UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TROYCE MANASSA, AUSTIN DASENT, and J'TA FREEMAN,	)	
Plaintiffs,	)	
v.	)	No. 1:20-cv-03172-RLY-MJD
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, BOARD OF GOVERNORS OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, and DIVISION I BOARD OF DIRECTORS OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	)	
Defendants.	)	

ENTRY ON DEFENDANTS' MOTION TO DISMISS

Troyce Manassa, Austin Dasent, and J'Ta Freeman, Plaintiffs, are current or former Black student-athletes at Savannah State University ("SSU") and Howard University, two Historically Black Colleges and Universities ("HBCUs"). The National Collegiate Athletic Association ("NCAA"), Defendant, designed and implemented the Academic Performance Program ("APP") for academic eligibility, which penalizes teams for failing to meet certain thresholds for academic performance. Among the possible penalties is a ban from postseason play.

Plaintiffs believe the NCAA's APP rules intentionally discriminate against Black student-athletes at HBCUs, so they brought this class action against the NCAA, the

NCAA's Board of Governors, and the NCAA's Division I Board of Directors for violations of 42 U.S.C. § 1981, 42 U.S.C. § 1985, and the District of Columbia Human Rights Act, D.C. Code § 2-4101.01 *et seq*. Defendants move to dismiss Plaintiffs' complaint under Rules 12(b)(1) and 12(b)(6). For the reasons that follow, Defendants' motion is **GRANTED in part** and **DENIED in part.**

I. Background

The court accepts the facts below, taken from Plaintiffs' complaint, as true, and draws all inferences from those facts in Plaintiffs' favor. *Doe v. Purdue Univ.*, 928 F.3d 652, 656 (7th Cir. 2019).

A. The Parties

Manassa is a former member of the SSU men's basketball team during the 2015-2016 and 2016-2017 seasons. (Filing No. 1, Complaint ¶ 17). Manassa signed a National Letter of Intent before playing for SSU, and he received a full athletic scholarship. (*Id.* ¶ 19). During the 2016-2017 school year, Manassa's senior year, the NCAA banned the SSU men's basketball team from postseason play for violating the NCAA's APP rules. (*Id.* ¶ 22). Manassa ended his career at SSU just shy of 1,000 career points, and he intends to continue his basketball career overseas in 2021. (*Id.* ¶¶ 29-30).

Dasent is also a former member of the SSU men's basketball team during the 2016-2017 and 2017-2018 seasons. (*Id.* ¶ 32). Like Manassa, Dasent signed a National Letter of Intent before playing for SSU, and he received a full athletic scholarship. (*Id.* ¶ 34). Because Dasent was on the team during the 2016-2017 season, he was subject to SSU's postseason ban. (*Id.* ¶ 37). Dasent played basketball overseas for a short time

after graduating, and he currently provides private coaching and training to youth basketball teams and players. (*Id.* ¶¶ 45-46).

Freeman played for Howard University's women's lacrosse team during the 2019-2020 school year, and she intends to play during the 2021-2022 school year. (*Id.* ¶ 50). When Freeman accepted a full athletic scholarship to play lacrosse for Howard, she was unaware that the NCAA had banned the team from the postseason in the past. (*Id.* ¶¶ 48, 51-52). Under the NCAA's APP rules, Freeman and her lacrosse team are at risk of another postseason ban. (*Id.* ¶ 53).

The NCAA is an unincorporated association that acts as the governing body of college sports, and its constitution, bylaws, and regulations dictate rules of conduct, ethics, and eligibility for member institutions and student-athletes. (*Id.* ¶¶ 54-55). The NCAA Board of Governors (the "NCAA Board"), the highest governing body of the NCAA, is comprised of several individuals representing colleges and universities from around the country, as well as five individuals unaffiliated with any NCAA member institution. (*Id.* ¶ 57). The NCAA Board is charged with ensuring that all member institutions comply with the NCAA's policies, and it can implement rules by which all institutions must abide. (*Id.* ¶¶ 58-59).

Since 1973, the NCAA's member schools have been organized into three divisions—Division I, Division II, and Division III—and each division has its own set of rules and guidelines governing athletics. (*Id.* ¶ 62). The most prestigious division, Division I ("D1"), is made up of approximately 350 of the NCAA's 1,200 member schools. (*Id.* ¶ 63). Division I is governed by a Division I Council and a Board of

Directors ("D1 Board of Directors), comprised of 12 presidents and chancellors from each athletic conference, and numerous committees. (*Id.*). The D1 Committee on Academics, which reports to the D1 Board of Directors, manages eligibility standards and the APP. (*Id.*). The D1 Board of Directors is responsible for enacting policy and legislation that govern Division I.

B. HBCU's

For many years in the United States, education of Blacks, free or enslaved, was prohibited. (*Id.* ¶ 67). Even after the Civil War, the doors of white educational institutions were closed to Blacks, so HBCUs developed as the primary avenue for providing postsecondary education to Black students. (*Id.* ¶ 68). Historically, HBCUs had fewer resources, poorer facilities, and smaller budgets than white institutions, and they received less support from state and federal governments. (*Id.* ¶ 74). Today, there are 101 HBCUs in 19 states that enroll almost 300,000 students, approximately 80% of whom are Black, 70% of whom are low-income, and many of whom are first-generation students. (*Id.* ¶ 76).

C. The NCAA's Academic Performance Program

Once a student-athlete has selected which D1 school they will attend, they sign a National Letter of Intent ("NLI"). (*Id.* ¶ 102). The NLI is a valid, binding contract in which the student-athlete agrees to attend and compete for a certain school in exchange for financial aid for a particular number of years and the opportunity to participate in NCAA athletics. (*Id.*). The NCAA controls all aspects of the NLI process. (*Id.* ¶ 103).

Once a student-athlete signs the NLI, they are bound by the NCAA's bylaws and regulations, which control student-athlete conduct. (*Id.* ¶ 104).

Until 1965, the time of desegregation, the NCAA imposed little to no academic requirements on student-athletes. (*Id.* ¶ 109). Since then, the NCAA's academic requirements have undergone numerous revisions. (*Id.* ¶¶ 110-28). With each new eligibility requirement, there was significant evidence that Black student-athletes were being disproportionately affected. (*Id.* ¶¶ 112, 116, 119, 123, 126-27).

After several additional revisions to the academic eligibility requirements, the NCAA finally settled on the APP in 2004. (*Id.* ¶ 130). For the first time, teams as opposed to individual student-athletes were subject to sanctions. (*Id.*). The key components of the APP are two metrics: the Graduation Success Rate ("GSR") and the Academic Progress Rate ("APR"). (*Id.* ¶ 134). The GSR is the NCAA's calculation of student graduation rates, including transfer students. (*Id.*). The APR is a team-based measurement of eligibility, retention, and graduation. (*Id.*). Each student-athlete who receives an athletic scholarship earns one point for continuing enrollment and one point for remaining academically eligible pursuant to NCAA guidelines. (*Id.* ¶ 135). The team's total points are divided by points possible and multiplied by 1000, resulting in the APR. (*Id.*).

The NCAA designed the APP with race in mind to respond to allegations of discrimination against Black student-athletes. (*Id.* ¶ 138-39). According to Plaintiffs, however, the formula on which the APP was based included metrics that the NCAA knew would directly and negatively affect Black student-athletes, but the NCAA

implemented the new system anyway. (*Id.* ¶ 139). For example, in the 1998-1999 school year, the GSR for Black student-athletes was 59%, as compared to 82% for white student-athletes. (*Id.* ¶ 140). Despite knowledge of this disparity in GSRs, the NCAA continued to rely on the GSR in determining APR, even though there was little to no correlation between GSR and a particular student's academic success. (*Id.* ¶ 141-42).

In 2011, the NCAA implemented the current penalty structure, and it did so with knowledge that the revised programs would more heavily impact HBCUs than predominantly white institutions. (*Id.* ¶¶ 149-50). In response, the Division I Committee on Academic Performance, the body responsible for overseeing the APR, recommended the D1 Board establish an HBCU Academic Advisory group to assist on issues affecting HBCUs. (*Id.* ¶¶ 147, 151). However, the Historically Black Colleges and Universities and Low Resource Institution Academic Advisory Group was largely marginalized by the NCAA, and its recommendations were ignored. (*Id.* ¶ 152).

The APP penalties have been disproportionately applied to HBCUs for more than a decade. (*Id.* ¶ 173). HBCUs comprise only 6.5% of Division I schools (23 out of 350), but they make up 72% of the 159 teams that have been banned from postseason play since 2010 (114 of 159). (*Id.* ¶ 174). An HBCU team is 43 times more likely to receive a postseason ban than a team at a predominantly white institution. (*Id.* ¶ 176). Not only does the APP disproportionately punish HBCUs, but the NCAA now provides financial awards to schools who consistently achieve high APRs. (*Id.* ¶ 184).

D. Postseason Bans

Postseason bans exclude student-athletes from all postseason events, including NCAA championships, football bowl games, and the men's and women's basketball tournaments. (*Id.* ¶ 189). These competitions are nationally televised and provide student-athletes with significant exposure to fans, professional scouts, corporate sponsors, and the public. (*Id.* ¶ 190). The loss of this national stage denies players the opportunity to further their athletic careers, receive media coverage, and improve play-based metrics, which can alter subsequent career trajectories. (*Id.* ¶ 191). It also affects players' confidence in their HBCUs, teams, and themselves. (*Id.* ¶ 191). In all these ways, Plaintiffs allege the NCAA's postseason bans interfere with Black student-athletes receiving the full benefits and privileges of their NLI contracts. (*Id.* ¶ 200).

E. Purported Classes

Plaintiffs bring this action on behalf of the following "Nationwide Class": "All Black student-athletes who participated in Division I HBCU athletic teams that were subjected to a postseason access ban from the 2010-2011 school year through the date of class certification."

Freeman brings this action on behalf of the following "Current D1 HBCU Subclass": "All Black student-athletes who participated in Division I NCAA sports at Historically Black Colleges and Universities at any time during the 2020-2021 school year through the date of class certification."

Freeman also brings this action on behalf of the following "District of Columbia Subclass": "All Black student-athletes who participated in Division I NCAA sports at

Historically Black Colleges and Universities located in the District of Columbia during the 2010-2011 school year through the date of class certification."

II. Legal Standard

A motion to dismiss under Rule 12(b)(1) tests the jurisdictional sufficiency of the complaint. *Bultasa Buddhist Temple of Chicago v. Nielsen*, 878 F.3d 570, 573 (7th Cir. 2017). While the court accepts all well-pleaded factual allegations as true, a plaintiff facing a 12(b)(1) motion bears the burden of establishing that jurisdictional requirements have been met. *Ctr. for Dermatology & Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588-89 (7th Cir. 2014). When evaluating a facial challenge to subject matter jurisdiction under Rule 12(b)(1), the court applies the same "plausibility" requirement as a motion to dismiss under Rule 12(b)(6). *Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015). Thus, Plaintiffs need only plead facts that plausibly suggest they have standing. *Id.*

To survive a motion to dismiss under 12(b)(6), the complaint must "state a claim to relief that is plausible on its face." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. Discussion

Defendants seek dismissal on several grounds. As a threshold matter, Defendants argue Plaintiffs lack standing. Defendants next argue the NCAA Board and the Division I Board of Directors lack capacity to be sued. Defendants also argue Manassa and

Dasent's claims under § 1985 are untimely. Finally, Defendants argue Plaintiffs fail to state a claim under § 1981, § 1985, and the District of Columbia Human Rights Act. The court addresses each argument in turn.

A. Standing

To establish Article III standing, Plaintiffs must show: (1) they have suffered a concrete and particularized injury in fact; (2) the injury is fairly traceable to Defendants' challenged conduct; and (3) the injury will likely be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

1. Manassa and Dasent

Manassa and Dasent have satisfied their burden at this stage to establish standing. First, they have plausibly alleged an injury in fact. An injury in fact requires "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, as revised (May 24, 2016) (quoting *Lujan*, 504 U.S. at 560).

Manassa and Dasent have plausibly identified a protected interest in the benefits and privileges that come with signing an NLI, including the opportunity to compete in postseason tournaments. *See Matushkina v. Nielsen*, 877 F.3d 289, 293 (7th Cir. 2017) ("The interest at issue need not rise to the level of a right, let alone a constitutional right."); *see also Lujan*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."). Further, Manassa and Dasent have plausibly alleged an injury to that interest. Specifically, they allege the NCAA intentionally designed the APP and its

penalty structure in such a way that it discriminates against Black student-athletes and HBCUs; the NCAA had ample evidence that the APP's formula disproportionately impacted HBCUs; yet the NCAA continued to use the APP to ban schools. (Complaint ¶¶ 138-45, 150, 173-76, 234-35). Manassa and Dasent have plausibly alleged they were denied the full benefit of their NLIs when the NCAA banned SSU from the postseason during the 2016-2017 school year for violating APP rules.

Defendants argue that Manassa and Dasent's injuries are entirely conjectural, such as the denial of the chance to reach the 1,000 career point milestone, (Complaint ¶ 194), and the lost exposure to professional scouts and the public that comes from postseason competition, (*id.* ¶ 201). But in cases like this one, where the defendant erects a "barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, . . . [the plaintiff] need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993); *see also Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497 (7th Cir. 2005) ("This analysis, moreover, is not limited to cases alleging a violation of the Equal Protection Clause."). Rather, the injury in fact "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *City of Jacksonville*, 508 U.S. at 666. The barrier here is the APP's allegedly discriminatory design that disproportionately affects HBCUs and makes it more difficult for Black student-athletes at those schools to fully participate and compete in NCAA athletics. (Complaint ¶ 102). Moreover, Manassa and Dasent have

also alleged mental and emotional harm, humiliation, embarrassment, and degradation, (*id.* ¶ 253), which courts routinely recognize as injuries in fact. *See, e.g.*, *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 300 (7th Cir. 2000). Thus, Manassa and Dasent have adequately pleaded an injury in fact.

These injuries are also "fairly traceable" to Defendants' challenged conduct. "The causation element of standing demands that the injury be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lac Du Flambeau*, 422 F.3d at 500 (quoting *Lujan*, 504 U.S. at 560-61). At this stage, the court must take Plaintiffs at their word based on the allegations contained in the Complaint. Plaintiffs have alleged that the NCAA controls all aspects of the NLI process, and that once a student-athlete signs an NLI, they are bound by the NCAA's bylaws and regulations, including all eligibility requirements. (Complaint ¶¶ 102-107). Ultimately, it is also the NCAA's adoption and continued reliance on the APP that determines post-season eligibility. (*Id.* ¶¶ 129-32, 138-50). These allegations plausibly establish that Manassa and Dasent's injuries are "fairly traceable" to the NCAA's challenged conduct.

As for redressability, at this stage Plaintiffs need only plead "that there is a 'substantial likelihood' that the relief requested will redress the injury claimed." *Lac Du Flambeau*, 422 F.3d at 501 (citation omitted). The relief requested for their various injuries includes compensatory and statutory damages and equitable relief. While an award of monetary damages will not undo any past harm, that is not what the redressability requirement requires. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801

(2021) ("True, a single dollar often cannot provide full redress, but the ability 'to effectuate a partial remedy' satisfies the redressability requirement.") (citation omitted). Monetary damages would at least partially compensate plaintiffs for the harm they allegedly sustained. Accordingly, Manassa and Dasent have plausibly alleged a redressable injury caused by Defendants, and they have standing to bring this suit.

2. Freeman

Turning to Freeman, she claims to have standing based on Howard University's lacrosse team receiving postseason bans in the past, her intention of participating on the team in the upcoming season, and the increased risk that she and her team will be banned from the postseason in the future because of the APP.[1] This is insufficient to establish standing.

An allegation of future injury may establish standing if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (Allegations that convey a "*possible* future injury are not sufficient."). The Complaint does not plausibly allege that a postseason ban is "certainly impending," so the question then is whether there is a "substantial risk" of future harm.

[1] Standing under the District of Columbia Human Rights Act is coextensive with Article III. *See* standing. *Molovinsky v. Fair Emp. Council of Greater Washington, Inc.*, 683 A.2d 142, 146 (D.C. 1996).

Freeman has not plausibly alleged that there is a substantial risk that she and her team will receive a postseason ban in light of the "highly speculative" and "attenuated chain of inferences" required to find harm here. *Id.* at 410, 414 n.5 (2013). Freeman alleges that she intends to join the lacrosse team; that HBCUs constitute 72% of teams banned since 2010, even though they comprise only 6.5% of all DI schools; HBCU teams are 43 times more likely than predominantly white teams to receive a postseason ban under the APP; and the NCAA already banned the Howard lacrosse team from the postseason in 2012-2013 and 2014-2015. (Complaint ¶¶ 174-76, Appx. A). Based on her allegations, Freeman asks the court to make the following inferences: that she is in fact on the team, that the team's APR will be lower than the last several years when the team did not receive a postseason ban, and that the team's score will be below the NCAA cut score for this year. Further, there is no indication that the current lacrosse team is at risk of a postseason ban for violating the APP: while the team was banned several years ago, the team could have achieved near perfect academic performance for the last several years. Overall, Freeman's fear of a postseason ban is highly speculative, and the court cannot conclude that Freeman faces a substantial enough risk of harm to confer standing.

The cases cited by Freeman do not counsel otherwise. In *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), the court concluded that customers whose data was stolen in a data breach "should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur." *Id.* at 693 (citation omitted). But the court explained the risk that the plaintiffs' personal data would be

misused was "immediate and very real," and there was "no need to speculate as to whether [the Neiman Marcus customers'] information has been stolen and what information was taken." *Id.* (alteration in original). Here, the future injury is not immediate, and the court can only speculate that Freeman and her team would be penalized by the NCAA.

Freeman's reliance on *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) is similarly misplaced. In that case, which involved a pre-enforcement challenge to a law operating as a prior restraint on speech, the Court explained that a plaintiff could establish a future injury by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and "a credible threat of prosecution." *Id.* at 159 (quotations and citation omitted). The court found a "substantial" threat of prosecution where the plaintiff was recently the subject of a complaint; the speech at issue had already been found to likely violate the statute, and that finding could be used in future proceedings; the potential universe of possible future complainants was expansive (including potential political opponents); and enforcement of the statute was relatively common. *Id.* at 164-65. Here, Freeman does not allege that she intends to take any action that is proscribed by any NCAA rule or regulation, and the risk of harm to her is more attenuated. Further, unlike political speech, participating in postseason athletics is not "arguably affected with a constitutional interest." *Id.* at 159. The constitutional interest here is one step removed—the alleged discriminatory eligibility rules for postseason play.

Finally, *Bauer v. Veneman*, 352 F.3d 625 (2d Cir. 2003) and *Johnson v. Allsteel Inc.*, 259 F.3d 885 (7th Cir. 2001) are unhelpful. The court's reasoning in *Bauer*, which involved a plaintiff's increased risk of contracting a food-borne illness from beef infected with "mad cow" disease, was expressly limited to "the specific context of food and drug safety suits." *Id.* at 633. In *Johnson*, Allsteel unilaterally changed a provision of a collectively-bargained ERISA plan and gave the plan administrator increased discretion in interpreting the plan. 259 F.3d at 887. The court explained that the plaintiffs were already injured by the change itself because the right to have a plan administered with a limited amount of discretion is an important right for plan participants. *Id.* In other words, it was the erosion of that bargained for right that constituted the injury in fact, not the risk that the plan participants might be denied future coverage. *Id.*

Because Freeman has not adequately pleaded an injury in fact, she lacks standing to bring this suit.

B. NCAA Board of Governors and NCAA Division I Board of Directors Are Not Suable Entities

The NCAA is an unincorporated association and its capacity to sue or be sued is determined by the law of the state where the court is located. Fed. R. Civ. P. 17(b). Indiana law permits unincorporated associations to sue or be sued in their common name, *see* Ind. Trial R. 17(E), but it is silent on whether the boards of such associations can be sued. While Indiana has recognized that the certain boards can be sued, such as the boards of certain hospitals, Ind. Code § 16-22-3-24, *id.* § 16-23-1-47, and the boards of trustees of certain universities, *id.* § 21-27-5-2, *id.* § 21-27-4-2, Plaintiffs have not

pointed to any case or statute authorizing suit against the board of an unincorporated association under Indiana law. Absent this authority, the court is left to conclude that the NCAA Board of Governors and the NCAA Division I Board of Directors are not suable entities. Accordingly, all claims against those defendants are dismissed.

C. Manassa and Dasent's § 1985 Claims Are Not Untimely

The statute of limitations for claims under § 1985 is "determined by the law of the state in which the violation took place." *Hoaglund v. Town of Cleark Lak, Ind.*, 415 F.3d 693, 699-700 (7th Cir. 2005). The parties agree that Plaintiffs' claims are governed by Georgia's two-year statute of limitations for personal injury actions, as Plaintiffs were enrolled at Savanah State University, located in Georgia, when the team received the postseason ban. *See id.* (applying Indiana's personal injury statute of limitations to § 1985 claim); *Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996) (Section 1985 claims are subject to the relevant state's personal injury statute of limitations period); Ga. Code § 9-3-33 ("[A]ctions for injuries to the person shall be brought within two years after the right of action accrues.").

"Civil rights claims . . . accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992). Defendants argue that Manassa and Dasent's claims accrued once they were not allowed to play in the postseason in the spring of 2017, and any claim should have been filed by the spring of 2019. Plaintiffs filed this action in December 2020.

"[A] motion to dismiss based on failure to comply with the statute of limitations should be granted only where the allegations of the complaint itself set forth everything

necessary to satisfy the affirmative defense." *Vergara v. City of Chicago*, 939 F.3d 882, 886 (7th Cir. 2019); *see also Hyson USA, Inc. v. Hyson 2U, Ltd.*, 821 F.3d 935, 939 (7th Cir. 2016) ("[D]ismissal is appropriate *only* when the factual allegations in the complaint *unambiguously* establish all elements of the defense.") (second emphasis added). Here, when Plaintiffs' claims accrued turns on when they knew or should have known that the NCAA's APP program and its penalty structure were discriminatory. The Complaint does not demonstrate when Plaintiffs knew or even should have known that the reason for their postseason ban was the discriminatory nature of the APP. Because Plaintiffs did not "affirmatively plead [themselves] out of court," dismissal on statute of limitations grounds would be inappropriate. *See Chicago Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 614 (7th Cir. 2014).

D. Manassa and Dasent Have Plausibly Alleged Claims Under § 1981

To state a claim under § 1981, Plaintiffs must plausibly allege: (1) they are members of a racial minority; (2) the defendants intended to discriminate on the basis of race; and (3) the discrimination concerned the making or enforcing of a contract. *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 756 (7th Cir. 2006). Defendants argue Plaintiffs do not plausibly allege intentional discrimination, but-for causation, and interference with the making and enforcement of a contract.

First, Plaintiffs have plausibly alleged intentional discrimination on the basis of race. They allege the NCAA expressly considered race in the design and implementation of the APP, (Complaint ¶¶ 137-38), the NCAA had ample evidence that the APP's various iterations disproportionately impacted HBCUs and Black student-athletes at those

schools, (*id.* ¶¶ 112, 116, 119, 123, 126-27), and the NCAA knew that the formula it used to develop the APP relied on metrics that negatively affected Black student-athletes, (*id.* ¶ 139). At this stage, Plaintiffs have carried their burden of plausibly pleading intentional discrimination.

Plaintiffs have also adequately pleaded but-for causation. To prevail on a § 1981 claim, "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019, 206 L. Ed. 2d 356 (2020). Here, Plaintiffs have carried their burden by alleging that the NCAA expressly considered race when it developed the APP, and that the APP disproportionately impacts them as Black student-athletes at HBCUs. If Plaintiffs had attended a predominantly white institution, the APP's formulation would not have affected them in the same way. This is sufficient to allege but-for causation at the pleadings stage. *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (concluding plaintiff's allegations of discrimination in violation of the Fair Housing Act—a statute that included "because of" language—were sufficient because the complaint identified the type of discrimination, by whom, and when).

Plaintiffs have also plausibly alleged interference with the making and enforcement of a contract. Section 1981 defines making and enforcing of contracts as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981; *Pourghoraishi*, 449 F.3d at 756. As discussed in the standing section above, Manassa and Dasent allege that they signed an NLI, which is a valid and binding

contract in which the student-athlete agrees to attend and compete for a certain school in exchange for financial aid and the opportunity to participate in NCAA athletics. (Complaint ¶ 102). The NCAA controls all aspects of the NLI process, and once a student-athlete signs the NLI, they are bound by the NCAA's bylaws and regulations. (*Id.* ¶¶ 103-04). They further allege that postseason play is among the "benefits, privileges, terms, and conditions" of the NLI. 42 U.S.C. § 1981; (Complaint ¶¶ 107, 189-202, 250-52). These allegations plausibly allege interference with making and enforcing a contract, so Plaintiffs claims under § 1981 may proceed.

E. Plaintiffs Have Plausibly Alleged A Conspiracy Under § 1985

The intracorporate conspiracy doctrine provides that "an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017); *see also Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492 (7th Cir. 1994) (extending the intracorporate conspiracy doctrine to claims under § 1985). However, the doctrine does not apply to conspiracies that are "part of some broader discriminatory pattern," or to conspiracies that "permeate the ranks of the organization's employees." *Hartman v. Bd. of Trustees of Cmty. Coll. Dist. No. 508, Cook Cty., Ill.*, 4 F.3d 465, 470-71 (7th Cir. 1993).

Plaintiffs have plausibly alleged that over many years, the NCAA and its employees developed and implemented an intentionally discriminatory system of eligibility requirements and penalties. (Complaint ¶¶ 138-39, 259). The NCAA knew the formula on which the APP was based included metrics that would directly and

negatively affect Black student-athletes, that the APP would perpetuate racial disparities, and implemented the APP anyway. (*Id.* ¶ 139). This all came about through numerous acts and decisions by the NCAA's leadership, as well as a failure to disclose certain information to Plaintiffs that the NCAA knew would impact Plaintiffs' decisions regarding their NLIs. (*Id.* ¶¶ 262-63). These allegations are sufficient for their conspiracy claim to survive dismissal.

IV. Conclusion

For foregoing reasons, Defendants Motion to Dismiss (Filing No. 31) is **GRANTED in part** and **DENIED in part.**

The motion is **GRANTED** on all claims brought by Plaintiff J'Ta Freeman because she lacks standing. The motion is also **GRANTED** on all claims against the NCAA's Board of Directors and the NCAA's Division I Board of Directors because they are not suable entities. The clerk is directed to remove those defendants from this case.

The motion is **DENIED** with respect to the claims brought by Plaintiffs Troyce Manassa and Austin Dasent against the NCAA.

SO ORDERED this 13th day of September 2021.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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