.3d 915, 922 (6th Cir. 2003). In the same way, the Tennessee right of publicity statute provides no avenue for relief, since it is limited to advertisements. The only means to enjoin such activity and to recover damages is the right of publicity under Tennessee common law. In light of the lower court's decision, however, the celebrity cannot use the common law ROP to stop the unauthorized merchandise or to recover damages. The merchandise will continue to be sold, and the celebrity is now left without an adequate means to enjoin it.

C. The Lower Court Erred in Dismissing Plaintiffs' TPRPA Claim.

As referenced above, the TPRPA provides, in pertinent part:

Any person who knowingly uses or infringes upon the use of another individual's name, photograph or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce . . . without such individual's prior consent . . . shall be liable to a civil action.

Tenn. Code Ann. § 47-25-1105(a). The TPRPA also includes the following fair use defense: "It is deemed a fair use and no violation of an individual's rights shall be found, for purposes of this part, if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account." *Id.* at § 47-25-1107(a).

Looking at nothing more than the above two sections of the TPRPA, the lower court concluded: "Thus, the TPRPA clearly confers no right of publicity in sports broadcast, or with respect to any advertisement if the advertisement is in

connection with such a broadcast.” (RE288, Memorandum, PID#2676). In so doing, the lower court found that Defendants are protected against liability for *all* advertisements in which Plaintiffs’ NILs appear “in connection” with *any* sports broadcast. (RE288, Memorandum, PID#2767) (citing the TPRPA’s fair use sports broadcast defense, Tenn. Code Ann. § 47-25-1107(a)). Additionally, the lower court found that, to the extent Defendants use Plaintiffs’ and college athletes’ NILs to advertise products *unrelated* to sports broadcasts, Plaintiffs failed to plead “specific facts which show that any of their names, images, or likenesses have been used in any advertisement, nor do they specify which Defendant(s) created and placed the advertisement, or in what medium it was placed.” (RE288, Memorandum, PID#2767).

In dismissing the TPRPA claim, the lower court erred by: (1) prematurely deciding that the fair use sports broadcast defense applies to all of Defendants’ misconduct, and (2) applying the incorrect standard under Rule 12.

1. The Fair Use Sports Broadcast Defense Requires A Developed Record.

In the context of the right of publicity, “[f]air use is a doctrine, grounded in First Amendment free speech protections, that has applications in connection[] with both copyright and trademark claims.” WESTON ANSON, RIGHT OF PUBLICITY: ANALYSIS, VALUATION, AND THE LAW 55 (2015). The sports broadcast defense found within the TPRPA is part of a larger fair use defense that includes news and

public affairs. See Moore v. Weinstein Co. LLC, No. 3:09-0166, 2010 WL 8913520, at *12 (M.D. Tenn. May 12, 2010) (unpublished). Moore is a case that was heavily relied on by Defendants and which the lower court found to be persuasive. As Moore explains, the case law and TPRPA “stand[] for the proposition that, when a likeness is exploited in the entertainment context, the court must balance the [fair use] First Amendment interests with the individual’s interest in protecting his or her property right.” Id. Like all fair use defenses, “First Amendment rights are *not absolute*. In certain circumstances, the interests protected by the First Amendment will inevitably conflict with another individual’s right of publicity.” Apple Corps Ltd. v. ADPR, Inc., 843 F. Supp. 342, 346 (M.D. Tenn. 1993) (emphasis added) (quoted in Moore, 2010 WL 8913520, at *12). Similar to other fair use defenses, “the First Amendment values of free speech are *balanced on a case-by-case basis* against the right of publicity values.” Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 926 (N.D. Ohio 2004) (emphasis added) (quoted in Moore, 2010 WL 8913520, at *12). Against this backdrop, the court in Moore denied the Rule 12(b)(6) motion to dismiss, explaining:

it is not enough for the defendants to simply assume that a “life story” about Mr. Moore would be protected speech. The plaintiffs do not allege that the defendants have told Moore’s life story; rather they allege that, through the Movie-related products, they have exploited and distorted Moore’s image for commercial gain. In light of this more nuanced reality, *additional discovery and fact gathering is necessary* to determine if the plaintiffs’ rights under the TPRPA were violated or whether the defendants’ use of any likenesses of Mr.

Moore is protected by the First Amendment.

2010 WL 8913520, at *12 (emphasis added).

Whether a fair use defense can be used successfully to defend against a right of publicity claim is a mixed question of law and fact. See also Browne v. McCain, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009) (examining fair use in the analogous context of copyright law). “[I]n light of a court’s narrow inquiry at this stage and limited access to all potentially relevant and material facts needed to undertake the analysis, courts rarely analyze fair use on a 12(b)(6) motion.” Id. (citing Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997)). Here, the lower court erred by failing to first establish the factual record needed to determine the applicability of the fair use sports broadcast defense to the particular conduct in question.

2. The Court Applied The Incorrect Standard Under Rule 12.

In dismissing the TPRPA claim, the lower court applied a more stringent pleading standard than required, ignored facts that were pleaded in the Complaint, failed to read the Complaint in the light most favorable to Plaintiffs, and failed to apply its judicial experience and common sense to draw reasonable inferences from the Complaint.

The lower court criticized Plaintiffs for failing to “demonstrate[] a causal connection between the defendants’ use of their persona and a direct, non-

incidental benefit to the defendants from that use.” (RE288, Memorandum, PID#2676) (quoting Gauck, 805 F. Supp. 2d. at 502). The lower court also criticized Plaintiffs’ Complaint for failing to suggest that Defendants used Plaintiffs’ likenesses for advertising or endorsement purposes. Id. (citing McKee v. Meltech, Inc., No.10-2730, 2011 WL 1770461, at *12 (W.D. Tenn. May 9, 2011). But even a cursory glance at the Complaint upends both of these criticisms; throughout the Complaint, Plaintiffs pleaded that Defendants have conspired with each other to commercially exploit college athletes’ NILs without permission to generate millions of dollars in annual revenue.

More specifically, the lower court erred by demanding a higher pleading standard than required by the Supreme Court. In cautioning against reading Twombly and Iqbal “so narrowly as to the death of notice pleading,” this Court has recognized “the continuing viability of the ‘short and plain’ language of Federal Rule of Civil Procedure 8.” HDC, 675 F.3d 608 at 614. Notably, where a district court has required a plaintiff to plead detailed factual content, such as dates and names, this Court has held that such a requirement wrongly disregards the continuing viability of Rule 8’s “short and plain” language requirement and constitutes error. See Rhodes v. R & L Carriers, Inc., 491 F. App’x 579, 583-84 (6th Cir. 2012).

The lower court also erred by ignoring specific facts pleaded in the Complaint concerning Defendants' unauthorized commercial exploitation of Plaintiffs' NILs, where Plaintiffs included examples of specific games that were nationally televised. For example, paragraph 11 of the Complaint alleges that Plaintiff Javon Marshall "started in every game of his junior and senior year" and in 2012 "played against North Carolina State in the nationally televised Franklin American Mortgage Music City Bowl." (RE1, Complaint, PID#5). The Complaint also provides additional specifics, alleging that Plaintiff Eric Samuels "led his team to the nationally televised Autozone Liberty Bowl." (RE1, Complaint, PID#5).

The Complaint includes additional allegations of specific games, all of which were televised by at least one of the Broadcast Defendants. For example, Paragraph 33 states Defendants ABC and ESPN "use the underlying college football and basketball games to promote and advertise each other's programming, including even programming that is non-sports related (such as prime-time television shows)." (RE1, Complaint, PID#5). In addition, paragraphs 1, 66, 178, 181, and 182 all allege that Defendants use Plaintiffs' and college athletes' NILs in advertisements. (RE1, Complaint, PID#2, 15, 35, 36). Viewed in the light most favorable to Plaintiffs, these allegations sufficiently plead a statutory right of publicity claim.

To illustrate the above factual allegations, at the hearing on the motion to dismiss Plaintiffs' counsel showed a video clip of a college basketball game where a Broadcast Defendant used the NILs of college basketball players' in an unrelated advertisement for one of its prime-time television shows, *CSI Cyber*. (RE280, Transcript, PID#2554). Here, the lower court ignored facts that were pleaded and failed to draw reasonable inferences in favor of Plaintiffs from the Complaint, common sense and judicial experience. The Complaint and all reasonable inferences justify Plaintiffs being permitted to engage in discovery and fact gathering to determine if Plaintiffs' and college athletes' TPRPA rights were violated. As this Court has held, "[w]hen an allegation is capable of more than one inference, it must be construed in the plaintiff's favor . . . Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." See Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995). Here, the lower court erroneously departed from this rule, warranting reversal.

These circumstances, in conjunction with the Complaint's allegations that Defendants have used college athletes' (including Plaintiffs') NILs in advertisements, more than satisfy this Court's requirements sufficient to withstand dismissal on insufficient pleading grounds. For all the reasons stated above, the

lower Court's order dismissing Plaintiffs' TPRPA right of publicity claims should be reversed.

D. Tennessee's Common Law Continues to Evolve.

The lower court criticized Plaintiffs for failing to cite “authority for the proposition that participants in sporting events have a right to publicity under the common law.” (RE288, District Court Memorandum, PID #2672). But the absence of a prior case dealing with college athletes' rights of publicity is not grounds for dismissal. See Hodge, 382 S.W.3d at 337. “While the law must be stable it cannot stand still.” Id. (citation omitted). “Accordingly, the common law is evolutionary.” Id. The common law is “flexible enough to adapt to the emerging conditions of society.” Id. Here, the lower court erroneously accepted Defendants' argument that the absence of prior case law with the exact same fact pattern alleged in the Complaint equates to no cause of action. This rationale is contrary to the governing principles of common law, as Tennessee courts “should not and must not close their doors to changing conditions.” Id. (citing Metropolitan Gov't of Nashville & Davidson Cnty. v. Poe, 383 S.W.2d 265, 277 (Tenn. 1964)). Under such flawed rationale, if a prior case does not contain the precise facts at issue in a later case, then all common law claims brought in later cases would fail. This logic runs counter to the very purpose and bedrock principles of common law.

E. Of The Cases Outside Tennessee, O'Bannon Is Most Persuasive.

Circumventing the mandatory principles set forth in Guy, the lower court relied on inapposite cases from jurisdictions outside Tennessee, none of which involved rights of publicity arising under Tennessee law, to support its conclusion that Plaintiffs have no rights of publicity in their NILs when exploited in the context of a sporting event. (RE288, Memorandum, PID#2673) (citing Dryer v. Nat'l Football League, 55 F. Supp. 3d 1181 (D. Minn. 2014); National Football League v. Alley, Inc., 624 F. Supp. 6 (S.D. Fla. 1993); and Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307 (Cal. App. 2001)). The question of whether *college* athletes have rights of publicity in broadcasts and advertisements was not before the courts in any of those cases; rather, as those courts noted, the plaintiffs in those cases were *paid* professional athletes whose salaries largely derive from the proceeds of lucrative broadcast contracts. Among other distinctions from the present case, the above cases involved players' NILs being used in the context of historical documentaries, Dryer, 55 F. Supp. 3d at 1186; in the presentation of "historic events from long ago," Gionfriddo, 114 Cal. Rptr. 2d at 314; and with the players' consent. NFL, 624 F. Supp. 6 at *9. Given the factual distinctions between those cases and the present one, none of the cases relied on by the lower court are persuasive here.

The lower court then criticized Plaintiffs' reliance on the only other case involving the unauthorized exploitation college athletes' NILs in the context of a live game telecast. (RE288, Memorandum, PID#2673) (discussing In re NCAA Student Athlete Name and Likeness Litig., 37 F. Supp. 3d 1126, 1134 (N.D. Cal. 2014) (case referred to herein as "O'Bannon"). Remarkably, the lower court characterized this decision as an "exception" to the "line of authority" found in the above paragraph. Id. In O'Bannon, four plaintiffs sued the NCAA for violating their rights of publicity² and 20 others sued the NCAA for violating antitrust laws. Id. at 1133-34.

In order to establish injury for purposes of the antitrust claim, the plaintiffs had to establish value in their NILs, which prompted the court to consider the class's rights of publicity in the context of live game telecasts. See O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 968 (N.D. Cal. 2014) (post-trial order), aff'd in part, vacated in part sub nom. O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015). Analyzing the use of college athletes' NILs in live game telecasts³, that court

² Subsequently, the parties settled the right of publicity claims. See Dkt. No. 1115 (June 9, 2014).

³ The O'Bannon court also examined additional markets in which college athletes could control and receive compensation for exploitation of their NILs, including videogames, re-broadcasts, advertisements and other archival footage.

explained: “Television networks frequently enter into licensing agreements to use the intellectual property of schools, conferences and event organizers . . . in live telecasts of football and basketball games. In these agreements, the networks often seek to acquire the rights to use the names, images, and likenesses of the participating student-athletes during the telecast.” Id. The O’Bannon district court examined multiple broadcasters’ licensing agreements that included “Name & Likeness” provisions and concluded: “Thus, a market for these rights exists.” Id. at 969. “[A]bsent the challenged NCAA rules,” the O’Bannon court held that college athletes would be able to control and receive compensation “for the use of their names, images and likenesses in live game telecasts.” Id. Given this holding and the similarity between the facts of O’Bannon and the present case, it was error for the lower court to diminish the importance of O’Bannon.⁴

II. THE LOWER COURT ERRED IN DISMISSING PLAINTIFFS’ FALSE ENDORCEMENT CLAIM UNDER THE LANHAM ACT.

The lower court cited two reasons for dismissing Plaintiffs’ Lanham Act false endorsement claim, both of which are in error. First, it found that Plaintiffs

⁴ Even a recently published American Bar Association treatise supports Plaintiffs’ reliance on decisions in the O’Bannon case. See WESTON ANSON, RIGHT OF PUBLICITY: ANALYSIS, VALUATION, AND THE LAW (2015). There, the author explains that because the court in O’Bannon denied the Rule 12(b)(6) motion to dismiss, such holding “basically confirmed the notion that college athletes can indeed enforce their right of publicity and have a protectable right in their commercial value.” Id. at 54.

failed to adequately allege likelihood of confusion. (RE228, Memorandum, PID#2692). Without undertaking any analysis into this Circuit’s eight-factor likelihood-of-confusion test, the court substituted its opinion for that of the jury and concluded that Defendants’ promotion of non-sports related products/prime time television shows during the telecasts that feature college athletes created no likelihood of confusion of false endorsement, sponsorship or approval. (Id.). Second, it found the First Amendment provides Defendants with blanket immunity to Plaintiffs’ false endorsement claim. (Id. at PID#2691). In reaching this finding, the lower court explained that the Lanham Act only regulates commercial speech – that which proposes a commercial transaction. (Id.). The lower court erroneously concluded that telecasts of games do not constitute commercial speech for purposes of First Amendment jurisprudence. (Id. at PID#2692). The court also erred in ignoring Plaintiffs’ allegations that Defendants also promote Defendants’ other programming (such as their prime-time television shows) while exploiting Plaintiffs’ NILs. (Id.).

A. Legal Standard for False Endorsement in the Sixth Circuit.

“Courts have recognized false endorsement claims under § 43(a) of the Lanham Act where a celebrity’s image or persona is used in association with a product so as to imply that the celebrity endorses the product.” ETW, 332 F.3d at 925. “False endorsement occurs when a celebrity’s identity is connected with a

product or service in such a way that consumers are likely to be misled about the celebrity's sponsorship or approval of the product or service.” Id. at 925-26 (citing cases). “Celebrities have standing to sue under § 43(a) because they possess an economic interest in their identities akin to that of a traditional trademark holder.” Parks v. Laface Records, 329 F.3d 437, 445 (6th Cir. 2003).

To prevail on a false endorsement claim, a plaintiff must show that “use of his or her name is likely to cause confusion among consumers as to the ‘affiliation, connection, or association’ between the celebrity and the defendant’s goods or services or as to the celebrity’s participation in the ‘origin, sponsorship, or approval’ of the defendant’s goods or services.” Id. at 445-46 (quoting 15 U.S.C. § 1125(a)(1)(A) and citing cases). “Consumer confusion occurs when ‘consumers ... believe that the products or services offered by the parties are affiliated in some way,’ . . . or ‘when consumers make an incorrect mental association between [the celebrity and] the involved commercial products or their producers” Id. at 446 (citations omitted). The Sixth Circuit has formulated an eight-factor test to determine the likelihood of confusion. ETW Corp., 332 F.3d at 926. A plaintiff need only show “a sufficient *potential* of confusion, not actual confusion.” Parks, 329 F.3d at 446 (quoting Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Ctr., 109 F.3d 275, 284 (6th Cir.1997)) (emphasis in original).

Where a plaintiff has demanded a jury, the issue of likelihood of confusion should be decided by the jury. See ETW Corp., 332 F.3d at 942 (Clay, J., dissenting) (explaining that the lower court erred in conducting the likelihood-of-confusion examination itself, and that the issue should be submitted to the jury) (citing cases). In cases that demand only a bench trial, likelihood of confusion constitutes “a mixed question of fact and law which the Sixth Circuit reviews for clear error when examining the underlying factual findings, but reviews *de novo* when determining whether those findings overall reveal a likelihood of confusion.” Daddy’s Junky Music Stores, 109 F.3d at 279.

B. The Complaint Pleads Sufficient Facts to Withstand Dismissal.

Here, the Complaint repeatedly alleges that Defendants use Plaintiffs’ and college athletes’ NILs in advertisements and nationally televised airings of football and basketball games. Here, the Complaint alleges that Plaintiffs and other college athletes are well-recognized sports figures who have appeared in primetime matchups before a national audience. (RE1, Complaint, PID#5-9, ¶¶ 11-20). The Complaint devotes an extensive paragraph to each named Plaintiff, identifying several highlights for each athlete in which he appeared on national television. (Id.) The Complaint alleges that the Broadcast and Licensing Defendants have used Plaintiffs’ and college players’ NILs in connection with their advertisements and underlying telecasts of games, for the explicit purpose of promoting the

airings, increasing brand awareness and driving revenue to themselves. (Id. at PID35-36, ¶ 178). It also alleges that Plaintiffs’ and other college athletes’ NILs “are highly recognizable to consumers deciding whether to watch or order the Broadcast and Licensing Defendants’ broadcasts of FBS football and Division I basketball games.” (Id. at ¶ 180). Plaintiffs also allege that Defendants’ misconduct has caused actual confusion as to their affiliation, support and endorsement. (Id. at PID#35-36, ¶ 181). Such false endorsements clearly fall within the misleading conduct that the Lanham Act seeks to prevent.

Further, paragraph 33, pleads that Defendants ABC and ESPN use Plaintiffs’ and Class Members’ NILs to advertise for non-sports related content. (RE1, Complaint, at PID#11, ¶ 33, incorporated by reference into the Lanham Act claim at PID#34, ¶ 176). As an example of Defendants’ alleged misconduct, Plaintiffs’ counsel played a video clip at the hearing on the motion to dismiss that, as the lower court even admitted “captured a player preparing to shoot a free-throw, while an *advertisement* appeared on the bottom of the screen.” (RE288, Memorandum, PID#2692) (emphasis added).

Here the lower court didn’t merely fail to view the Complaint’s allegations in a light most favorable to Plaintiffs, it completely ignored all of the above allegations from the Complaint, referenced above. It concluded erroneously, that

the “Plaintiffs fail to adequately allege likelihood of confusion.” (RE288, Memorandum, PID#2692).

The lower court provided only a few sentences of conclusory analysis in support of its dismissal of Plaintiffs’ Lanham Act claim, stating:

[I]t is simply implausible to conclude that the shooter or those along the key were in anyway endorsing the upcoming program, any more than Tennessee Titans players, their opponents, or spectators endorse Louisiana-Pacific building products . . . when games are played at LP field, even though such advertisements may be captured in the background during the game. The broadcast Plaintiffs complain about show football players or basketball players playing their sport. There is no confusion about what they are doing. Accordingly, their Lanham Act claim is subject to dismissal.

(RE288, Memorandum, PID#2692-2693). The lower court examined none of the eight factors in the Sixth Circuit’s likelihood-of-confusion test and, in so doing, erred. By failing to conduct such analysis, examination and substituting its own opinion on the issue of consumer confusion for the opinion of the ultimate trier of the fact, the lower court committed reversible error. See ETW, 332 F.3d at 942 (Clay, J., dissenting).

The video clip referenced by the lower court is an example of Plaintiffs’ allegation in paragraph 33 of the Complaint that Defendants intentionally superimposed advertisements of unrelated products during the telecast of the games. This allegation alone is sufficient to withstand dismissal.

In dismissing Plaintiffs' claim of False Endorsement in violation of Section 43(a) of the Lanham Act, the lower court ignored well-established Sixth Circuit pleading standards discussed above. Instead of applying the proper legal standard, reading the Complaint in a light most favorable to Plaintiffs, drawing reasonable inferences and applying common sense, the lower court inserted its own opinion on consumer confusion – the ultimate question of fact in all false endorsement claims brought under the Lanham Act.

At a minimum, it is premature to dismiss Plaintiffs' Lanham Act claim at the Rule 12 stage. In Wendt v. Host Intern., Inc., 125 F.3d 806, 809 (9th Cir. 1997), the Ninth Circuit held that even summary judgment was premature where the plaintiffs had asserted false endorsement claims under the Lanham Act and violations under California's statutory and common law right of publicity. In fact, the Ninth Circuit twice reversed summary judgment. Id. Here, Plaintiffs should be permitted to take discovery and develop the record into the eight factor test.

C. The Lower Court's First Amendment Findings Were Incorrect & Premature.

The lower court erred by concluding that *none* of the contexts about which Plaintiffs complain where Defendants exploit Plaintiffs' NILs constitute commercial speech or propose a commercial transaction. The lower court correctly explained that commercial speech is speech that proposes a commercial transaction. (RE288, Memorandum, PID#2691). But "this definition is just a

starting point . . . [and] other communications also may constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.” Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 516 (7th Cir. 2014) (citation omitted). As the Supreme Court has explained, “advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech.” Id. (quoting Zauderer v. Office of Disciplinary Counsel of the Sup.Ct. of Ohio, 471 U.S. 626, 637(1985)).

In Jordan, basketball player Michael Jordan sued Jewel Food Stores after it ran a print advertisement in *Sports Illustrated* that congratulated Jordan on his induction into the Basketball Hall of Fame. Id. at 511. He asserted claims for false endorsement under the Lanham Act and violations of the Illinois Right of Publicity Act, as well as other claims. Id. Jewel argued it was entitled to “blanket immunity” from suit under the First Amendment, maintaining that its ad was “noncommercial” speech. Id. The lower court agreed with Jewel, holding that the ad was fully protected noncommercial speech and entered summary judgment for Jewel. Id. The Seventh Circuit disagreed and reversed. Id. at 512.

As the Seventh Circuit explained there, the commercial-speech category is not limited to speech that directly or indirectly proposes a commercial transaction.” Id. at 517. “Modern commercial advertising is enormously varied in form and style.” Id. at 518. It explained:

We know from common experience that commercial advertising occupies diverse media, draws on a limitless array of imaginative techniques, and is often supported by sophisticated marketing research. It is highly creative, sometimes abstract, and frequently relies on subtle cues. The notion that an advertisement counts as “commercial” only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less “commercial” because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service. Applying the “core” definition of commercial speech too rigidly ignores this reality. Very often the commercial message is general and implicit rather than specific and explicit.

Jewel’s ad served two functions: congratulating Jordan on his induction into the Hall of Fame and promoting Jewel’s supermarkets. . . .

[C]onsidered in context, and without the rose-colored glasses, Jewel’s ad has an unmistakable commercial function: enhancing the Jewel–Osco brand in the minds of consumers. This commercial message is implicit but easily inferred, and is the dominant one.

Id. at 518.

Similarly, in reversing summary judgment for the defendants in a Lanham Act case regarding an article in a trade journal, the Sixth Circuit held that the misrepresentations constituted commercial speech. Semco, Inc. v. Amcast, Inc., 52 F.3d 108, 114 (6th Cir. 1995). It explained that “[s]peech need not closely resemble a typical advertisement to be commercial.” Id. at 112.

Similarly, the speech here is unquestionably commercial. Telecasts of the underlying games, advertisements for such games, and advertisements for

unrelated products all constitute commercial speech. None of Defendants' activity is entitled to First Amendment protection.

Alternatively, at a minimum, it is premature at the Rule 12 stage to decide the First Amendment issue in Defendants' favor. In fact, "[t]he Supreme Court itself 'recognize[s] the difficulty in making a determination that speech is either 'commercial' or 'noncommercial.'" Semco, 52 F.3d at 112 (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 539 (1981) (Brennan, J., concurring)). In Moore, the lower court denied the defendants' Rule 12(b)(6) motion to dismiss where, after viewing the facts in a light most favorable to the plaintiffs, it concluded: "In light of this more nuanced reality, *additional discovery and fact gathering is necessary* to determine if the plaintiffs' rights under the TPRPA were violated or whether the defendants' use of any likenesses of Mr. Moore is protected by the First Amendment." Moore, 2010 WL 8913520, at *12. Similarly, here it was premature for the lower court to dismiss Plaintiffs' Lanham Act claim and discovery should be permitted to inquire into whether the speech in question here is commercial or not.

III. THE LOWER COURT MISAPPLIED ZACCHINI.

In examining the parties' arguments regarding the First Amendment, the lower court made various findings but did not cite the First Amendment as a reason for dismissal. (RE288, Memorandum, PID#2677-79). Nevertheless, the lower

court erred in failing to find that Defendants are precluded from using the First Amendment as blanket immunity against the ROP claims in the present case. More specifically, the lower court failed to follow Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977), which holds that “the First . . . Amendment[] do[es] not immunize the media [from right of publicity claims] when they broadcast a performer’s *entire* act without his consent.” 433 U.S. at 574 (emphasis added). Zacchini is controlling in the present case because Defendants broadcast the entire games played by Plaintiffs and college athletes without their consent.

Noting that Mr. Zacchini (the human cannonball) was not only a performer, but also a producer, the court erroneously found that Zacchini does not apply here since Plaintiffs and college athletes are mere performers and not also producers of the live telecasts of the games. (RE288, Memorandum, PID#2678). Turning Zacchini on its head, the lower court committed reversible error in concluding: “It is a mistake, the Court believes, to read Zacchini as supporting a right of publicity by anyone who performs in an event produced by someone else.” (Id.). But the right of publicity belongs to the celebrity, not the producer. It recognizes “one of the basic principles of Anglo-American jurisprudence that ‘one may not reap where another has sown nor gather where another has strewn.’” Crowell, 733 at 98. Unless reversed, the lower court’s conclusion would completely eviscerate the

right of publicity across the country, giving producers everywhere the right to exploit the NILs of celebrities everywhere, without any opportunity for redress.

IV. PLAINTIFFS' COMPLAINT STATES AN ANTITRUST CLAIM UNDER THE SHERMAN ACT.

The Ninth Circuit's decision in O'Bannon leaves no doubt that the NCAA's rules governing student athletes are subject to antitrust scrutiny, including the rules that the NCAA's business partners adhere to. O'Bannon, 2015 WL 5712106 . The O'Bannon decision, while out of circuit, provides compelling precedent for reversing the district court.

A. Plaintiffs' Complaint Alleges That Defendants' Actions Are An Unreasonable Restraint On Trade.

In order to participate in NCAA athletics, student-athletes must comply with the NCAA's amateurism requirement, which prohibits student-athletes from receiving commercial compensation while participating in intercollegiate athletics. (RE1, Complaint, PID#21-22, ¶ 99). The Complaint alleges that the NCAA's amateurism rules are "inherently anticompetitive" because they prevent student-athletes from competing in the marketplace for the value of their services, both on and off the field. (Id. at PID#22, ¶100). The Conference Defendants each have similar rules enforcing amateurism among their members and their members' student-athletes. (Id. at PID#22-23, ¶103). The Complaint alleges that these NCAA and Conference Defendants' amateurism rules constitute horizontal

agreements between and among these groups which effectively set the price of any student-athlete's value at zero, because student-athletes must comply with the rules or face being declared ineligible. (Id. at PID#22, ¶ 100).

The Broadcast Defendants benefit from these agreements through their participation in unlawful and anticompetitive broadcast agreements with the NCAA and the Conference Defendants. (Id. at PID#23, ¶ 105). Because the amateurism rules prohibit negotiation directly with student-athletes, the Broadcast Defendants instead negotiate and enter into agreements with the NCAA, the Conference Defendants, and their individual member institutions. (Id. at PID# 24, ¶ 110). In doing so, the Broadcast Defendants obtain the rights to broadcast student-athletes' NILs at a fraction of their real value, despite the fact that the agreements do not contain any enforceable provision by which the Broadcast Defendants actually obtain the right to commercially exploit the value of these NILs. (Id. at PID#24-25, ¶¶ 112-13).

Finally, the Complaint also alleges that the Licensing Defendants unreasonably restrain trade by entering into multimedia licensing agreements with the NCAA member schools. (Id. at PID#26, ¶¶ 120-22). These licensing agreements purport to encompass the commercial value of student-athletes' rights of publicity, but student-athletes are prohibited by the above-described NCAA and conference rules from negotiating the value of such rights themselves. (Id. at

PID#26-27, ¶ 123). The licensing agreements therefore artificially depress the value of these rights, and constitute an unreasonable restraint of trade. (Id.).

B. Plaintiffs' Complaint Alleges That Defendants' Actions Caused Plaintiffs' Injury.

Plaintiffs, the student-athletes whose NILs are the “economic driving force behind the lucrative business of college sports,” are excluded from the above-described broadcast and licensing agreements and are injured as a result. (Id. at PID#25, ¶ 114). Instead, the NCAA imposes strict limits on the amount of compensation that student-athletes may receive from their schools, limited to the “cost of attendance.” (Id.). The “cost of attendance” pales in comparison to the revenue generated by the student-athletes for the schools and conferences through the broadcast and licensing agreements described above. (Id. at PID#25-26, ¶ 115). By being denied the opportunity to negotiate a fair value for their NIL rights, and instead being forced to accept the meager “cost of attendance,” Plaintiffs have been injured by Defendants’ unreasonable restraints on trade.

C. The NCAA Need Not Be A Named Defendant To Hold Its Co-Conspirators Liable For The Antitrust Conspiracy.

A crucial flaw running through the district court’s decision is its failure to recognize that Plaintiffs need not name the NCAA as a party to the action in order to state plausible claims of relief, and in particular their Sherman Act claim. Plaintiffs need not name every member of an alleged cartel as a defendant.

See State of Ga. v. Pennsylvania R. Co., 324 U.S. 439, 463 (1945) (“In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant.”); In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 284 (4th Cir. 2007) (“plaintiff can prove the existence of a conspiracy in an action against just one of the members of the conspiracy”). It is well-settled law that a plaintiff, as “the master of his complaint,” may choose what law he intends to rely on and which defendants to sue. See Alexander v. Elec. Data Sys. Corp., 13 F.3d 940, 943-44 (6th Cir. 1994); Eastman v. Marine Mech. Corp., 438 F.3d 544, 550 (6th Cir. 2006). Plaintiffs may therefore choose to file against all, or only some, members of a conspiracy—so long as the allegations themselves allege a viable Sherman Act claim, the Complaint stands.

The district court’s decision, to the extent it was predicated on Plaintiffs’ failure to include the NCAA as a defendant, is therefore erroneous.

D. NCAA v. Board of Regents Supports Plaintiffs’ Claim.

In NCAA v. Bd. of Regents of the Un. of OK, 468 U.S. 85 (1984) (“BoR”), the Supreme Court held that the NCAA’s plan for televising college football games was a horizontal agreement in restraint of trade and invalid under the Sherman Act. The Court declined to apply a per se rule of invalidity to the agreement and instead opined that a Rule of Reason approach was required because “this case involves an

industry in which horizontal restraints on competition are essential if the product is to be available at all.” Id. at 101.

The district court here appeared to misread BoR, reasoning that the Court protected the NCAA’s amateurism rules from the Sherman Act. (RE288, Memorandum, PID#2684). (“Their attack runs counter to a line of cases which have addressed the amateur’s rules in a variety of circumstances, including [BoR], decided more than 30 years ago.”). The Supreme Court in BoR found an antitrust violation; it stated that “the NCAA’s historic role in . . . amateur athletics” did not lower the applicable antitrust standard. BoR, 468 U. S. at 101. Furthermore, as the *O’Bannon* court held, “[t]he Court’s long encomium to amateurism, though impressive-sounding, was therefore dicta. . . . But we are not bound by [BoR] to conclude that every NCAA rule that somehow relates to amateurism is automatically valid.” O’Bannon, 2015 WL5712106 at *11. Indeed, the O’Bannon circuit court recognized “the Court discussed the amateurism rules for a different and particular purpose: to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se.” Id.

E. The Challenged Restraints Are By Their Very Existence Commercial.

The district court incorrectly held that the Sherman Act does not apply to the commercial activities alleged in this case. There is no disagreement that college

football and basketball are multi-billion-dollar athletic businesses that commercially exploit Plaintiffs' NILs.

The district court compounds its error by reading Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008), as foreclosing a Sherman Act claim. The district court relied on Bassett an eligibility was not commercial. (RE288, Memorandum, PID#2687). Plaintiffs here seek compensation for their NIL use by Defendants in their advertising-laden broadcasts. Of course, that is commercial. The former college coach in Bassett, when he complained of the NCAA's rules, was not arguing about commercial rules, but eligibility rules. The eligibility rules in question were NCAA bylaws that forbade improper inducements and academic fraud during recruiting of high school students. 528 F.3d at 429. This is particularly so on behalf of the Plaintiffs here, who are former student athletes, who received consideration in the form of their education for their athletic participation. Ongoing exploitation of their NILs must be commercial because they are no longer competing in college football and basketball. The money others are receiving for use of their NIL is by its very nature commercial.

In Agnew v. NCAA, 683 F3d 328 (7th Cir. 2012), the Seventh Circuit recognized that "the Sherman Act applies to commercial transactions, and the modern definition of commerce includes 'almost every activity from which [an] actor anticipates economic gain.' No knowledgeable observer could earnestly

assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.” Agnew, 683 F.3d at 340 (citation omitted). The O’Bannon appellate court also rejects Agnew, finding it “unpersuasive.” O’Bannon, 2015 WL5712106 at *12. See also O’Bannon at *14-15 (noting that the O’Bannon court believes that Bassett was wrongly decided).

The distinction between commercial and “non-commercial” activity is not applicable in this case. Here, the agreement not to compensate Plaintiffs for use of their NILs is a means to divide the monetary proceeds of the athletes’ labor between the schools and the media, excluding the Plaintiffs entirely. This is obviously commercial activity.

F. Plaintiffs Suffered “Injury In Fact” From Defendants’ Commercial Restraint.

Contrary to the district court’s circular conclusion, Plaintiffs suffered injury in fact regardless of whether or not they have a right to publicity under Tennessee law. The Sherman Act is a stand-alone claim; it does not rely on a predicate tort. The question is not, as the district court framed it, if Plaintiffs have a right to publicity under Tennessee law, then will they have suffered injury in-fact for the media’s failure to compensate them for use of their NILs? See (RE288, Memorandum, PID#2688). But rather, the correct question is, does the agreement

among the media, the NCAA, and the NCAA member institutions not to compensate the student athletes for use of their NILs violate the Sherman Act?

As the O'Bannon district court found, “even if some television networks believed that student-athletes lacked publicity rights in the use of their names, images, and likenesses, they may have still sought to acquire these rights as a precautionary measure. Businesses often negotiate licenses to acquire uncertain rights.” O'Bannon, 7 F. Supp. 3d at 994. The O'Bannon record shows that numerous college sports broadcast agreements already transfer the NIL rights that the NCAA, the broadcasters, and the district court insist do not exist. Based on this evidence, the *O'Bannon* district court correctly found that “the networks often seek to acquire the rights to use the names, images, and likenesses of the participating student-athletes during the telecast.” Id. at 968. The Ninth Circuit explicitly affirmed the O'Bannon district court in finding plaintiffs suffered antitrust injury in fact, finding the analysis governing the NCAA’s rules having foreclosed the market for plaintiffs’ NIL video games also governed compensation rules claims. O'Bannon, 2015 WL 5712106 at *15-16. The same analysis applies here.

G. Plaintiffs Suffered Antitrust Injury.

The district court erred while giving cursory recognition to Plaintiffs’ antitrust injury allegations. The district court incorrectly concluded that the Defendants, singling out in particular the network and broadcast defendants, by

complying with the NCAA rule of not compensating student athletes, therefore cannot be blamed for reducing competition in any related antitrust injury. (RE288, Memorandum, PID#2690). The district court then supported its analysis by citation to In re Canadian Import Antitrust Litigation, 470 F.3d 785, 792 (8th Cir. 2006), where the court found no antitrust injury where the plaintiffs were not able to import less expensive drugs because of government rules. Id.

Here, however, the government is not involved. No one claims the NCAA is the arm of the government. It is an unincorporated association that generates billions of dollars in revenue for its business partners and its member academic institutions, and millions of dollars for its executives. A cartel participant cannot excuse its participation in an illegal cartel by claiming that one of its co-conspirators is immune from the antitrust laws. The NCAA's self-justifying rules do not provide immunity for its business partners' agreement to follow them in exchange for receiving billions of dollars in revenue. Again, the O'Bannon appellate court found that because the plaintiffs there had shown absent the NCAA's compensation rules, "video game makers would likely pay them for the right to use their NILs in college sports video games, the plaintiffs have satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury." O'Bannon, 2015 WL 5712106 at *18. The same analysis governs here. Absent the same NCAA compensation rules, plaintiffs allege that sports

broadcasters would likely pay student athletes for the right to use their NILs in college sports broadcasts. Certainly for pleading purposes, plaintiffs have satisfied the antitrust injury requirement.

V. THE LOWER COURT ERRED IN DISMISSING THE REMAINING CLAIMS.

Plaintiffs asserted additional claims against Defendants for Civil Conspiracy, Unjust Enrichment and for an Accounting. The lower court concluded that because those claims were all “linked” to the dismissed claims asserted under the right of publicity, the Sherman Act and the Lanham Act, those claims should likewise be dismissed. As set forth hereinabove, Plaintiffs have asserted claims under the right of publicity, the Sherman Act and the Lanham Act for which relief can be granted. The lower court thus erred in dismissing the remaining claims asserted in the Complaint.

VI. THE LOWER COURT ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE.

The lower court dismissed the Complaint with prejudice, because Plaintiffs did not file a motion to amend prior to the lower court’s ruling on Defendants’ motions to dismiss. (RE288, Memorandum, PID#2694). In support of its dismissal with prejudice, the lower court quoted Louisiana Sch. Bd. Emps’ Ret. Sys. V. Ernst & Young, LLP, 622 F.3d 471, 486 (6th Cir. 2010), which stated that plaintiffs are “not entitled to an advisory opinion from the Court informing them of the

deficiencies of the complaint and then an opportunity to cure those deficiencies.” (quoting Begala v. PNC Bank, Ohio, Nat. Ass’n, 214 F.3d 776, 784 (6th Cir. 2000)). This case authority notwithstanding, the lower court’s decision is subject to an abuse of discretion standard on appeal, and the district court violated that standard here.

The lower court’s holding directly contradicts the language and purpose of Fed. R. Civ. P. 15, which states that amendments are to be freely given. While Plaintiffs did not file a motion to amend the Complaint, the leading pleading states a case of first impression. Ignoring the Rule 15 standard, the lower court sought to shut the door on a case filed at a time when the legal landscape of big-time collegiate sports is changing. Amendment of these pleadings should have been freely granted, but the lower court’s holding essentially rendered future amendments futile.

The lower court’s central holding was that Plaintiffs had no enforceable rights of publicity for which relief could be granted. Following the lower court’s reasoning, there would have been *no* set of facts that Plaintiffs could have alleged to stake an actionable claim for relief. The Court’s dismissal with prejudice amounts to no more than a preemptive strike to discourage future litigation and to shut the door on significant issues of law and fact that warrant full adjudication. The lower court’s dismissal with prejudice, therefore, was

unnecessary, arbitrary, and violative of the letter and spirit of the Federal Rules of Civil Procedure.

CONCLUSION

The college athletes who brought this lawsuit stated, for the first time, actionable claims against conglomerates that have reaped billions of dollars in profits for use of the athletes' NILs. The numerous and specific facts pled by Plaintiffs, if proven true, demonstrate that these athletes, individually and collectively, are entitled to enforce their rights of publicity, as well as those afforded under the Lanham Act, the Sherman Act and other Tennessee laws. In its haste to avoid making new law, the lower court failed to adhere to elementary pleading principles in the Rules of Civil Procedure, failed to follow standards of statutory construction set by the Tennessee Supreme Court, failed to properly apply federal constitutional and statutory law, and disregarded emerging and persuasive precedent supporting the rights of college athletes. Plaintiffs therefore pray that this Honorable Court **REVERSE** the lower court's dismissal of Plaintiffs' complaint, and that this Court matter be **REMANDED** for proceedings.

Dated: October 9, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,152 words, excluding certain parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

/s/ Stephen J. Zralek _____

ADDENDUM

The following publicly filed docket entries, all of which were filed in the District Court's electronic record, are relevant to this appeal.

Description of Entry	Date	Record Entry No.	PID# Range
Complaint	10/03/14	1	1-40
Conference Defendants' Motion to Dismiss	12/10/14	214	769-781
Memorandum in Support of Conference Defendants' Motion to Dismiss	12/10/14	215	782-814
Licensing Defendants' Motion to Dismiss	12/10/14	218	829-837
Memorandum in Support of Conference Defendants' Motion to Dismiss	12/10/14	219	838-855
Broadcast Defendants' Motion to Dismiss	12/10/14	220	856-868
Memorandum in Support of Broadcast Defendants' Motion to Dismiss	12/10/14	221	869-931
Defendants' Motion to Stay Discovery	12/10/14	224	932-1284
Memorandum in Support of Defendants' Motion to Stay Discovery	12/10/14	225	1285-1310
Plaintiffs' Response in Opposition to Defendants' Motion to Stay Discovery	01/08/15	243	1667-1682
Defendants' Reply to Plaintiffs' Response in Opposition to Defendants' Motion to Stay Discovery	01/29/15	252	1793-1813
Order Granting Defendants' Motion to Stay Discovery	02/05/15	255	1865-1866
Plaintiffs' Response in Opposition to Broadcast Defendants' Motion to Dismiss	02/13/15	257	1874-1923
Plaintiffs' Response in Opposition to Conference Defendants' Motion to Dismiss	02/13/15	258	1924-1947
Plaintiffs' Response in Opposition to Licensing Defendants' Motion to Dismiss	02/13/15	259	1948-1959
Conference Defendants' Reply to Plaintiffs' Response in Opposition to Conference Defendants' Motion to	03/06/15	268	2231-2266

Description of Entry	Date	Record Entry No.	PID# Range
Dismiss			
Broadcast Defendants' Reply to Plaintiffs' Response in Opposition to Broadcast Defendants' Motion to Dismiss	03/06/15	269	2267-2305
Licensing Defendants' Reply to Plaintiffs' Response in Opposition to Licensing Defendants' Motion to Dismiss	03/06/15	271	2401-2421
Motion to Dismiss Hearing Transcript	04/28/15	280	2513-2599
Order Dismissing Plaintiffs' Claims with Prejudice	06/04/15	285	2659-2660
Memorandum	06/08/15	288	2663-2695
Notice of Appeal	07/08/15	289	2696-2702

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs-Appellants' Opening Brief was filed via the Court's electronic filing system on October 9, 2015, which will serve electronic notice to all parties of record.

/s/ Stephen J. Zralek
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General Information

Court	United States Court of Appeals for the Sixth Circuit; United States Court of Appeals for the Sixth Circuit
Federal Nature of Suit	Antitrust[3410]
Docket Number	15-05753