No. 22-1783 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ZION WILLIAMSON,

Plaintiff/Counterclaim Defendant-Appellee,

v.

PRIME SPORTS MARKETING, LLC., and GINA FORD,

Defendants/Counterclaim Plaintiffs-Appellants.

On Appeal from the United States District Court
for the Middle District of North Carolina

INITIAL BRIEF OF APPELLANT

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CASE NO: 22-1793 (L)

ZION WILLIAMSON v. PRIME SPORTS MARKETING, LLC

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24. Honorable Loretta C. Biggs, United States District Judge (NCMD)

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26. Gina Ford

27. Zion Williamson

s/ Douglas F. Eaton
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STATEMENT REGARDING ORAL ARGUMENT

Because of the fact specific nature of this appeal, Appellants' counsel believes that our familiarity with the record could be helpful in aiding the Court in making its decision. Therefore, we would welcome the opportunity for oral argument.

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I. STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332, based on the complete diversity of citizenship. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which permits appeals from final decisions rendered by district courts.

II. STATEMENT OF THE ISSUES ON APPEAL

1. DID THE DISTRICT COURT ERR IN GRANTING JUDGEMENT ON THE PLEADINGS IN FAVOR OF THE PLAINTIFF WHEN THE DEFENDANT HAD PLED SUFFICIENT FACTS TO SUPPORT AN AFFIRMATIVE DEFENSE TO PLAINTIFF'S CLAIM THAT THE AGENCY CONTRACT WAS VOID UNDER NORTH CAROLINA'S UNIFORM ATHLETE AGENT ACT?

2. DID THE DISTRICT COURT ERR IN GRANTING FINAL SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF ON THE DEFENDANTS' COUNTERCLAIMS, WHEN THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENDANT, DEMONSTRATED THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT THAT REQUIRED RESOULTION BY A JURY?

III. STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

Zion Williamson was the most heralded rookie to enter the NBA since Lebron James. Unsurprisingly, there were many suitors seeking to

serve as the marketing agent for this talented young man. Having researched marketing agents, Williamson and his family reached out to Appellants Gina Ford and her agency Prime Sports Marketing, (hereinafter collectively "Ford"), who represented world record sprinter Usain Bolt, and prior NBA number one draft pick DeAndre Ayton, and invited her to their North Carolina home. The meeting went well, and Williamson signed a contract hiring Ford to become his marketing agent.

The business of a representing professional athletes is a cutthroat one, and the agency that Williamson hired to represent him as his NBA player agent, Creative Artists Agency ("CAA") was not content to handle only one slice of the pie. Because the commission revenue from Williamson's marketing contracts will far exceed the commission revenue from Williamson's NBA player contracts over the course of his career, CAA talked Williamson into terminating his agreement with Ford by telling him that they would not represent him as his NBA player agent unless he also signed with them as his marketing agent.

Williamson agreed to do so, but not before obtaining Ford's marketing plan detailing the numerous offers she had obtained for

Williamson. Williamson promptly handed those offers over to CAA, who later went on to finalize several of the offers into endorsement deals.

Anticipating fallout from Williamson's actions, CAA retained counsel for him, who filed the underlying lawsuit seeking a declaration that Williamson's contract with Ford was void as being violative of North Carolina's Uniform Athlete Agent Act ("UAAA"). Ford counterclaimed, alleging a number of claims arising from Williamson's breach of his contract with Ford and misappropriation of Ford's marketing trade secrets.

The district court granted judgment on the pleadings on Williamson's declaratory judgment claim, holding that because Williamson had not been declared ineligible by the NCAA, he met the definition of student athlete under the UAAA, and the contract was therefore void. The district court further denied leave to amend the pleadings to make specific allegations as to the conduct that Williamson had engaged in that would have rendered him ineligible under NCAA rules. Finally, the district court granted summary judgment in favor of Williamson on all of Ford's counter-claims. This appeal follows.

B. PROCEDURAL HISTORY

Williamson filed his complaint against Ford for declaratory judgment on June 13, 2019. (DE1)[1] Williamson filed an amended complaint on August 3, 2019. (JA20) After Ford's motion to dismiss was denied, Ford filed her answer and counterclaim against Williamson on May 8, 2020. (JA64) The counterclaim included 11 separate claims, but alleged two primary acts of wrongdoing on Williamson's part. First, Williamson breached his contract with Ford by terminating it without cause. (JA131) Second, Williamson obtained, under false pretenses, Ford's marketing plan and endorsement offers that she had negotiated and provided those documents to CAA. (JA165)

On May 20, 2020, Williamson moved for judgment on the pleadings, arguing that he was entitled to the protections of the UAAA, which required that agents register in the state of North Carolina and that their contracts contain a specific warning to student athletes in order to be valid. (JA412) Ford filed her response, arguing that she did not need to

[1] References to docket entries not included in the Joint Appendix will be designated (DE__). References to the Joint Appendix will be designated (JA__).

comply with the UAAA because Williamson did not meet the definition of student athlete under the statute because he had received improper benefits which would have rendered him ineligible under NCAA rules. (DE37) Williamson filed his reply on June 22, 2020. (DE40)

On January 20, 2021, the district court issued its order granting Williamson's motion for partial judgment on the pleadings, determining that the contract was void as a matter of law under the UAAA. (JA345) In the order, the district court held that the NCAA's determination of Williamson's eligibility to play basketball was binding, and Ford was not entitled to establish that Williamson had engaged in conduct that would have rendered him ineligible under NCAA rules. (JA361)

Ford filed a motion to amend the court's judgment, and a motion to amend her answer, affirmative defenses and counterclaim. (JA414, JA420) In the motion, Ford asked the district court to reconsider its ruling, pointing to numerous cases in which courts considered the question of a student athlete's eligibility in fact, notwithstanding the NCAA's determination. Ford also requested that the Court grant leave to amend her answer, affirmative defenses and counterclaim to allege

specific conduct involving the receipt of improper benefits that would have rendered Williamson ineligible under NCAA rules. Williamson responded to both motions. (DE57,DE58) Ford provided an Omnibus reply. (DE63)

Subsequent to Ford's reply, Ford obtained additional evidence of improper benefits that Williamson had received. On May 11, 2021, Ford filed a motion to substitute the proposed amended answer, affirmative defenses and counterclaim with a new pleading that included allegations related to this newly discovered evidence. (JA430) On September 15, 2021, the district court denied all of Ford's motion, holding that amendment would be futile, because the district court had no authority to "make an initial retroactive determination of eligibility under the guidelines set forth by a voluntary association." (JA365)

The case then proceeded to discovery on the claims related to the misappropriation of Ford's marketing plan. On February 11, 2022, Williamson filed a motion for summary judgment with respect to all of Ford's claims. (JA782) Ford in turn, filed her own motion for summary judgment. (JA1669) After extensive briefing by both parties, on July 18,

2022, the District Court entered an order granting Williamson's motion for final summary judgment with respect to all of Plaintiff's claims. (JA384) In short, the district court held that all of Ford's contract related claims failed because the contract was void under the UAAA, and that Ford's trade secret claims failed because Ford's alleged trades secrets were not trade secrets as a matter of law. The district court entered final judgment on August 16, 2022. (JA409)

C. Facts relevant to the Orders on Appeal

1. Motion for Judgment on the Pleadings

Though the record below is very fact intensive, the question before the court is relatively discreet. There is no dispute that Williamson played one season of college basketball at Duke and that he was never declared ineligible by NCAA. There is no dispute that Ford had not complied with the registration requirement of the UAAA, and her contract did not contain the notice required by the UAAA. The sole issue before this court is whether Ford could assert an affirmative defense that Williamson did not meet the definition of a "student athlete" under the

UAAA because he engaged in conduct that would render him ineligible under NCAA rules.

For purposes of this appeal, the Court must accept, as true, Ford's allegations that Williamson engaged in such conduct. As acknowledged by the district court, in Ford's initial affirmative defense and counterclaim:

> Defendants have raised a question of Plaintiff's status as a student-athlete, as an affirmative defense, (ECF No. 32 at 24), and alleged the same within a counterclaim, (*Id.* at 40–41). According to Defendants, "[a]t the time Plaintiff [entered] Duke University as a Freshman in 2018, the Plaintiff was not a 'student athlete' as define[d] by the [National Collegiate Athletic Association ("NCAA")] and/or as defined by [the] UAAA." (ECF No. 32 at 24.) This is because, allegedly, "the Plaintiff and/or third parties acting on the Plaintiff's behalf had violated one or more of the NCAA and/or UAAA rules that . . . rendered him ineligible to be a student athlete." (*Id.* (internal quotations omitted).)

(JA356)

> Further, Ford alleged that Williamson had:
>
> …engaged in conduct/acts that rendered and renders him ineligible to be or remain a "student-athlete" including, but not limited to:
>
> a) He agrees orally or in writing to be represented by any individual other than a NCAA-certified agent;
> b) He accepts any benefits from an individual other than a NCAA-certified agent; and

> c) He entered the NBA Draft AND did not intend to and did not take the appropriate steps to withdraw and declare any intention of resuming intercollegiate participation and, in fact, repeatedly and publicly declared and made it abundantly clear that he was not ever returning to intercollegiate basketball.
>
> (Id. at 24–25, 40–41) (emphasis omitted).

(JA359)

Because the order suggested that these allegations were insufficient to establish Williamson's ineligibility should the district court allow Ford to prove her affirmative defense, Ford asked for leave to amend her pleadings. (JA420) Ford's final proposed answer and affirmative defenses included the following allegations. Although it was unnecessary for her to do so, Ford submitted documentary evidence supporting each allegation. (JA435)

Given's Williamson's renown as a high school recruit, it was unsurprising that a bidding war would erupt for his services. As part of that bidding war, Williamson and his family (mother, Sharonda Sampson, and Stepfather, Lee Anderson), were offered improper benefits by a representative of Adidas in an effort to steer Williamson to the University of Kansas. (JA529) Nike, in an effort to steer Williamson to

Duke University, paid Williamson's mother for consulting services that she had no experience providing. (JA531)

After signing a letter of intent to attend Duke, the improper benefits continued to flow. Prior to attending Duke, Williamson and his family lived in a property valued at approximately $153,000. (JA533) Once he was admitted to Duke, Williamson and his family moved to North Carolina, where they resided in a property worth approximately $950,000 and for which the monthly rent was listed at $4,995.00. (Id.) The entire year's rent was paid in a single lump sum by a certified check from Williamson's parents, even though they were unemployed at the time. (JA534)

In December 2017, during Williamson's senior year at high school, Lee Anderson registered a 2016 GMC Yukon in his name. (JA532) In February 2018, Sharonda Sampson registered a 2015 Cadillac Escalade in her name. (Id.)

In October 2018, Williamson executed a written marketing agreement with Slavko Duric, President of Maxwell Management Group, Inc., to represent him for marketing purposes once he graduated from

Duke. In exchange for his agreement, Duric provided Williamson and his family with the sum of $500,000.00. (JA536) Williamson subsequently reneged on this agreement, signing first with Plaintiffs and subsequently, with CAA, to act as his marketing agent.

As a result of these improper benefits received by Williamson and his family, Williamson did not meet the definition of a student athlete under North Carolina's Uniform Athlete Agent Act (UAAA). (JA525) As a result, he was not entitled to the protections provided by the statute and agents like the Plaintiffs, who were not registered in North Carolina, were free to solicit and sign him.

2. MOTION FOR SUMMARY JUDGMENT

The facts relevant to Ford's claims for fraud, misappropriation of trade secrets, deceptive and unfair trade practices, and civil conspiracy are set forth below, in the light most favorable to Ford.

Soon after the conclusion of his Freshman season, in February of 2019, Williamson reached out to Plaintiffs and invited Ford to present Williamson with a contract to serve as his marketing agent. (JA1317) Williamson and his family had done their research and selected her for

based on her representation of Olympic Sprinter Usain Bolt. (JA1317,1318) Ford travelled to Williamson's home in North Carolina at his invitation and met with him and his family on April 20, 2019. (Id.) At that time, Williamson signed a marketing agreement with the Plaintiffs (the Contract) and provided her with a letter of authorization which she could use to present in her marketing efforts. (JA1319)

During the April 20, 2019, meeting, Williamson's parents advised the Plaintiff that they had spoken with Defendant CAA and had informed them that they were signing with the Plaintiffs for marketing and branding purposes. (JA1320) They were, however, interested in signing with CAA to act as Williamson's NBA Player Agent. (Id.) Ford immediately got to work for Williamson, arranging a cover shoot and article for Slam Magazine which occurred on April 28, 2019. (JA1338)

By April 28, 2019, Ford already had an offer in place for Williamson for $100 Million Dollars from an investor willing to bankroll the formation of Williamson's own shoe company. (JA1332) Because it would take at least two years to build such a company, Ford had already spoken

with Puma regarding a seven-figure deal that would encompass the two years prior to the launch of Williamson's shoe company. (JA1334)

Ford spent the next month doing her job – securing endorsement offers for Williamson from numerous companies, including PUMA, General Mills (Wheaties), Beats by Dre, Chase Bank, Harper Collins, Monster Hydro, Burger King, Mercedes Benz, T-Mobile, Kraft Heinz, Powerade (Coca-Cola), BioSteel and Marvel. (JA1328-JA1332) She would present these offers to Williamson and his family as they came in.

Williamson was first contacted by CAA through Alton Brown in March of 2019. (JA1346) Mr. Brown is a player agent operating out of Chicago, IL. His focus was on representing athletes and securing contracts with the various leagues that they played for. (Id.) He was not a marketing agent. In his effort to woo Williamson on behalf of CAA, Brown arranged for the family to take a private jet from North Carolina to Los Angeles on May 3, 2019, so that Williamson and his family could visit CAA's offices. (Id.)

During her tenure at CAA, Metelus could not recall CAA ever flying another potential client to LA on a private jet. (JA1351) CAA covered all

expenses related to the private jet, meals in Los Angeles, and Williamson's stay at the Peninsula Hotel. (JA1350) In Los Angeles, Brown and Metelus met with Williamson and his family at CAA's office for a pitch meeting wherein CAA proposed to represent Williamson both as his player agent and as his marketing agent. (JA1349)

At the time of this meeting, Metelus and CAA were aware that Williamson had signed with Plaintiffs to represent him as his marketing agent. (JA1358) That night, Metelus and Brown took Williamson and his family to dinner where they were joined by NBA head coach Doc Rivers. (JA1352) Between May 3rd and May 13th, Brown continued to pitch Williamson and his family on becoming Williamson's agent for all purposes. (JA1355)

Ford, Brown, Metelus, Williamson and his family were all present in Chicago during the weekend of May 12 through May 14, 2019, for the NBA draft lottery. (JA1356) Ford reached out to Williamson's family several times to meet that weekend, but Williamson's mother rebuffed her overtures. (JA1355) Meanwhile, on May 13, 2019, Williamson and his parents had a second meeting with CAA in its Chicago office. (JA1356)

During this May 13, 2019, pitch meeting, Lee Anderson once again informed CAA and Metelus that Ford was Williamson's marketing agent. (JA1358) In response, Brown told Williamson and his family that CAA would not sign Williamson unless Williamson signed with CAA for all purposes, both as his NBA player agency and as his marketing agent. (JA1359)

Undaunted, Brown and Metelus continued their pitch meeting, discussing the branding and marketing opportunities that they wished to pursue if Williamson signed with CAA. (JA1361) On May 14, 2019, Metelus texted Sampson stating that she was with the Gatorade representative, who had mentioned Ford's relationship to Williamson. (JA1362)

Despite not being able to meet with Williamson in Chicago, Ford remained unaware that Williamson had been talking with Metelus and Brown. Ford continued to do her job, forwarding an offer from Mercedes Benz to Sampson on May 17, 2019. (JA1363) At that time, Sampson instructed her to forward all future offers to Anderson. (JA1364)

On May 22, 2019, Ford emailed Sampson six endorsement offers from BioSteel, Activision, EA Sports, Fanatics, Gatorade, and NBA 2K. (JA1364) Sampson immediately forwarded Plaintiff's work product to Brown. (JA1365) Brown, in turn, forwarded these offers to Metelus, attached to an email stating, "Here we go…" (JA1371) Brown responded to Sampson and requested that she provide him with a copy of Williamson's Contract with Plaintiffs, so that Brown could have CAA's lawyers review it. (JA1369)

Brown forwarded Ford's endorsement offers to another CAA employee. (JA1371) Eventually, Ford's offers were itemized in an internal spreadsheet created by CAA for tracking purposes. (JA1372) The following day, May 23, 2019, Williamson was scheduled to be in Los Angeles for a commercial shoot for the movie *Hobbes and Shaw*. (JA1374) Ford had arranged and paid for flights for Williamson and his family to travel to Los Angeles for this shoot, which would pay Williamson a total of $100,000.00 for a couple of hours of work. (Id.)

On May 23, 2019, Ford met with Anderson and presented him with Plaintiff's Strategic Global Brand Management strategy for Williamson,

a document that contained Prime Sports' methods, ideas and propriety information that was created and compiled specifically for the marketing of Williamson. (JA1376, JA1425) This document was produced by Ford at the request of Williamson's parents, who wanted to see her plan for globally marketing and branding Williamson. (JA1377)

At the time. Ford delivered three copies of this report to Anderson, neither Williamson nor his parents had advised Ford that they were considering hiring CAA or Metelus to be his marketing agent. (JA1379) Had Ford known this fact, she would not have continued working on Williamson's behalf, nor would she had provided Anderson with any of her marketing trade secrets. (Id.)

On May 24, 2019, Sampson sent an email to Ford instructing her to cease negotiations on behalf of Williamson until further notified. (JA1398) Between May 24th and May 30th, Anderson repeatedly contacted Ford requesting Williamson's compensation for the *Hobbes and Shaw* commercial. (JA1399) Ford transferred those funds on May 30, 2019. (Id.) That same day, Williamson signed a contract with CAA and Brown to represent him as his player agent. (JA1400)

On May 30th, a CAA marketing employee had already begun engaging in discussions with PUMA, even though Williamson's agent and Williamson had yet to terminate Ford and yet to sign the marketing agreement with CAA. (JA1402) That happened the next day, on May 31, 2019, shortly after Ford emailed Sampson additional endorsement offers that had been negotiated prior to the May 24th "cease negotiations" email from Sampson. (JA1404) On May 31, 2019, Williamson sent a notice of termination letter to Plaintiffs, and signed a marketing agreement with CAA. (Id.)

On June 5, 2019, Sampson forwarded these endorsement offers received on May 31st to Brown. (JA1405) Brown was now in possession of all of the endorsement offers that Ford had negotiated and secured on Williamson's behalf. In short order, Williamson signed partnership endorsement contracts with most of the companies that Ford had negotiated deals with: Gatorade, Mercedes Benz, Beats by Dre, NBA2K, Fanatics and Panini. (JA1406)

Gatorade's representative was sufficiently concerned about the appearance of going from negotiating with Ford to negotiating with CAA

that she asked for contract language to protect Gatorade from any issues with Ford. Brown referred her to CAA's attorneys. (JA1407) On June 14, 2019, Brown messaged Williamson telling him not to "stress out about this Gina stuff at all . . . she is clearly in the wrong and not one brand will care about this, nor will the Pelicans. I promise you . . . we deal with these kinds of people all the time in our business. We got your back 100%." (JA1410)

As part of CAA's effort to induce Williamson to terminate his agreement with Ford, CAA agreed to pay all legal fees incurred by Williamson in any litigation with the Plaintiffs, and further pay for any damage award that might be entered against Williamson in such litigation. (JA1410)

IV. SUMMARY OF THE ARGUMENT

The district court erred in granting judgement on the pleadings for Williamson. The district court held that the only way to challenge the applicability of the UAAA to the parties' contract was to allege that Williamson had been declared ineligible by the NCAA. Merely alleging

that Williamson had engaged in conduct that violated NCAA rules and rendered him ineligible as a result was insufficient.

This ruling violated the rules of statutory construction. The district court failed to review the entirety of the statute. The district court added language to the statute that was not present. And the district court's ruling rendered sections of the statute meaningless.

The district court's holding that it could not conduct its own analysis as to whether Williamson met the definition of a student athlete under the UAAA is unsupported by any authority. Indeed, caselaw demonstrates that federal district courts are not bound by findings of government agencies or other courts. Further, caselaw demonstrates that both agents and athletes have routinely challenged NCAA findings of both eligibility and ineligibility.

Here, Ford alleged conduct by Williamson that indisputably violated NCAA rules and rendered him ineligible to play college basketball. The fact that he was not caught by the NCAA is irrelevant for determining whether or not he was entitled to the protections of the

UAAA. The district court's order granting judgment on the pleadings should be reversed.

Assuming this Court reverses this order, this would require reversal of the district court's order granting summary judgment on Ford's contract-based claims, which was based on the finding that the contract was Ford. The district court further erred in granting summary judgment on Ford's fraud claim, which was not a new theory of recovery, and which supported a claim for fraud by concealment given the principal/agent relationship between Williamson and Ford.

The district court erred in granting summary judgment on Ford's claim for misappropriation of trade secrets. Typically, the existence of a trade secret is a question of fact for the jury. The endorsement deals Ford negotiated for Williamson were trade secrets. They contained information known only to Ford and the various brands who made the offers. They had value to Ford's competitor, CAA, who simply signed Williamson to six of the deals that Ford had negotiated for him.

Finally, because Ford's remaining claims were based on her fraud and misappropriation claims, reversal of summary judgment on or both

of the claims would necessarily require reversal of summary judgment entered on these claims as well.

V. ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews de novo a district court's ruling on a motion for judgment on the pleadings. *Drager v. PLIVA USA, Inc.,* 741 F.3d 470, 474 (4th Cir. 2014). A motion for judgment on the pleadings "should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir.1999).

The district court's decision to deny Ford's motion to amend was based on its conclusion that amendment would be futile because the court deemed the NCAA's determination of eligibility binding on it as a matter of law. This was an erroneous conclusion of law, which the Court also reviews de novo. *United States v. Burgess*, 478 F.3d 658, 661 (4th Cir. 2007).

Finally, "[i]n reviewing a summary judgment, [this Court applies] de novo the same standard that the district court was required by law to apply for granting the motion for summary judgment." *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 817 (4th Cir.1995).

B. THE DISTRICT COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS AND VOIDING THE CONTRACT BETWEEN FORD AND WILLIAMSON.

1. THE DISTRICT COURT'S HOLDING VIOLATES THE RULES OF STATUTORY CONSTRUCTION.

In order for Williamson to invoke the protections of the UAAA, is axiomatic that he must have met the definition of a "student athlete" at the time that he entered into the contract with the Defendants. As has been repeatedly noted throughout this litigation, the complete definition of "student athlete" under the UAAA is as follows:

> An individual who engages in, is eligible to engage in, or may be eligible to engage in any intercollegiate sport. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for the purposes of the sport.

N.C. Gen. Stat. § 78C-86(11). The second sentence makes clear that notwithstanding the first sentence, individuals that are permanently ineligible to compete in a sport do not meet the definition of student

athlete under the statute. Below, Williamson accused Ford of seeking to "re-write the statute." On the contrary, Ford asks the Court to "give effect, if possible, to every clause and word of a statute" as required by the "cardinal principle" of statutory interpretation. *Loughrin v. United States*, 573 U.S. 351, 358 (2014).

As a starting point, we note that § 78C-100 of the UAAA contains the following clause: "(e)This Article does not restrict rights, remedies, or defenses of any person under law or equity." "Exceptions to statutory definitions are generally matters for affirmative defenses." *United States v. Beason*, 690 F.2d 439, 445 (5th Cir. 1982). The right to raise an affirmative defense challenging whether a prerequisite statutory definition has been met has been recognized in numerous contexts.[2]

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[2] *See Baylon v. Wells Fargo Bank, N.A.*, 2016 WL 7494256, at *2 (D.N.M. Mar. 9, 2016) (Wells Fargo asserted affirmative defense to FDCPA claim that it did "not meet the statutory definition of a 'debt collector.'"); *Potmesil v. Alexandria Prod. Credit Ass'n*, 42 B.R. 731, 732 (W.D. La. 1984) (Debtors were entitled to relief from order of the bankruptcy court based on their affirmative defense that they met the statutory definition of farmers.); *Waterhouse v. Tennessee Valley Auth.*, 475 F. Supp. 3d 817, 821 (E.D. Tenn. 2020) (Property Owner raised affirmative defense that he met the statutory definition of a "landowner" under Tennessee's "recreational use statute."); *Cole v. Cate*, 2010 WL 5148463, at *21 (S.D. Cal. Oct. 21, 2010), *report and recommendation adopted,* 2010 WL

Jenkins v. Allied Interstate, Inc., 2009 WL 3157399 (W.D.N.C. Sept. 28, 2009) provides the closest analogue we could find. In *Jenkins*, the plaintiff sued defendant for violation of the TCPA and North Carolina state law related to telephone calls made by debt collectors. The defendant asserted affirmative defenses alleging "that Plaintiff is not a 'consumer' within the meaning of North Carolina General Statute § 58–70–90 (governing collection of debts from debtors) and that defendant is not a "telephone solicitor" within the meaning of North Carolina General

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5148440 (S.D. Cal. Dec. 14, 2010) (Defendant in securities litigation raised affirmative defense "that he [was] excluded from the statutory definition of a broker-dealer."); *Outbound Mar. Corp. v. P.T. Indonesian Consortium of Const. Indus.*, 575 F. Supp. 1222, 1224 (S.D.N.Y. 1983) (Defendant entity seeking protection from prejudgment attachment under Foreign Sovereign Immunities Act must plead and prove an affirmative defense establishing that it falls within the statutory definition of a "foreign state."); *United States v. One Hundred Thirty-Seven (137) Draw Poker-Type Machines & Six (6) Slot Machines*, 765 F.2d 147 (6th Cir. 1985) (Defendant asserted "the affirmative defense that at least some of the machines are not gambling devices within the statutory definition."); *United States v. McMillan*, 346 Fed. Appx. 945, 947 (4th Cir. 2009) (Defendant in an unlawful possession of a firearm case may raise the affirmative defense that the gun meets the statutory definition of an "antique firearm."); and *State v. Childers*, 255 S.E.2d 654, 657–58 (N.C. Ct. App. 1979) (Defendant charged with unlawful possession of marijuana seeds may raise the affirmative defense that the seeds do not meet the statutory definition of seeds because they have been sterilized or rendered incapable of germination.)

Statute § 75–101 (governing telephone solicitations)." *Jenkins* at *4. The court agreed that the plaintiff was not a "consumer" and the defendant was not a "telephone solicitor" for purposes of the relative statutes and granted judgment on the pleadings to the defendant on those statutory counts. *Jenkins* at *4. Just as the *Jenkins* defendant was able to challenge whether the plaintiff met the statutory definition of consumer, so too should Ford be allowed to challenge whether Williamson met the statutory definition of student athlete. The UAAA explicitly reserves Ford that right.

With respect to the definition of "student athlete," it is the Court's job "to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015). Williamson sought to apply the first sentence in isolation, essentially asking the district court to ignore the second sentence entirely. The district court correctly rejected Williamson's invitation to ignore the second sentence of the definition. Instead, the district court took a different approach, but one which we believe runs afoul of the prohibition on re-writing statutory language.

Specifically, the district court added a requirement that in order to utilize the second sentence of the definition to avoid the application of the UAAA, Ford would have to establish that there had been a "declaration" by the NCAA that Williamson had been permanently illegible, as follows:

> Defendants' listing of purported offenses are insufficient to raise a genuine issue of material fact as to whether Plaintiff had been deemed permanently ineligible during the time period in question and thus no longer a student-athlete under the UAAA. Defendants have provided no authority, caselaw or otherwise, that suggests that it is for a court to adjudicate the details of a student-athlete's eligibility under NCAA rules. Rather, in applying the statute, it would appear that the Court's role is to determine whether the student-athlete has been either determined to be or declared "permanently ineligible" by the governing body authorized to do so. . . . Further, there is no genuine dispute that he had not been declared permanently ineligible to do so at the time of the Agreement.

(JA361)

Is a well settled rule of statutory construction that, "[c]ourts must construe statutes as written, [and] not add words of their own choosing." *Ignacio v. United States*, 674 F.3d 252, 255 (4th Cir. 2012). In its initial order, the district court added a requirement to the statute that is not present in the language. Under the district court's interpretation, a student athlete meets the definition of a student athlete until the NCAA

declares them to be permanently illegible. This position improperly cedes the authority of district court to the ruling of a private organization.

The district court's interpretation would also render portions of the civil remedies section of the UAAA meaningless. First, Section 78C-94 (c) dictates the notice that must be provided in a UAAA compliant contract:

> An agency contract must contain, in close proximity to the signature of the student-athlete, a conspicuous notice in boldface type in capital letters stating:
> **WARNING TO STUDENT-ATHLETE IF YOU SIGN THIS CONTRACT:**
> **(1) YOU SHALL LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT.**

Under the district court's interpretation, this warning wouldn't be necessary, because a player would not be ineligible for purposes of the UAAA until the NCAA declared him to be ineligible. Ford alleged that in October 2018, in exchange for $500,000, Williamson executed a written marketing agreement with Slavko Duric to represent him for marketing purposes once he graduated from Duke. Under the UAAA, signing that agreement cost Williamson his college eligibility. But because the NCAA

didn't declare him ineligible, the district court deemed that allegation insufficient.

Section 78C-100(b) of the UAAA allows an educational institution to sue for damages "incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Article or was penalized, disqualified, or suspended from participation in athletics by: (i) a national association for the promotion and regulation of athletics; (ii) an athletic conference; or (iii) reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by an athletic organization."

This section makes two things clear. First, contrary to Williamson's assertion below, the UAAA is not focused solely on the conduct of the agent. [3] Second, the school has a right of action against the former student-athlete for damages as a result of violations of NCAA rules that never led to an NCAA declaration of ineligibility. By necessity, such a

[3] See e.g., Section 78C-100(c), which states that "[a] right of action under this section does not accrue until the educational institution discovers, or by the exercise of reasonable diligence would have discovered, *the violation by* the athlete agent or *former student-athlete.*

suit would require the finder of fact to determine whether or not the alleged violations could have resulted in a finding of ineligibility. There is no logical reason why the fact finder could make such a determination under one part of the statute but not another.

Finally, if an athlete's eligibility status was solely dependent on the NCAA's determination, then the statute would provide no incentive to self-impose sanctions in order to mitigate the sanctions that *might* be handed down by the NCAA. A Court may not interpret statutes in a manner that would render parts of it, like § 78C-100(c)(iii), meaningless. *Etape v. Chertoff*, 497 F.3d 379, 384 (4th Cir. 2007)

When the UAAA is examined through the rules of statutory construction, it is clear that Ford had the right to raise an affirmative defense alleging that Williamson failed to meet the definition of student athlete under the UAAA because he engaged in conduct that rendered him ineligible.

2. FEDERAL DISTRICT COURTS ARE NOT BOUND BY THE FINDINGS OF OTHER COURTS OR GOVERNMENT ENTITIES.

In its initial order, the district court stated that Ford failed to provide any "authority, caselaw or otherwise, that suggested that it is for

a court to adjudicate the details of a student athlete's eligibility under NCAA rules." (JA361) Ford did, in fact, provide such authority, a point we will discuss further below. However, we believe that, as the proponent of this argument, it was incumbent upon the Williamson to provide some authority to demonstrate that the district court was bound by the NCAA's determination regarding his eligibility. This obligation to provide such authority is magnified because this argument runs contrary to the overwhelming weight of the law which demonstrates that a Federal District Court is almost never bound by the factual findings of other governmental entities, let alone those of private enterprises.

As a starting point, we note that federal district courts are not bound by the findings of state courts. *See Horton v. United Services Auto. Ass'n,* 218 F.2d 453, 454 (5th Cir. 1955) ("[T]he findings of fact in the opinion of the Court of Appeal of Louisiana are, of course, not binding upon the district court or this court."); *United States v. Xiarhos*, 820 F. Supp. 634, 635 (D. Mass. 1993) (District court was not bound by the state's court finding at a probable cause hearing, that the defendant's alleged traffic violation was insufficient reason for stopping the

defendant's car.); and *Garza as Next Friend of Garza v. Hobbs Pub. Sch.,* 2000 WL 36739864, at *4 (D.N.M. Apr. 6, 2000) ("It is clear the state court's findings and conclusions are not binding on this Court."). Similarly, Bankruptcy courts are not bound by findings of fact made in a separate related case by a district court. *In re Int'l Loan Network, Inc.*, 160 B.R. 1, 9-10 (Bankr. D.C. 1993). Finally, district courts are not bound by decisions of the International Court of Justice. *Medellin v. Texas,* 552 U.S. 491, 511 (2008).

District courts are not bound by the findings of numerous government agencies. District courts are not bound by the patent eligibility determinations of the Patent and Trial Appeal Board. *See In re Rudy,* 956 F.3d 1379, 1382 (Fed. Cir. 2020). (The patent office guidance "is not, itself, the law of patent eligibility, does not carry the force of law, and is not binding in our patent eligibility analysis."); *Coho Licensing LLC v. Glam Media, Inc.,* 2017 WL 6210882, at *7 (N.D. Cal. Jan. 23, 2017) (Ruling of Patent and Trial Appeal Board "would certainly not bind nor necessarily inform this Court's determination of patent eligibility.") District courts are not bound by the findings of the Register

of Copyrights. *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.,* 365 F. Supp. 1199, 1200 (S.D.N.Y. 1973) ("The courts have long held that any finding of fact or conclusion of law by the Register of Copyrights is not binding on the courts.")

The findings of the Coast Guard Examiner as to whether a sailor has deserted are not binding on a district court. *Petition of Larson,* 152 F. Supp. 252, 254 (E.D. Va. 1957). A district court is not bound by the findings of the EEOC. *Price v. Rosiek Const. Co.,* 509 F.3d 704, 709 (5th Cir. 2007) ("A finding by the EEOC of employment discrimination, while admissible is evidence in civil proceedings, is not binding on the finder of fact.") Even the finding of the Labor and Immigration Department that an individual is a citizen of the United States is not binding on a district court. *Wong Gum v. McGranery*, 111 F. Supp. 114, 115 (N.D. Cal. 1953). Instead, those findings merely create a rebuttable presumption that the government is entitled to challenge by demonstrating "fraud or other circumstances." *Id.* Williamson's claim of NCAA eligibility should be treated no differently here - as a mere presumption that Ford could

overcome with evidence showing that his eligibility was obtained through a fraudulent certification.

As a final example, there are hundreds of cases involving disability determinations made by the Social Security Administrator. Courts have consistently held that the Administrator's findings of disability are, "as a matter of law, not binding on the court." *Bowen v. Celebrezze*, 250 F. Supp. 46, 47 (W.D. La. 1963). *See also Gilbertson v. Allied Signal, Inc.*, 2005 WL 8163839, at *7, n.12 (D.N.M. June 30, 2005) (Benefits eligibility determinations by SSA are not binding on disability insurers unless the insurance ties the benefits to a social security decision.") Applying the district court's holding to these cases would deprive insurers of their ability to challenge an insured's entitlement to benefits under their policy in any case where the insured had been declared disabled by the Social Security Administrator.

A district court is no more bound by the NCAA's eligibility determination than it would be by any finding issued by any of the entities discussed above. It *is* the district court's role to adjudicate the question of a student athlete's eligibility under NCAA rules. Were it not,

then the cases we will discuss in the following section would have stated so?

3. FEDERAL DISTRICT COURTS ARE NOT BOUND BY THE FINDINGS OF THE NCAA WITH RESPECT TO AN ATHLETE'S ELIGIBILITY.

As regulatory bodies go, the NCAA is a remarkably ineffectual one. Its effectiveness as a regulator is hampered both by its small size relative to the 460,000 student athletes it purports to regulate, and the inherent conflict of interest it has in regulating a flagship program like Duke Basketball, a perennial contender for the championship of one of the NCAA's most lucrative sporting events - March Madness.[4]

As explained in *O'Halloran v. Univ. of Washington*, 856 F.2d 1375, 1377 (9th Cir. 1988), the NCAA is almost entirely reliant on its member schools self-certifying the eligibility of its athletes:

> As a condition of membership in the NCAA, the University of Washington agreed "[t]o administer their athletics programs in accordance with the Constitution, the Bylaws and other legislation of the Association." NCAA Const., art. IV, § 2(a). The NCAA Constitution also states that if a student athlete is ineligible under the NCAA requirements, the member school must withhold that athlete from all intercollegiate competition. NCAA Const., art. IV, 0.I.11. If the member

[4] https://www.forbes.com/sites/sportsmoney/2019/03/19/march-madness-is-most-profitable-postseason-tv-deal-in-sports/?sh=353b80e71795n

> school does not withhold the ineligible student from competition, the school is subject to NCAA enforcement proceedings and may be expelled from the NCAA. NCAA Const., art. II, § 2(b).

O'Halloran at 1377.

As *O'Halloran* makes clear, a student athlete is ineligible under NCAA requirements when he violates NCAA rules, **not** when the NCAA declares him to be ineligible. The court in *United States v. Walters,* 711 F. Supp. 1435, 1437–38 (N.D. Ill. 1989), reiterates this point:

> The National Collegiate Athletic Association ("NCAA") [has] regulations governing the amateur status of athletes eligible to compete in events sponsored by the entity. In substance, the regulations provide that student-athletes are ineligible to participate in a sport if they do any one of the following:
> —they contract to be represented by an agent in the marketing of the individual's athletic ability or reputation in that sport.
> — they take any pay for participation in that sport including the promise of pay when such pay was to be received following completion of the student-athletes intercollegiate athletic career.
> —they receive financial assistance other than that administered by their schools except where the assistance comes from the athletes' family or was awarded on a basis having no relationship to athletic ability.
> To ensure compliance with the regulations, the athletic regulatory bodies and the schools require every student-athlete to sign and submit each year statements containing information relating to eligibility, amateur status, and financial aid. Based on this information, the schools

> determine a student-athlete's eligibility to compete and to receive an athletic scholarship.

Walters at 1437-38.

Thus, if Ford proves that Williamson engaged in any of the conduct identified above, she necessarily establishes that Williamson was permanently ineligible to play basketball at Duke, thus establishing he was not a student athlete as defined under UAAA. Williamson argued that allowing Ford to "retroactively challenge Williamson's protection as a student athlete would eviscerate the UAAA's protections." This is exactly backwards. The protections of the UAAA are designed for true student athletes who played by the rules, not athletes who successfully defrauded the NCAA but didn't get caught. It's undisputed that an athlete that has been declared ineligible by the NCAA for violations of its rules would not be entitled to protections of the UAAA. There is no public policy reason to treat athletes who engaged in the same improper conduct differently based solely on whether or not they got caught. Both gamed the system. Neither should be entitled to the protections of the UAAA.

Further, the UAAA was designed to protect athletes who wish to maintain their college eligibility from inadvertently harming their

eligibility by signing with an agent without knowing the consequences of doing so. It was not designed to protect athletes like Williamson, who only played college basketball because he could not go straight to the NBA out of high school, and who left school the minute his season ended. Precluding Ford from challenging whether Williamson met the definition of a student athlete provides legal protections to a player who neither needed them nor deserved them.

Williamson wholly failed to provide the district court with any authority supporting his position that the court could not examine his eligibility status. As a result, the district court's orders contain no authority in support of its holdings. Williamson will be unable to provide this Court with any such authority because no such authority exists. Conversely, Ford did provide authority demonstrating that an agent seeking to avoid penalties for violation of the UAAA may raise the ineligibility of the athlete as an affirmative defense.

In *Sloane v. Tennessee Dep't of State, Bus. Services Div.*, 2019 WL 4891262 (Tenn. Ct. App. Oct. 3, 2019), an agent appealed the result of a disciplinary action brought against him for violating Tennessee's version

of the UAAA.[5] The appellate court acknowledged that "if an athlete agent recruits an individual who is not a student athlete then the act does not apply." *Sloane* at *6. Unfortunately for the agent, he failed to raise this defense at the trial level and waited until the appeal to make the argument that the athlete in question was "not an eligible student athlete under the act." *Id.* The court rejected this argument as untimely because the agent had stipulated during trial "that he violated the act, thereby implicitly admitting that [the athlete] was a student athlete." *Id.* Notably, the *Sloane* court did *not* hold that the agent had no right to challenge the athlete's eligibility as a student athlete. On the contrary, *Sloane* makes it clear that such a defense was available to the agent, had he properly and timely raised it. Under the district court's interpretation, the NCAA's finding of eligibility for the athlete would

[5] Because these acts are based on a Model Act, Tennessee's version of the UAAA is identical in all material respects to North Carolina's. Section 78C-102 of North Carolina's UAAA, titled, "Uniformity of application and construction," states: "In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." The district court's interpretation clearly conflicts the interpretation of the courts of Tennessee and Mississippi.

have rendered him a student athlete as a matter of law, thus depriving the agent of any argument that the act did not apply.

Howard v. Mississippi Secretary of State, 184 So. 3d 295 (Miss. Ct. App. 2015) addressed an almost identical scenario. In *Howard,* an agent appealed the Mississippi Secretary of State's ruling finding him in violation of Mississippi's UAAA analogue. The agent argued "that he did not violate the act because Robinson was not a student athlete as defined by the act." *Howard* at 300. But, as the court explained, the agent failed to raise this issue below:

> Howard argues that Robinson was not a student athlete because he had exhausted his eligibility. However, when Howard was prompted to show cause why he had not violated the Act, Howard simply apologized for his unawareness of the registration requirement, urged that he received no compensation from Robinson, and claimed that "Mr. Robinson contacted me and asked if we could assist him in his professional career." Howard did not qualify his admission by stating that Robinson was not a "student-athlete" because Robinson had exhausted his eligibility, as he now contends. The Secretary of State specifically found that Robinson was a student-athlete within the meaning of the Act. Based on Howard's admissions and the record before us, we will not disturb the Secretary of State's finding because it is conclusive under Mississippi Code Annotated section 73–42–34(6).

Howard at 300. Like the court in *Sloane,* the *Howard* court acknowledged the agent's right to raise the ineligibility of the student athlete as an affirmative defense, notwithstanding the NCAA's determination of eligibility.[6]

Further undermining the district court's holding is the fact that student athletes declared ineligible by the NCAA can and routinely do sue the NCAA in order to have that determination reversed. *See McAdoo v. Univ. of N.C. at Chapel Hill*, 736 S.E.2d 811, 818 (N.C. Ct. App. 2013); *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 296 (D. Mass. 1975); and *Buckton v. Nat'l Collegiate Athletic Assn.,* 436 F. Supp. 1258, 1259–60 (D. Mass. 1977). In *Manuel v. Oklahoma City Univ.,* 833 P.2d

[6] Notwithstanding the concluding sentence of the opinion, Mississippi's UAAA specifically authorizes a reviewing court to modify or set aside the order of the Secretary of State, in whole or in part, if the findings (such as a finding that an athlete "was a student athlete within the meaning of the Act") were not "supported by competent material and substantial evidence." Mississippi Code Annotated § 73–42–34(6). Similarly, North Carolina's UAAA allows a court to "reverse or modify a decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusions, or decisions are affected by other error of law or unsupported by substantial evidence." N.C. Gen. Stat. Ann. § 150B-51. Thus, both the Administrative Law Judge and the Circuit Court may review the evidence surrounding the athlete's eligibility.

288, 292 (Okla. Civ. App. 1992), a student athlete sued the NAIA after it declared him automatically ineligible to play based solely on his ineligibility under NCAA rules. The court held that the NAIA had arbitrarily applied its rules because they contained "no provision under its by-laws requiring those disciplined by the NCAA to be similarly disciplined by the NAIA, or a requirement that the NAIA must declare a student ineligible because of the fact he was ineligible under the NCAA." *Manuel* at 292. Had the eligibility determinations of the NCAA or NAIA been binding on the courts above, then none of the students who sued would have had any redress. There is simply no authority to suggest that the instant case presents the *only* scenario where a court is bound by the NCAA's eligibility determination.

Additional support for our argument can be found in criminal cases brought against individuals who provided improper benefits to student athletes. In *United States v. Gatto*, 295 F. Supp. 3d 336 (S.D.N.Y. 2018), the defendants were indicted for concealing payments to high school basketball players and their families in exchange for their commitments to play for certain universities. Throughout the order, the court

repeatedly makes it clear that in accepting the bribes, these student athletes were ineligible under NCAA rules. The court stated "student-athletes who are recruited in violation of NCAA rules are ineligible to play," and "the universities agreed to provide scholarships to student athletes who were in fact ineligible to compete as a result of the bribe payments." *Gatto* at 339, 340. The court noted that the indictment made it "abundantly clear NCAA rules prohibited the payments . . . and that the university stood to suffer substantial penalties if the payments were uncovered." *Gatto* at 342. The opinion contains no indication that the NCAA actually uncovered the scheme, let alone imposed sanctions on the players, such as declaring them permanently ineligible.

Indeed, the defendants highlighted the absence of such sanctions, arguing that the indictment only identified "potential harms that, in fact, would have been *undesirable* to defendants - *e.g.*, a determination that a scholarship recipient was ineligible to compete for the Universities, or the imposition of penalties on the Universities by the NCAA." *Gatto* at 347. (emphasis in original) The court rejected this "potential harm" argument as unpersuasive, noting that the "indictment need not allege .

. . that the specified harms had materialized . . . or were certain to materialize in the future." *Gatto* at 348, n.64. Finally, the court noted that the harm alleged in the indictment was, in part, that "the universities agreed to provide athletic scholarships to student athletes who, in truth and in fact, were ineligible to compete." *Gatto* at 348.

The *Gatto* defendants were convicted of their crimes and appealed their convictions to the Second Circuit. The Second Circuit affirmed the convictions, and in doing so, approved of the presumption made by the prosecutors and the district court that the acceptance of the bribes rendered the students ineligible to compete under NCAA rules, notwithstanding the absence of any declaration from the NCAA stating so. The Court agreed that the actions of the defendants deprived the universities of control over their scholarship assets because the "Universities would not have awarded the Recruits this aid had they known the Recruits *were ineligible to compete*." *United States v. Gatto,* 986 F.3d 104, 111-12 (2d Cir. 2021). Later in the opinion, the Second Circuit affirmed the district court's decision to allow the fraudulent certifications of eligibility signed by the recruits to be imputed to the

defendants because those false certifications "rendered [the recruits] ineligible by violating the NCAA rules." *Gatto* at *12.

The district court's argument that a court may not make an independent determination of a student athlete's eligibility under NCAA rules would have resulted in a "get out of jail free card" for the *Gatto* defendants, because the NCAA never declared the recruits permanently ineligible, and therefore, they remained eligible as a matter of law. The law does not countenance such an absurd outcome. Just as the prosecutors in *Gatto* were entitled to demonstrate to the jury the harm that could have been caused to the universities as a result of allowing these ineligible students to play, Ford must be afforded the opportunity to establish that Williamson was, in truth and in fact, ineligible to compete during his tenure at Duke as result of his acceptance of improper benefits for himself and his family.

As a final point, Williamson's own filings undermine the district court's holding. In his motion for judgment on the pleadings, Williamson addressed the existence of an Instagram post he made prior to signing the contract with Ford in which he stated he was intending to enter the

2019 NBA draft. (DE35 at 22) Williamson wrote "the Instagram video thus does not create a question of material fact as to whether Mr. Williamson was a 'student athlete,' because a social media post cannot and did not affect Mr. Williamson's eligibility." (Id.) By implication, this argument acknowledges that there *are* factors outside the NCAA's determination of eligibility that can affect a student athlete's eligibility. Otherwise, Williamson would have argued that the Instagram post was irrelevant as a matter of law because the only factor relevant to the Court's analysis is the NCAA's determination of eligibility.

4. THE DISTRICT COURT'S ATTEMPT TO DISTINGUISH FORD'S CASES WAS UNAVAILING.

In its order denying reconsideration, the district court stated that its "determination is in line with relevant case law." (JA373) But the district court cited no case law in support of its position, and its attempt to distinguish the law Ford relies on was unavailing.

We start with the district court's discussion of the *Gatto* decisions. The court writes:

> *Gatto* was not a case that was interpreting the definition of a "student-athlete" under the UAAA, and it is unclear whether the district court or circuit court actually determined the

> eligibility of the *Gatto* defendants or the process through which such a determination would be made. *Gatto* involved a criminal indictment for wire fraud and refers to student-athletes who were ineligible at the time of the fraud. The case does not outline the process through which they were determined to be ineligible.

(App) DE83 at 11-12)

Respectfully, the district court clearly misread the *Gatto* cases. Both courts held that the payments that the players received violated NCAA rules. *Gatto*, 295 F. Supp. 3d at 342 ("the indictment makes abundantly clear that NCAA rules prohibited the payments"); *Gatto*, 986 F.3d at 111 ("This activity violated NCAA rules, and if the NCAA were to discover the payments, the players would not be permitted to play in games and the Universities would be subject to penalties.") Both courts made it clear that it is the acceptance of improper benefits that renders a player ineligible, not the determination of the NCAA. *Gatto*, 295 F. Supp. 3d at 339 ("Student-athletes who are recruited in violation of NCAA rules are ineligible to play.")

Both courts made it clear that the NCAA had not declared the players ineligible because neither the schools nor the NCAA were aware of the improper benefits. *Gatto*, 986 F.3d at 116-17 ("hiding the Recruits'

ineligibility was essential to Defendants' scheme -- had the Universities known the Recruits were ineligible, they would not have offered them athletic-based aid or roster spots on their basketball teams… the Recruits had to misrepresent their eligibility to deceive the Universities into giving them athletic-based aid.") The takeaway from the *Gatto* cases is that federal courts are not and cannot bound by the NCAA's determinations of eligibility.

The district court's arguments distinguishing *Howard* and *Sloane* were similarly ineffective. The district court acknowledged that, per these cases, a defendant may "call into question" "a student-athlete's eligibility" "if he raises a claim pursuant to the UAAA." (JA375) But then the district court holds that the only way to do that is to show that the student athlete had been declared permanently ineligible by the NCAA:

> The question the Court had to determine in interpreting the applicability of the UAAA was not whether Plaintiff *could have conceivably* been found permanently ineligible by the overseeing collegiate association or *should have* been found permanently ineligible, but rather whether Defendants had sufficiently alleged that he *was* permanently ineligible.
>
> . . .

> In analyzing the UAAA, the Court is not tasked with undertaking an analysis of whether a student athlete engaged in activities that should have rendered him permanently ineligible to participate in a particular intercollegiate sport. The UAAA states that a student is not a student-athlete if that individual is permanently ineligible, not if an individual engages in activities that would make him permanently ineligible.

(JA376, JA378) As we explained above, this requires re-writing the statute as follows: "If an individual is [declared] permanently ineligible [by a governing body]…". It was error for the district court to do so, and the order granting judgment on the pleadings for Williamson should be reversed.

C. THE DISTRICT COURT ERRED IN DENYING FORD'S MOTION FOR LEAVE TO AMEND THEIR ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS.

In the event the Court reverses the order granting judgment on the pleadings, the Court should also reverse the order denying Ford's motion to amend their Answer, Affirmative Defenses and Counterclaim. While we believe our initial pleading was sufficient to avoid judgment on the pleadings, we seek to avoid any arguments on remand regarding the sufficiency of our allegations establishing that Williamson had violated NCAA rules and was therefore ineligible to compete.

The Fourth Circuit recognizes the liberal rule regarding amendment, which "gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). The Fourth Circuit has further held "[t]he federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that [the] plaintiff be given every opportunity to cure a formal defect in his pleading." *Ostrzenski v. Seigel,* 177 F.3d 245, 252–53 (4th Cir.1999).

In the Middle District, courts have noted that the party facing dismissal should be entitled to at least one amendment unless it is certain that they will be unable to state a cause of action. *See Vecchione v. Prof'l Recovery Consultants, Inc.,* 2014 WL 12588495, at *5 (M.D.N.C. May 19, 2014), *citing Ostrzenski v. Seigel,* 177 F.3d 245, 253 (4th Cir. 1999) ("Indeed, unless it is certain that a plaintiff cannot state a claim upon amendment, then 'the better practice is to allow at least one amendment.'")

The district court denied Ford's motion for leave to amend because it determined that amendment would be futile, because the proposed

amendment did not state that Williamson had "been determined to be permanently ineligible by any governing body at the time of the Agreement." (JA380) If this Court determines Williamson was not entitled to judgment on the pleadings, it necessarily follows that Ford's motion for leave should not have been denied for futility.

D. THE DISTRICT COURT ERRED IN GRANTING WILLIAMSON'S MOTION FOR SUMMARY JUDGMENT AS TO COUNTS I, VII, VII, AND VIII.

The district court granted summary judgment for Williamson on Ford's claims for Breach of Contract, Unjust Enrichment, Breach of Implied Duty of Good Faith and Fair Dealing, and Declaratory Judgment based on its prior ruling declaring the Contract void as a matter of law. It follows that if this Court reverses that ruling as requested above, then summary judgment on these counts must also be reversed.

E. THE DISTRICT COURT ERRED IN GRANTING WILLIAMSON'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT II FOR FRAUD.

In granting summary judgment in favor of Williamson on Ford's fraud claim, the district court claims that Ford had "pivot[ed] at the summary judgment stage to a new legal theory that is based on allegations that are not included in their pleadings," citing to *Harris v.*

Reston Hosp. Ctr., LLC, 523 Fed. Appx. 938 (4th Cir. 2013). (JA391) First, *Harris* was a discrimination claim where the plaintiff sought to pursue "an additional theory of recovery, asserted for the first time in her opposition to Appellee's motion for summary judgment, that she has a 'record' of a physical or mental impairment that substantially limits one or more major life activities." *Harris* at 946. This basis for alleged discrimination did not appear in her EEOC claim, her amended complaint, her interrogatories, or her deposition. .

The district court held that Ford's claim that Williamson "falsely omitted his discussions with CAA and his plan to end his relationship with [Ford], inducing [Ford] to provide him with the [marketing] Plan and other benefits" was a new legal theory not included in the pleadings. (JA391) However, Ford alleged that Williamson had a duty to speak and to disclose his true intention to provide Ford's marketing plan to CAA in an effort to assist CAA in their efforts to finalize the deals that Ford had already negotiated on his behalf. (JA154) Ford's argument at summary judgement was thus consistent with her allegations. Certainly, Ford did not present a new theory of recovery of the type addressed in *Harris*.

The district court next held that even if Ford's theory of fraud by concealment was viable, Williamson had no duty to speak. (JA391) First, Ford's relationship with Williamson was not an "arms-length transaction" of the type discussed in *Pearson v. Gardere Wynne Sewell LLP*, 814 F. Supp. 2d 592, 605 (M.D.N.C. 2011). The relationship between Williamson and Ford was a principal/agent relationship. Such a relationship is a fiduciary one, or at a minimum a relationship involving transactions so intrinsically fiduciary that a degree of trust and confidence is required to protect the parties." *Salovaara v. Jackson Nat. Life Ins. Co.*, 66 F. Supp. 2d 593, 602 (D.N.J. 1999). In such relationships, a duty to disclose exists, and silence amounts to fraud "because it amounts to an affirmation that a state of things exists which does not, and the uninformed party is deprived to the same extent that he would have been by positive assertion." *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 196 (M.D.N.C. 1997)

Further, even if a special relationship did not exist between Ford and Williamson, as the case cited by the district court demonstrates, a duty to disclose may still "arise in an arms-length transaction where the

defendants took steps to conceal material information from the plaintiffs, which the defendants knew plaintiffs were unable to obtain." *Pearson v. Gardere Wynne Sewell LLP*, 814 F. Supp. 2d 592, 605 (M.D.N.C. 2011). The evidence is undisputed that Williamson and his family took steps to conceal their intent to terminate Ford and provide her marketing plan to CAA. The evidence is further undisputed that Ford was unable to obtain this information. The reasons given by the district court for granting summary judgment on Ford's fraud claim are simply not supported by the law or the record, and the order should be reversed.

F. THE DISTRICT COURT ERRED IN GRANTING WILLIAMSON'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT V.

As the district court noted, "[w]hether or not a trade secret exists is a 'fact-intensive question to be resolved at trial.'" *Decision Insights, Inc. v. Sentia Group, Inc.*, 311 Fed. Appx. 586, 592–93 (4th Cir. 2009). Nevertheless, the district court held that none of Ford's claimed trade secrets were trade secrets as a matter of law.

N.C.G.S. § 66-152(3) defines a "trade secret" as:

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Courts have routinely recognized that marketing plans can be subject to trade secret protection. In *La Calhene, Inc. v. Spolyar*, 938 F. Supp. 523, 530 (W.D. Wis. 1996), the court held:

> Plaintiff's strategic and marketing plans are subject to protection. The evidence is that these plans were seen by only a small number of the officers of plaintiff and its parent. The salespeople were provided one page of the document; they were not given copies of any other pages. Such information is highly valuable to competitors and is the product of time and effort on the part of plaintiff.

See also Mattel, Inc. v. MGA Entm't, Inc., 782 F. Supp. 2d 911, 982 (C.D. Cal. 2011) ("a reasonable fact-finder could conclude that a particular marketing strategy not generally known to the public gave Mattel Canada a competitive advantage over other retailers"); *TNS Media Research, LLC v. Tivo Research & Analytics, Inc.,* 629 Fed. Appx. 916, 932–33 (Fed. Cir. 2015), (Reversing summary judgment finding that such as customer contract terms, customer proposals, and customer pricing

were not trade secrets); and *Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d 664, 676 (M.D.N.C. 2009) ("Customer pricing lists, cost information, confidential customer lists, and pricing and bidding formulas can constitute trade secrets.")

Ford's marketing materials included a compilation of endorsement offers that she had obtained from various brands. (JA1458, JA1467, JA1629) These offers were not generally known or readily ascertainable as they were relayed only to Ford, as Williamson's agent. There is clearly economic value in these offers, as the district court conceded – "the information may have had some value to Defendants and their competitors." (JA399)

The district court held that the offers that CAA eventually obtained for Williamson were "ascertained through independent development" because each company "independently brought their offers to CAA." (JA398-399) The record shows otherwise. Immediately upon receipt of the offers that Ford had obtained for Williamson, he forwarded the offers to Alton Brown, who then forwarded the offers to Lisa Metelus, writing "Here we go…" (JA1623) CAA's internal spreadsheet of offers then listed

all seven of those offers along with a date of offer of May 22, 2019, eight days before Williamson sent his termination letter. (JA1622) CAA thus directly benefited from Ford's efforts to identify potential endorsement partners and obtain offers from them. This evidence was sufficient to create a question of fact on whether a trade secret existed.

The district court also held that Ford failed to establish that she took efforts to took measures to guard the secrecy of the information. Again, the record demonstrates otherwise. First, the contract between Williamson and Ford included the following clause in which Williamson agreed "…to keep, protect and hold confidential all information shared between the parties that is related to the matters of this Agreement" which included "any trade secrets, business plans, strategies … concerning the Client…" (JA1273-1274) Further, the only other people who were privy to the marketing plan and offers sent to Williamson were Ford and her employees, both of whom agreed to keep Ford's work product confidential.

For the reasons set forth above, the district court erred in granting summary judgment on Ford's claim for misappropriation of trade secrets.

G. THE DISTRICT COURT ERRED IN GRANTING WILLIAMSON'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT III, IX, X, AND XI.

The district court granted summary judgment on Ford's claims for civil conspiracy, unfair and deceptive trade practices, injunctive relief, and punitive damages because each of these claims was based on Williamson's fraud or misappropriation of trade secrets. Because the district court held that Williamson did not commit fraud or misappropriate trade secrets, these claims would necessarily fail as well. The converse is true also. Should this Court reverse the district court's ruling on the fraud or trade secret count, or both, these claims should also be reinstated.

VI. CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court reverse the district court's order granting partial judgment on the pleadings on Williamson's declaratory judgment claim, and reverse the district court's order granting Williamson's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B).

CERTIFICATE OF FONT SIZE AND PITCH

WE HEREBY CERTIFY that the above and foregoing Appellants' Initial Brief is typed in Century Schoolbook, 14pt. font.

CERTIFICATE OF SERVICE

The undersigned certifies that on **January 11, 2023**, I electronically filed the foregoing document with the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by CM/ECF system: **Zachary D. Tripp, Esq.**, Weil, Gotshal & Manges, LLP, 2001 N. Street NW, Suite 600, Washington, DC 20036; Zack.tpp@weil.com; **Mr. Zachary Schreiber, Esq.**, **Jeffrey Steven Klein, Esq.;** Weil Gotshal & Manges, LLP, 767 Fifth Ave., New York, NY 10153-0119; zachary.schreiber@weil.com; Jeffrey.klein@weil.com; **John Robbins Wester, Esq., Fitz, E. Barringer, Esq.,** Robinson, Bradshaw, et al., 101

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