UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ma'Lik Richmond,	:	
Plaintiff,	:	Case No. 4:17-cv-01927
vs.	:	Judge Benita Y. Pearson
Youngstown State University,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM CONTRA PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

NOW COMES Defendant, Youngstown State University, by and through counsel, and respectfully requests this Honorable Court to deny Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (ECF# 3). A Memorandum in Support is attached hereto and incorporated herein by reference.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s/ Christina L. Corl
CHRISTINA L. CORL (0067869)
Daniel J. Hurley (0034499)
David L. Van Slyke (0077721)
Plunkett Cooney
300 East Broad Street, Suite 590
Columbus, Ohio 43215
Telephone: (614) 629-3018
Facsimile: (614) 629-3019
ccorl@plunkettcooney.com

Counsel for Defendant

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Proving the old adage that no good deed goes unpunished, Youngstown State University (hereinafter "YSU") has been hauled into court by a student that YSU has bent over backward to assist, support and provide a second chance when no one else would. The rest of the world had written Plaintiff off as an unrepentent rapist, but YSU encouraged him and integrated him as "part of the student community." (Brief in Supp. of Mot. for TRO, ECF #3-1, pg. 6). In fact, when Plaintiff quit school and said he would not return to football, YSU representatives went to his home and encouraged him to stay in the program. Id., pg. 10.

Plaintiff, however, in becoming part of a "student community," must take the good with the bad. YSU has a responsibility – not just to Plaintiff – but to the whole student population and the community at large. In this case, the student population voiced its concern that YSU's welcoming and sympathetic treatment of Plaintiff would send a message to the University community that if one is an athlete, one does not really have to pay much of a price for being found responsible for sexual assault, whether on campus or off. In balancing those interests, as any good university administration must, a decision was made to continue to encourage Plaintiff's participation but also to send a message that sexual assault is taken seriously at YSU. As such, Plaintiff stayed on the active roster of the football team but will not be playing this year. Simply put, this was a

decision in the sound discretion of the YSU Athletic Department, made after consultation with University administration and the coaching staff. (Affidavit of YSU Athletic Director, Ronald Strollo, Exhibit A). It also bears noting that Plaintiff, himself, was receiving serious threats of harm if he followed through on his intention to play football this season. Id.

Plaintiff has now filed a Complaint alleging that he has been discriminated against on the basis of his gender in violation of Title IX, that YSU has violated his constitutional right to due process[1] and that YSU has breached some sort of contractual relationship with Plaintiff. (Compl., ECF #1, pgs. 24-27). Plaintiff has also moved for a TRO stating that "[i]n the absence of a temporary restraining order, [he] will be denied participation in the YSU football game scheduled for September 16, 2017." (Brief in Supp. of Mot. for TRO, pg. 10). As more fully detailed below, not only is Plaintiff not entitled to injunctive relief, his Complaint is subject to dismissal.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 65 (b) permits a party to seek injunctive relief to prevent immediate and irreparable injury. *Marshall v. Ohio Univ.*, 2015 WL 1179955, *4

[1] It bears noting that Plaintiff's Motion for TRO breathes not a word about his 42 U.S.C. § 1983 claim alleging violation of his constitutional right to due process and, further, makes no argument that the due process claim has any likelihood of success, let alone a strong likelihood of success. This is for good reason. Courts have consistently held that students have no protected property interest in participating in collegiate athletics. See, e.g., *Karmanos v. Baker*, 617 F. Supp. 809, 815 (E.D. Mich 1985) aff'd 816 F. 2d 258 (6th Cir. 1987); *Awrey v. Gilbertson*, 833 F. Supp. 2d 738 (E.D. Mich. 2011); *Conrad v. University of Washington*, 834 P. 2d 17, 22 (Wash. 1992); *Fluitt v. University of Nebraska*, 489 F. Supp. 1194 (D. Neb. 1980); *Brands v. Sheldon Comm. Sch.*, 871 F. Supp. 627 (N.D. Iowa 1987). Further any "interest in . . . [a] future professional [athletic] career" is "speculative and not of constitutional dimensions." *Justice v. NCAA*, 577 F. Supp. 356, 374 (D. Arizona 1983)(Citations omitted).

(S.D. Ohio March 13, 2015). "A temporary restraining order is an extraordinary remedy whose purpose is to preserve the status quo." Id., citing *Procter & Gamble Co. v. Bankers Trust Co.,* 78 F. 3d 219, 226 (6th Cir. 1996). It is the burden of the Plaintiff to prove that the circumstances "clearly demand" such an extraordinary remedy and that burden must be met by reaching the standard of clear and convincing evidence. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't,* 305 F.3d 566, 573 (6th Cir. 2002).

The following elements must be considered by the Court: 1.) Strong likelihood of success on the merits of Plaintiff's claims; 2.) Irreparable injury to Plaintiff if the injunctive relief is not granted; 3.) The absence of substantial harm to others[2]; and 4.) The public interest is "best served" by granting the injunction. *Chabad of S.Ohio & Congregation Lubavitch v. City of Cincinnati,* 363 F. 3d 427, 432 (6th Cir. 2004). For the reasons set forth below, Plaintiff is not entitled to this extraordinary remedy.

III. LAW AND ARGUMENT

A. Plaintiff has no Likelihood of Success on the Merits of his Claims.

1. Title IX.

Plaintiff's Title IX claim has no likelihood of success. In fact, it is subject to dismissal because it fails to state a claim. In the context of recent claims by male students alleging gender bias prohibited by Title IX, district courts are revisiting the pleading standards set forth by the Supreme Court in *Twombly* and *Iqbal.* In *Doe v. Univ. of*

[2] Plaintiff's Brief refers to this element as "lack of substantial harm to *defendants.*" (Brf. in Supp., pg. 10). This is not the correct standard, although that may be a consideration for the Court.

Colorado-Boulder, 2017 WL 2311209 (D. Colo. May 26, 2017), the Court refused to recognize what it considered to be a lesser standard of pleading accepted in the Second Circuit case of *Doe v. Columbia Univ.,* 831 F.3d 46 (2d Cir. 2016). [3] The *Univ. of Colorado* Court refused to accept as plausible blanket allegations that internal or external criticism of a university creates an inference of gender bias in adjudications of claims of sexual assault, stating, "The Court disagrees with cases that continue to accept conclusory allegations of gender bias. *Twombly* and *Iqbal* plainly disallow such acceptance." Id., at * 21-24. Here, Plaintiff's allegations in support of the Title IX claim are nothing more than supposition upon speculation, supported by no facts which could plausibly result in a viable claim. The gist of Plaintiff's claim is that entities outside of the University, in urging colleges and universities nationwide to take seriously allegations of sexual assault on college campuses, as well as students who were also enrolled at YSU, coerced or compelled YSU to engage in gender discrimination against Plaintiff. One, however, does not plausibly beget the other. Urging institutions of higher learning to take sexual assaults seriously does not plausibly lead to the conclusion that those institutions would, in response, rampantly engage in invidious gender discrimination against male students.

Title IX of the Education Amendments of 1972 is a federal statute which prohibits sexual discrimination and harassment in educational institutions receiving federal funding. It provides as follows: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

[3] Plaintiff heavily relied on this case in his Motion for TRO.

discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (a). Because there exists no "disparate impact" theory of liability available under Title IX, the plaintiff in such a case must demonstrate intentional discrimination. *Alexander v. Sandoval,* 532 U.S. 275, 280 (2001); *Marshall v. Ohio Univ.,* 2015 WL 7254213, *5 (S.D. Ohio Nov. 17, 2015).

The Sixth Circuit has recognized two potential causes of action pursuant to Title IX with respect to claims of gender discrimination arising from university disciplinary proceedings: erroneous outcome and selective enforcement. *Mallory v. Ohio Univ.,* 76 F. App'x 634, 638 (2003). See also, *Sahm v. Miami Univ.,* 2015 WL 246065, *4 (S.D. Ohio May 20, 2015); *Marshall v. Ohio Univ.,* 2015 WL 7254231, *5 (S.D. Ohio November 17, 2015). To state an "erroneous outcome" claim, the plaintiff must demonstrate that he or she was wrongly found to have committed a disciplinary offense on the basis of gender. *Sahm,* 2015 WL 2406065 at *3. To state a "selective enforcement" claim, a male plaintiff must demonstrate that "a female [student] was in circumstances sufficiently similar to his own and was treated more favorably . . . ." *Mallory,* 76 F.App'x at 641. Plaintiff can demonstrate neither.

a. Erroneous Outcome.

Erroneous outcome cases allege that the plaintiff was innocent and wrongly found to have committed an offense.[4] *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). To prevail on an erroneous outcome theory, Plaintiff must also prove that YSU's conduct

[4] Frankly, Plaintiff attempts to place a square peg in a round hole. He makes no allegation that he was wrongly accused of sexual misconduct or wrongly convicted. There is no viable erroneous outcome

was motivated by gender bias. *Doe v. Univ. of the South,* 687 F. Supp.2d 744, 756 (E.D. Tenn.2009) (citing *Mallory v. Ohio Univ.*, 76 Fed. App'x. 634, 638 (6th Cir. 2003)). Specifically, he must allege "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary hearing as well as a causal connection between the flawed outcome and gender bias." *Yusuf*, 35 F.3d at 715. A "plaintiff must thus also allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." Id. Examples of these circumstances include "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." Id. But allegations of an erroneous outcome "combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." Id.

Plaintiff's Complaint is entirely devoid of any factual allegations tying this case to his gender. Plaintiff has not pointed to any statements by members of university administration showing gender bias. Instead, he makes conclusory and entirely speculative allegations in an attempt to support his claim of gender bias, claiming that YSU has been pressured by the student body, the media and the U.S. Department of Education to adopt a gender-biased stance. (Brf. in Supp., pg. 11-12).

With respect to Plaintiff's "pressure on the University" allegations, even if those claims are interpreted most favorably to him, his allegations reflect a bias against people accused of sexual misconduct (regardless of gender) and in favor of victims and indicate nothing about gender discrimination. See *Haley v. Virginia Com. University*, 948 F.Supp.

---

claim under these facts.

573, 578-79 (E.D. Va. 1996); *King v. Depauw Univ.*, 2014 WL 4197507 at *10 (S.D. Ind. Aug. 22, 2014) (emphasis added). ("But DePauw is not responsible for the gender makeup of those who are accused *by other students* of sexual misconduct, and the fact that a vast majority of those accused were found liable might suggest a bias against accused students, but says nothing about gender.") As noted by another court, "it is possible that OSU was biased in favor of the alleged victims of sexual assault cases and against the alleged perpetrators, but courts have held that this is not the same as demonstrating bias against male students." *Doe v. The Ohio State University,* 2017 WL 951464. FN 11 (S.D. Ohio March 10, 2017)(citing *Bleiler v. Coll. of Holy Cross,* 2014 U.S. Dist. LEXIS 127775 (D. Mass. Aug. 26, 2013); *King v. DePauw,* supra; *Haley v. Va. Commonwealth,* supra.) See also, *Doe v. Baum,* 2017 WL 57241, *23-27 (E.D. Mich. Jan. 5, 2017)(holding that the allegations of pro-victim bias do not equate to anti-male bias and such allegations in the context of a Title IX claim cannot avoid a motion to dismiss); *Doe v. Univ. of Cincinnati,* 173 F. Supp. 3d 586, 606-08 (S.D. Ohio 2016)(same); *Ludlow v. Northwestern Univ.,* 125 F. Supp. 3d 783, 791-93 (N.D. Ill. 2015)(same); *Yu v. Vassar Coll.,* 97 F. Supp. 3d 448, 461-81 (S.D.N.Y. 2015)(same).

In *Doe v. Univ. of Colorado-Boulder,* 2017 WL 2311209 (D. Colo. May 26, 2017), the district court dismissed the male student's claims of gender bias where he claimed that a Department of Education investigation and the "Dear Colleague Letter" resulted in pressure on the university to violate Title IX. As stated by the Court:

> Considering all of [plaintiff's allegations of external pressure on the university] together, the Court finds

> no inference of gender bias that rises to the level of "plausible." [P]ressure from the federal government to investigate sexual assault allegations more aggressively – either general pressure exerted by the Dear Colleague Letter or specific pressure exerted by an investigation directed at the University, or both – says nothing about the University's alleged desire to find men responsible because they are men.

Id. at *24.

Plaintiff's allegations here, similarly, create no plausible inference that "external pressure" or pressure by the student body resulted in YSU engaging in intentional gender discrimination. See also *Doe v. Denison Univ.*, 2017 U.S. Dist. LEXIS 53168 (S.D. Ohio March 30, 2017) (dismissing erroneous outcome Title IX claim, on a motion to dismiss, because gender bias could not be inferred from allegations of external pressure); *Doe v. Western New England Univ.,* 228 F. Supp. 3d 154, 190 (D. Mass. 2017); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778-80 (S.D. Ohio 2015) (dismissing plaintiff's Title IX claim because the complaint failed to allege any statements of members of the disciplinary body or university officials or any patterns of conduct that permitted the court to infer bias against male students); *Doe v. University of Mass. – Amherst*, 2015 WL 4306520 at *8 (D. Mass. July 14. 2015); (dismissing plaintiff's Title IX claim because he failed to cite any statements that plausibly suggested the university's gender bias and because his unsupported claim that the university discriminated against males accused of sexual misconduct was insufficient); *Harris v. St. Joseph's Univ.,* 2014 WL 1910242, at *4 (E.D. Pa. May 13, 2014) (dismissing plaintiff's Title IX claim due to his failure to allege sufficient facts to support his claim that gender bias was a motivating factor in the

university's decision). As such, Plaintiff cannot meet the high burden of demonstrating that there is a strong likelihood of success on his "erroneous outcome" Title IX claim.

b. Selective Enforcement.

To maintain a "selective enforcement" Title IX claim, Plaintiff must demonstrate that he has been treated differently than *female* athletes in similar situations. *Mallory,* 76 F.App'x at 641. Plaintiff does not even attempt to allege that he has been treated differently than similarly-situated female students or athletes. Plaintiff simply states that "other student athletes with a prior record of juvenile or sexual misconduct" have been allowed to "participate fully" in YSU athletics. (Brf. in Supp., pg. 17). Plaintiff does not identify those athletes as female. As such, his selective enforcement allegations are subject to a motion to dismiss for failure to state a claim and certainly do not begin to rise to the level of demonstrating a substantial likelihood of success.

2. Breach of Contract.

There is no contract which applies to the circumstances of this case. Plaintiff's reliance on YSU handbooks and code of conduct is misplaced. Plaintiff was not cited for any rules violations under any YSU policy, and makes no allegation that he was. Plaintiff cites various sections of the YSU Student Code of Conduct and the Intercollegiate Athletics Department Student-Athlete Handbook . (Brf. in Supp., pgs. 19-23). None of the actions taken by YSU in this case, however, were taken pursuant to any provision in any YSU handbook or policy. (See Affidavit of YSU Athletic Director Ronald Strollo, Exhibit A). While Plaintiff argues that the action with respect to his

participation was a "sanction," it was not, and no "sanction" was imposed on him per any of the conduct policies promulgated by the University. Id.

In addition, if Plaintiff truly believed that this situation is controlled by University handbook policy and procedures, he has available a contractual remedy to address this situation. The Student –Athlete Handbook, at pages 33 and 34, contains a detailed "Student-Athlete Grievance Procedure." (See Student-Athlete Handbook, ECF #3-2, Page ID #186-87). Plaintiff has failed to take advantage of the grievance procedure in the "contract" he claims applies to this case. Courts in similar contexts have held that a plaintiff may not pursue a claim in federal court where he has failed to exhaust contractual grievance remedies. *Wilson v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 83 F.3d 747, 752 (6th Cir. 1996); see also, *Wagner v. General Dynamics,* 905 F.2d 126, 127 (6th Cir. 1990). Such "exhaustion" requirements have also held to apply to students claiming a school breached internal policy or procedure requirements. See, e.g., *McAlpin v. Burnett,* 185 F. Supp. 2d 730 (W.D. Ky. 2001)(Affirming state court dismissal of student "unfair grading" claim for failure to exhaust university grievance procedures).

Because there is not a single word or phrase in any University policy which prohibits or even refers to the situation here, there can be no breach of contract. Further, "[A] breach of contract claim will not arise from the failure to fulfill as statement of goals or ideals." *Ullmo exrel.Ullmo v. Gilmour Acad.,* 273 F. 3d 671, 676-77 (6th Cir. 2001). "Not all terms in a student handbook are enforceable contractual obligations, however,

and courts will only enforce terms that are 'specific and concrete'" *Knelman v. Middlebury Coll.*, 2010 WL 4481470, * 8-9 (D. Vt. Sept. 28, 2012) and "[n]ot every dispute between a student and a university is amenable to a breach of contract claim . . . ." *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 206 (S.D.N.Y. 1998). "[C]ourts have taken a flexible approach to the scope of contractual promises between students and universities: [H]ornbook rules cannot be applied mechanically where the principal is an educational institution and the result would be to override an [educational] determination." *Sung Park v. Ind Univ Sch. of Dentistry,* 692 F 3d 828, 831 (7th Cir. 2012). "[C]ourts quite properly exercised the utmost restraint in applying traditional legal rules to disputes within the academic community, noting that literal adherence to internal rules will not be required where the dismissal rests upon expert judgments as to academic or professional standards." Id. Courts will not "second-guess" educational decisions absent some evidence of bad faith. Id. The Court is "required to defer to academic decisions of the college unless it perceived '. . . such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment . . . .'" *Bleicher v. Univ. of Cincinnati Coll. of Medicine,* 78 Ohio App. 3d 302, 308 (10th Dist. 1992)(quoting *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985). Lastly, the "standard of review is not merely whether the court would have decided the matter differently but, rather, whether the faculty action was arbitrary or capricious." Id. (Citations omitted).

As outlined in the Affidavit of YSU Athletic Director Ronald Strollo, there was no action taken here pursuant to any policy, rule or regulation of the University. Instead, the action was taken in consultation with the YSU Athletic Department, Administration and Coaching Staff for the purposes of addressing the concerns raised by students regarding whether the University is committed to taking sexual assaults seriously. (Ex. A). Such a situation is neither contemplated in nor prohibited by the handbooks which Plaintiff claims YSU had breached. Plaintiff cannot demonstrate a likelihood of success on the merits of his breach of contract claim.

B. There is no Irreparable Harm.

Plaintiff has moved for a TRO claiming that every football game he fails to play at YSU diminishes "the performance data upon which professional football teams rely" and, therefore, diminishes his potential to be drafted by the NFL. (Brf. in Supp., pg. 24). Plaintiff provides not a scintilla of factual or legal support for this claim. The law is clear that claims of irreparable harm cannot rest on the thin reed of speculation and conjecture. *Abney v. Amgen, Inc.*, 443 F. 3d 540, 552 (6th Cir. 2006)(No irreparable injury where alleged harm is "speculative or unsubstantiated.") "In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog,* 945 F. 2d 150, 154 (6th Cir. 1991). Numerous courts have rejected claims by collegiate athletes against schools alleging that they were unfairly prevented from playing sports and thus denied subsequent earnings or

opportunities as professional athletes because such claims are too speculative and hypothetical. *McAdoo v. Univ. of N. Carolina at Chapel Hill*, 2013 WL 149694 (N.C. Ct. App. Jan. 15, 2013); *Justice v. NCAA*, 577 F. Supp. 356, 374 (D. Arizona 1983); *Colorado Seminary v. NCAA*, 417 F. Supp. 885, 895 (D. Colo. 1976).

To be certain, the elevation of a college athlete to a professional sports team is not a foregone conclusion. According to the NCAA, only 1.5% of college football players go on to be drafted by the NFL. (NCAA analysis, Exhibit B). In addition, Plaintiff provides no support for his claim that being unable to play football for one (1) year during a total of three (3) years of eligibility would affect his prospects of being drafted by the NFL in the first place. As stated in the Affidavit of Athletic Director Strollo, if Plaintiff plays football at YSU during his remaining two years of eligibility (after this year), his chances of being drafted by the NFL as a professional football player are the same as if he played this year as well. Ex. A. Therefore, there exists no irreparable harm.

As an additional consideration, Plaintiff's claim that this matter has created the pendency of immediate and irreparable harm is belied by his failure to take immediate action to address it. Plaintiff admits that he learned of the University action on August 9, 2017. (Brf. in Supp., pgs. 8-9). He did not, however, take any action on his claim of immediate and irreparable harm *until nearly 6 weeks later,* when he filed his lawsuit and motion for TRO. Plaintiff provides no explanation as to why this matter is currently so urgent or how missing playing time in the third game

of the season is more important or immediate than missing the first two games. Parties who "sleep" on their rights and wait to advance what they claim are emergency claims are not entitled to immediate injunctive relief. *Libertarian Party of Ohio v. Husted,* 2014 WL 12647018, *2 (S.D. Ohio Sept. 24, 2014); *Advocacy Org. for Patients and Providers v. Mercy Health Svcs.,* 987 F. Supp. 967, 969 (E.D. Mich. 1997)("Eleventh hour" TRO filings are disfavored.).

C. There is Harm to the University and Others if the TRO is Granted.

As outlined above, there is a long history of judicial restraint when courts address decisions made by college and university administrators. "A university is not a court of law, and it is neither practical nor desirable it be one." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 n.1 (6th Cir. 2005) (quoting *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 16 (D. Me. 2005)). "[C]ourts should refrain from second-guessing the . . . decisions made by school administrators." *Davis v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 648 (1999). Universities must be allowed to make educational decisions which are, in their estimation, in the best interests of the university community and the students themselves. It is, in fact, harmful to the university to have its decisions – which were made with much deliberation and consideration – be reversed in situations such as this where there are competing interests within the student body and community. Of note, one of the interests here is the protection of Plaintiff, himself, who was receiving serious threats of harm if he played football this season. (Ex. A).

D. The Public Interest is Not Served by Granting Injunctive Relief.

The public is clearly interested in this case. A petition drive garnered over 6,000 signatures seeking to dismiss Plaintiff from the YSU football team. (Brf. in Supp., pgs. 6-7). There is no other evidence on this matter that has been presented by Plaintiff. The only evidence presented in this case is that the public interest would be served only if the decision of YSU administrators is upheld.

IV. CONCLUSION.

Plaintiff has wholly failed to meet his burden to demonstrate entitlement to the extraordinary remedies which he seeks. As such, his Motion for TRO and Preliminary Injunction must be denied.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s/ Christina L. Corl
CHRISTINA L. CORL (0067869)
Daniel J. Hurley (0034499)
David L. Van Slyke (0077721)
Plunkett Cooney
300 East Broad Street, Suite 590
Columbus, Ohio 43215
Telephone: (614) 629-3018
Facsimile: (614) 629-3019
ccorl@plunkettcooney.com
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2017, I filed the foregoing with the Clerk of Court which will send notification of such service and subsequent filing to all counsel via the Court's Electronic Filing System.

/s/ Christina L. Corl
Christina L. Corl (0067869)

Open.P0235.P0235.19058804-1

STATE OF OHIO }
} SS: **AFFIDAVIT**
COUNTY OF MAHONING }

I, Ronald A. Strollo, being first duly sworn, depose and state as follow:

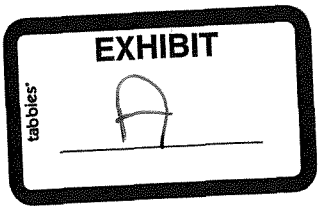
1. I am competent to testify as to the facts stated herein and I have personal knowledge of the facts stated herein.

2. I have been employed at Youngstown State University ("YSU") for 22 years. For the past 16 years I have been Executive Director of Intercollegiate Athletics for YSU.

3. I played football at YSU from 1988-1991 and was named captain of the football team in 1991. I earned my bachelor's degree in accounting from YSU in June 1993 and worked for three years at Hill Barth & King in Youngstown, where I became a CPA.

4. I have served in various capacities with the Horizon League, including chair of the strategic planning committee, chair of the executive council, chair of the finance committee, chair of the television committee, and liaison for men's basketball. I have served on the NCAA Division I Football Championship Selection ("FCS") Committee, was on the NCAA Division I Football Issues Committee, served as the Central Region Chair of the NCAA Regional Advisory Committee, and served four (4) years on the NCAA Championship and Competition Cabinet. In addition to my duties at YSU and various committee assignments, I currently serve as a member of the Board of Trustees for The Public Library of Youngstown and Mahoning County.

5. Since being named Executive Director of Intercollegiate Athletics at YSU in July 2001, I am aware of only two (2) football players that have been drafted by a team in the National Football League ("NFL") and only a handful of others that have made active rosters on NFL teams.



6. In my opinion, based upon my years of experience playing at YSU and in administration at YSU, the chances of a college football player being drafted by an NFL team, or otherwise making an NFL team roster, are speculative.

7. I am familiar with Ma'lik Richmond. Mr. Richmond, following high school, attended Potomac State College of West Virginia University and California University of Pennsylvania during the 2015-2016 academic year. Mr. Richmond transferred and enrolled at YSU in August 2016. Under applicable NCAA eligibility rules, because Mr. Richmond was enrolled at Potomac State College of West Virginia University and California University of Pennsylvania during the 2015-2016 academic year, Fall 2015 began his five (5) year clock. For eligibility purposes, Mr. Richmond could participate in intercollegiate athletics at an NCAA Division I school in the 2016-2017, 2017-2018, 2018-2019 and 2019-2020 academic years. In short, per NCAA rules and absent certain legislative exceptions, a student-athlete has a five (5) year period (10 semesters or 15 quarters) to complete four seasons of competition with the five (5) year clock commencing when the student-athlete first enrolls as a full-time student at any college. As a result, Mr. Richmond, following the 2017-2018 academic year, has two (2) years of eligibility to participate in intercollegiate athletics.

8. Assuming Mr. Richmond has the athletic ability to be drafted by an NFL team or otherwise make an NFL team roster, the two (2) years of eligibility to participate in intercollegiate athletics provides more than ample opportunity to showcase his talents for professional scouts.

9. I am not aware of any contractual agreement between Mr. Richmond and YSU relating to the facts of this particular case. The decision that Mr. Richmond would not

be permitted to compete in any football games on behalf of YSU in the 2017-2018 academic year was not premised upon the YSU Student Code of Conduct or the Intercollegiate Athletics Department Student-Athlete Handbook. The YSU administration became aware that threats had been made towards Mr. Richmond if he was competing in football games. The decision that Mr. Richmond would not be permitted to compete in any football games on behalf of YSU in the 2017-2018 academic year was not a "sanction" imposed on Mr. Richmond as defined by or otherwise governed by the YSU Student Code of Conduct or the Intercollegiate Athletics Department Student-Athlete Handbook. The decision that Mr. Richmond would not be permitted to compete in any football games on behalf of YSU in the 2017-2018 academic year was in the sound discretion of the YSU administration after consultation with the football coaching staff for the purposes of addressing concerns raised as to Mr. Richmond competing on behalf of YSU in the 2017- 2018 academic year.

10. I first became aware approximately one week before YSU's first football game, scheduled for September 2, 2017, that Mr. Richmond was considering legal action against YSU relative to the decision that Mr. Richmond would not be permitted to compete in any football games on behalf of YSU in the 2017-2018 academic year.

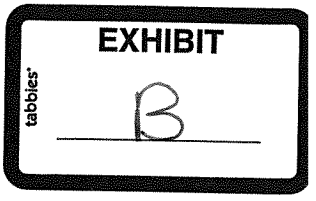
Further Affiant sayeth naught.

Ronald A. Strollo

SWORN TO BEFORE ME and subscribed in my presence, this 14th day of September, 2017.

NOTARY PUBLIC

MARGARITA BAILEY
Notary Public
In and for the State of Ohio
My Commission Expires



Estimated probability of competing in professional athletics

More than 480,000 compete as NCAA athletes, and just a select few within each sport move on to compete at the professional or Olympic level.

The table presents of how many NCAA athletes move on to professional careers in sports like basketball, football, baseball and ice hockey. Professional opportunities are extremely limited and the likelihood of a high school or even college athlete becoming a professional athlete is very low.

In contrast, the likelihood of an NCAA athlete earning a college degree is significantly greater; graduation success rates are 86% in Division I, 71% in Division II and 87% in Division III.

Download the 2017 Probablility of Competing Beyond High School Figures and Methodology

	NCAA Participants	Approximate # Draft Eligible	# Draft Picks	# NCAA Drafted	% NCAA to Major Pro*	% NCAA to Total Pro^
Baseball	34,554	7,679	1,206	695	**9.1%**	--
M Basketball	18,684	4,152	60	44	**1.1%**	19.1%
W Basketball	16,593	3,687	36	35	**0.9%**	4.9%
Football	73,660	16,369	253	251	**1.5%**	1.9%

M Ice Hockey	4,102	912	211	51	**5.6%**	--
M Soccer	24,803	5,512	81	75	**1.4%**	--

* **Percent NCAA to Major Pro** figures are based on the number of draft picks made in the NFL, NBA, WNBA, MLB, NHL and MLS drafts only. See methods notes for important details on the definition of NHL draftee in men's ice hockey. Column percentages were calculated as (#NCAA Drafted) / (Approximate # Draft Eligible).

^ **Percent NCAA to Total Pro** takes the number of pro opportunities from the "% NCAA to Major Pro" calculation and adds in some additional professional opportunities that we were able to quantify. So, for football, this calculation includes NFL, Canadian Football League and Arena League slots available to first-year professionals. For men's basketball we accounted for NBA, NBA D-League and international opportunities. For women's basketball, we assessed WNBA and international roster slots. See methods notes for details on these calculations. Data on full-time international professional opportunities available in baseball, men's ice hockey and men's soccer were not analyzed here.

Methodology and Notes

General

- College participation numbers are from the NCAA's 2015-16 Sports Sponsorship and Participation Rates Report. These college numbers account for participation in college athletics at NCAA-member schools only.
- To estimate the number of NCAA student-athletes in a sport eligible for a particular year's professional draft, the total number of NCAA student-athlete participants in the sport was divided by 4.5. This figure was used to provide a general estimate of the number of student-athletes in a draft cohort (single draft class) in a given year, accounting for redshirting, degree completion delays due to transfer, etc. that extend the average time to graduation to just beyond four year in all sports. In other words, we observe a year-to-year departure rate (whether due to graduation, dropout or departure for a professional sports opportunity) of just below one-quarter of the total number of student-athletes in each sport. Because the sports examined (M/W

basketball, football, baseball, men's ice hockey and men's soccer) have dramatically different rules for draft eligibility, these calculations should be treated as estimates
only.

- Data on available professional opportunities are described below for each sport.

Baseball

- MLB draft data from 2016. There were 1,206 draft picks in that year; 695 of those picked were from NCAA schools (source: MLB Draft Tracker 2016). Of the 695, Division I student-athletes comprised 595 of those chosen, Division II provided 80 and Division III had 20.
- Percent NCAA to Pro calculated as number of NCAA student-athletes taken in the draft (n=695) divided by the approximate number draft eligible. Not all of the student-athletes drafted go on to play professional baseball and many draftees fail to reach the Major League.

Men's Basketball

- NBA draft data from 2016. There were 60 draft slots in that year, but only 44 went to NCAA players (others chosen were international players not attending U.S. colleges). Percentage NCAA to Major Pro calculated using the 44 NCAA selections. Since 2006, 12 international players have been drafted on average each year.
- On 2016-17 opening day NBA rosters, former NCAA players filled 80% of roster spots (all were from Division I schools). (Source: Jim Sukup, College Basketball News).
- Data on other professional opportunities in men's basketball were collected by NCAA staff with the assistance of Marek Wojtera from eurobasket.com. Tracking 2016-17 international opportunities for the 2016 draft cohort, it was determined that an additional 751 former NCAA student-athletes played internationally, in the NBA D-League, or in the NBA as undrafted players (535 from Division I, 181 from Division II and 35 from Division III) after leaving college; this includes international players who attended NCAA institutions (previous versions of this document did not include these players). These numbers were combined with the NBA draftees to calculate an approximate NCAA to Total Professional opportunities figure (calculated as [44 + 751] / 4,152 = 19%).

- We estimate that 3.6% of draft-eligible Division I players were chosen in the 2016 NBA draft (44 / 1,216). However, in total, 48% of draft-eligible Division I players competed professionally (NBA, D-League, or internationally) in their first year after leaving college (calculated as [44 + 535] / 1,216). Approximately 14% of draft-eligible players from the five Division I conferences with autonomous governance (ACC, Big Ten, Big 12, Pac-12 and SEC) were drafted by the NBA in 2016 (32 / 225), while 74% played professionally somewhere in their first year post-college (calculated as [32 + 134] / 225).

Women's Basketball

- WNBA draft data from 2016. There were 36 draft slots in that year's draft, 35 of which went to NCAA players (other selection was an international player not attending a U.S. college). All 35 NCAA selections came from Division I colleges. Percentage NCAA to Major Pro calculated using the 35 NCAA selections.
- Data on international professional opportunities in women's basketball were collected by NCAA staff with the assistance of Marek Wojtera from eurobasket.com, and are limited to the 2016 draft cohort. It was determined that an additional 146 former NCAA student-athletes from the cohort played internationally in 2016-17 (131 from Division I, 14 from Division II and 1 from Division III). These numbers were combined with the WNBA draftees to calculate an approximate NCAA to Total Professional opportunities figure (calculated as [35 + 146] / 3,687 = 4.9%).
- We estimate that 3.2% of draft-eligible Division I players were chosen in the 2016 WNBA draft (35 / 1,110). However, in total, 15% of draft-eligible Division I players competed professionally (WNBA or internationally) in their first year after leaving college (calculated as [35 + 131] / 1,110). Approximately 12% of draft-eligible players from the five Division I conferences with autonomous governance (ACC, Big Ten, Big 12, Pac-12 and SEC) were drafted by the WNBA in 2015 (24 / 203), while 28% played professionally somewhere in their first year post-college (calculated as [24 + 33] / 203).

Football

- NFL draft data from 2016. There were 253 draft picks in that year's draft, 251 of whom were former NCAA players. NCAA to Major Pro figure calculated using these data.
- NCAA divisional breakdown of the 251 NCAA players selected in the 2016 NFL draft: Division I FBS (228), Division I FCS (20), Division II (3). The five football conferences with autonomous governance accounted for 189 of the 251 NCAA draft picks (SEC=51, Big Ten=47, ACC=33 [includes Notre Dame], Pac-12=32, Big 12=26).
- Data on Arena League and Canadian Football League opportunities were collected by NCAA staff via rosters on each organization's website (sources: cfl.ca and arenafootball.com) in March 2017. Due to the timing of each league's season, the 2015 draft cohort was used to estimate unique playing opportunities in the Arena League, while the 2016 draft cohort was used to track CFL rookies. It was determined that an additional 57 former NCAA student-athletes from those draft cohorts were listed on a roster (28 in the CFL, 29 in the Arena League). Across these two leagues, there were 29 former Division I FBS players, 14 from Division I FCS, 13 from Division II and 1 from Division III. These numbers were combined with the NFL draftees to calculate an NCAA to Total Professional opportunities proportion (calculated as [251 + 57] /16,369).
- We estimate that 3.9% of draft-eligible Division I players were chosen in the 2016 NFL draft (248 / 6,307). Limiting this calculation to subdivision, 6.7% of FBS players were estimated to be drafted (228 / 3,404), as compared to 0.7% of FCS players (20 / 2,902). Narrowing further to the five Division I conferences with autonomous governance (ACC, Big Ten, Big 12, Pac-12 and SEC), we estimate that 11% were drafted (189 / 1,747). Accounting for Arena League and CFL opportunities, the NCAA to Total Professional figures are estimated as 4.6% for Division I ([248 + 43] / 6,307), 7.4% for FBS ([222 + 29] / 3,404) and 12% for the five autonomous conferences ([189+ 19] / 1,747).

Men's ice hockey

- NHL draft data from 2015 (source: hockeydb.com). There were 211 draft picks in that year. Only 7 players from NCAA rosters were selected in that draft (all from Division I teams). However, this is not indicative of the likelihood of going from a college team to a professional team due to the nature of the NHL draft, where players are typically selected prior to turning college-aged.

- In examining the subsequent hockey pathways of 2015 draftees (hockeydb.com), it was determined that 51 of the 211 (source: collegehockeyinc.com) attended an NCAA college for any period of time through February 2017. These numbers, although not fully comparable to those used in the other sports examined, were used to calculate an approximate NCAA to Major Pro percentage. Note that only a small subset of players drafted ever play in an NHL game. Undrafted college players may go on to sign contracts with NHL teams after completing college (those numbers are not part of the current NCAA to Major Pro calculation).
- In 2016, 30% of players on active NHL rosters played college hockey (all in Division I), up from about 20% in the year 2000 (source: collegehockeyinc.com). 71% of former college players in the NHL played at least three college seasons, and 36% played all four. Thanks to Nate Ewell at College Hockey, Inc. for providing these data.

Men's soccer

- MLS SuperDraft data from 2016. There were 81 draft slots in that year, but only 75 players were selected (all from NCAA schools). Of the 75 picks, 72 were NCAA Division I student-athletes, two were from Division II and one was from Division III. Percentage NCAA to Major Pro calculated using the 75 NCAA selections. (Source: mlssoccer.com).
- These calculations do not account for other domestic (e.g., NASL, USL) or international professional soccer opportunities.

Last Updated: March 10, 2017

- Research

NCAA® Research