No. 23-____

IN THE

Supreme Court of the United States

BRIAN BOWEN, II,

Petitioner,

v.

ADIDAS AMERICA, INC.; JAMES GATTO; CHRISTIAN DAWKINS; MUNISH SOOD; THOMAS GASSNOLA; CHRISTOPHER RIVERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. WILKINS
MAYNARD NEXSEN PC
104 South Main Street
Suite 900
Greenville, SC 29601
(864) 370-2211
bwilkins@maynardnexsen.com

COLIN V. RAM
Counsel of Record
W. MULLINS MCLEOD, JR.
KRISTEN F. COOPER
MCLEOD LAW GROUP LLC
3 Morris Street, Suite A
Charleston, SC 29403
(843) 277-6655
colin@mcleod-lawgroup.com

Counsel for Petitioner

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QUESTION PRESENTED

Less than three years ago, this Court unanimously recognized that NCAA Division I student-athletes, as laborers, have a legally cognizable interest in the education-related benefits they receive as NCAA eligible student-athletes. *Nat'l Collegiate Athletic Assoc. v. Alston*, 141 S. Ct. 2141 (2021). Accepting the realities of modern-day college sports that have long been overlooked in lower courts, *Alston* observed that the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball," and that "there are no 'viable substitutes.'" *Id.* at 2152. Because of this market dominance, "student-athletes have *nowhere else* to sell their labor." *Id.* at 2156 (emphasis added). A student-athlete's eligibility to access this unparalleled market is therefore highly valuable.

The question presented is: Do elite student-athletes preparing for professional athletic careers have a business or property interest in their NCAA eligibility?

PARTIES TO THE PROCEEDING

Petitioner is Brian Bowen, II, an individual.

Respondents are Adidas America, Inc., a domestic corporation; James Gatto, an individual; Christian Dawkins, an individual; Munish Sood, an individual; Thomas Gassnola, an individual; and Christopher Rivers, an individual.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Fourth Circuit, Nos. 21-1764(L) and 21-2069, *Brian Bowen, II v. Adidas America, Inc.*, opinion issued October 12, 2023, en banc review denied on a vote of five to five on November 21, 2023. Mandate issued November 29, 2023.

U.S. District Court for the District of South Carolina, No. 3:18-cv-03118-JFA, Memorandum Opinion and Order entered May 26, 2021, Order on Reconsideration entered August 20, 2021.

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The district court's order denying Plaintiff-Petitioner's motion for reconsideration based on *NCAA v. Alston*, and other grounds, is not reported in Fed. Supp. but can be found at 2021 WL 3711131 and is reprinted at App. 46a.

The district court's order granting Defendants-Respondents' summary judgment motion on RICO standing is reported at 541 F. Supp. 3d 670 (D.S.C. 2021) and is reprinted at App. 55a.

JURISDICTION

The Fourth Circuit entered judgment on October 12, 2023, and denied rehearing en banc on November 21, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), requires injury to a plaintiff's "business or property" caused by a defendant's predicate criminal acts.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), requires injury to a Plaintiff's "business or property" caused by a violation of the antitrust laws.

INTRODUCTION

This case is set against the backdrop of the 2017 Adidas bribery scheme that rocked the world of college

basketball and led to the criminal convictions of Adidas personnel for engaging in fraud to steer the country's most talented players to Adidas-sponsored universities. *See United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 710 (2021). Petitioner Brian Bowen, II, who had no knowledge of the scheme, was one of these players. The scandal gutted the sanctity of NCAA college sports and, more critically, destroyed Brian's NCAA eligibility—barring him from participating in Division I men's basketball during the most critical period in his professional development into an NBA player.

Brian sued Respondents under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), alleging Respondents' predicate criminal acts—*i.e.*, wire fraud and money laundering—destroyed his NCAA eligibility and concomitantly stripped him of the valuable athletic benefits he secured in exchange for committing his athletic labor to Adidas's flagship school, the University of Louisville.

Though widely recognized as the worst victim of the Adidas criminal bribery scheme, Brian's parallel civil RICO action has faced one fictional hurdle barring his relief in the lower courts: that he was a mere college student-athlete and, therefore, he could not have held any business or property interest in his athletic labor due to the NCAA's rules on amateurism. Despite the University of Louisville being awarded restitution for the derivative injury it suffered from Brian's loss of eligibility to play on its nationally ranked basketball team, the district court rejected Brian's parallel civil claims because, under its logic, college athletes have no "business or property" interest in their athletic labor. App. 65a-67a. The Fourth Circuit, in a 2-1 decision, affirmed this faulty logic, App. 16a-20a, effectively sidelining this Court's unanimous decision

in *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021).

In calling out the fiction of NCAA amateurism, *Alston* precludes the Fourth Circuit from continuing to peddle the legally infirm narrative (a narrative that exists only in the lower courts and one that bears no connection to the realities of college sports) that elite NCAA Division I athletes preparing for professional athletic careers in the NBA and NFL—leagues that require players to be at least one year removed from high school as a prerequisite to entering the draft—have no business or property interests in participating in college athletics. *Alston* correctly acknowledged that, precisely due to the unique ascension to the professional leagues of these sports, NCAA Division I basketball and football are labor markets with "no 'viable substitute,'" *Alston*, 141 S. Ct. at 2152. Because NCAA Division I is "the relevant market for elite college football and basketball," *id.* at 2152 (internal quotation marks omitted), student-athletes have "nowhere else [other than NCAA member schools] to sell their labor." *Id.* at 2156. In other words, without their NCAA eligibility, elite athletes like Petitioner preparing for professional athletic careers have no market for their athletic labor.

Simply put, the lack of any comparable venue for post-high school athletes to further develop their athletic skills and talents prior to entering the NBA or NFL drafts confirms that these athletes have a valuable business or property interest in their NCAA eligibility. It is precisely because of the NCAA's market dominance over elite athletes' sole practical venue to develop and showcase their athletic talents while awaiting advancement to professional leagues that Petitioner's injury to his NCAA eligibility was an injury to his business or property interests.

While the *Alston* case was brought under the federal antitrust statutes, its implicit recognition of the business and property interests held by the men and women student-athlete plaintiffs cannot credibly be disputed or minimized. The *Alston* plaintiffs' interests are no different than Petitioner's interest in his NCAA eligibility. Indeed, the Division I basketball and football plaintiffs in *Alston* were required under antitrust law to have suffered an injury to their business or property interests as a matter of statutory standing. And, like the antitrust statutes in *Alston*, RICO standing requires only injury to a plaintiff's "business or property" interests. 18 U.S.C. § 1964(c). This Court in *Reiter v. Sonotone Corp.* stated that an expansive interpretation should be given to the term "injury to business or property" and recognized that "when a commercial enterprise suffers a loss of money it suffers an injury in both its 'business' and its 'property.'" 442 U.S. 330, 339 (1979). Like the *Alston* plaintiffs, Brian's athletic career—*i.e.*, exchanging his basketball labor for valuable athletic benefits found only at top NCAA Division I programs (*i.e.*, world class coaching, elite competition, and playing on a national stage in front of audiences of millions)—falls squarely within this definition. The RICO statute "requires no more than this" to bring suit. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).

The Fourth Circuit's rejection of this rationale contradicts the central tenet of *Alston*. More critically, it leads to an untenable situation where student-athletes like Petitioner have *no recourse* against the unlawful and eligibility-destroying exploitation of their labor by corporate sponsors, while the institutions for whom those athletes commit their skill and talents can legally claim a derivative injury flowing from the players' loss of NCAA eligibility. Absent legal recognition of the

business or property interests upon which college athletes may assert their rights, these students and their families, "many of whom are African American and from lower-income backgrounds," will continue to be targeted and exploited by corporate interests with impunity. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring). In an already broken and corrupt college sports marketplace that generates billions of dollars for athletic apparel companies and other entities that profit from winning players and teams, declining to correct the faulty logic that pervades the lower courts' decisions in this case will only further erode the sanctity and viability of college sports.

Accordingly, this Court's review is warranted to correct the Fourth Circuit's critical departure from *Alston* and to prevent the further exploitation of student-athletes.

STATEMENT OF THE CASE

After being heavily recruited by top Division I schools, Petitioner Brian Bowen, II, a five-star college basketball recruit and widely projected first-round NBA draft pick, began his freshman year as a starting player at the University of Louisville ("UofL"). UofL's recruiting offer to Brian provided him with the absolute best athletic benefits a future NBA player could possibly receive: elite coaching, immediate playing time, high-profile positions on the court, professional athletic training, strength and nutrition services, nationally-televised competition against other elite players and teams, and strategy sessions reading game film. In exchange, Brian agreed to provide UofL with his nationally recognized talent, skill, and labor which UofL needed to maintain a highly successful and profitable basketball program. *See, e.g.*, *United States v. Gatto*, 986 F.3d 104, 118 (2d Cir. 2021) (affirming

Respondents Gatto and Dawkins' criminal convictions and observing that, "[n]o doubt, universities stand to profit if their men's basketball programs are successful").

On September 23, 2017, following a federal investigation, Brian and the college sports world were blindsided by the revelation that he was a target of an illegal recruiting scheme spearheaded by Adidas and its agents. Adidas's agents, whom the Fourth Circuit dissent identified as the "Adidas Schemers," engaged in bribery, money laundering, and wire fraud targeting the country's most talented high school basketball players to secure their commitment to Adidas-sponsored universities. The bribery scheme "primarily targeted the parents and guardians of talented young African American athletes—largely from poor backgrounds—and used an array of unlawful means to secure their attendance at Adidas-sponsored NCAA universities. With an utter lack of tact, the Schemers described their secret strategy as the 'Soul Patrol' and the 'Black Ops.'" App. 24a.

As the dissent observed, Brian, who had no knowledge of the bribery scheme or of any wrongdoing in his recruitment, was immediately declared ineligible by UofL, lost his eligibility to play NCAA basketball at any member institution, and consequently never played in a single college basketball game. App. 27a. Within 24 hours of the public unsealing of Respondents' scheme, UofL's associate athletic director notified coaches that "MBB student-athlete Brian Bowen has been declared ineligible from athletics participation immediately" and that he "is both ineligible to compete and ineligible to participate in practice, conditioning, weights, sport performance, skill instruction or any other countable activity." (CA JA 1330).

Brian's loss of eligibility was also an immediate consequence under various NCAA bylaws designed to punish and, thus, disincentivize schools and their apparel sponsors (*i.e.*, Adidas) from engaging in such conduct. The moment UofL declared Brian ineligible to compete, he was stripped of the valuable athletic-related benefits he had accepted in exchange for his athletic labor and his only pathway to the NBA was blocked.

Brian sued Respondents under the federal RICO Act, 18 U.S.C. § 1964, for destroying his NCAA eligibility, his Athletic Tender Agreement with UofL, and his other financial interests. Discovery revealed overwhelming evidence of the bribery scheme, wire fraud, and money laundering as well as how these predicate acts of racketeering injured Brian's business and property interests as an athlete preparing for a career in the NBA. The district court, however, granted summary judgment in favor of Respondents, holding that as a mere college athlete, Brian lacked statutory standing to bring a RICO claim because he apparently had no "business" interest or "property" right in his NCAA eligibility, nor any legal expectation to receive any athletic benefits under his Athletic Tender Agreement, and no property interest in the legal fees he incurred in his effort to have his eligibility reinstated. App. 63a-69a.

The district court's rationale was rooted in a strained reading of inapposite case law standing for the limited but unremarkable proposition that no one has a *constitutional right* to play college sports. Therefore, the lower court reasoned, college athletes who commit their skill and labor to the $20 billion NCAA Division I basketball marketplace on their way to the NBA have an "insufficient" interest in their

NCAA eligibility. App. 66a-67a. Yet, just weeks after the district court granted summary judgment, *Alston* was decided, which affirmed that "certain restrictions on benefits that NCAA member schools can provide to student-athletes contravene the antitrust laws." *Alston*, 141 S. Ct. at 2152-54. Petitioner moved for reconsideration in light of *Alston*, which the district court denied. App. 49a-50a.

In a 2-1 opinion, the Fourth Circuit affirmed the district court. While acknowledging the argument that "losing his NCAA eligibility prevented [Brian] from playing college basketball, thereby improving his basketball skills, and increasing his prospects of being selected in the NBA draft," App. 19a, the majority held that Brian's loss of these coveted athletic services, which *Alston* characterized as having no "viable substitutes" outside of the NCAA, did not amount to a legally cognizable business or property interest because "he continued to receive the maximum compensation allowed at that time to a student-athlete: a full scholarship." App. 17a-18a.

The dissent, however, recognized that *Alston* accurately portrayed the marketplace for elite college athletes preparing for professional athletic careers. App. 34a ("[S]tudent-athletes have nowhere else [other than NCAA member schools] *to sell their labor*." (quoting *Alston*)). The dissent described the full panoply of athletic benefits Brian received as an NCAA-eligible student-athlete as "exceedingly valuable to Brian." App. 39a. Zeroing in on the majority's error, the dissent found it "fail[ed] to appreciate that Brian's scholarship was only part of the compensation he received from UofL in exchange for his valuable athletic labor." *Id.* The dissent concluded:

> It takes a tortured reading of the term "business or property" to maintain that the term does not include Brian's ability to participate in the sole market for his athletic labor and to obtain valuable compensation in the form of the elite coaching and playing experience offered nowhere but an NCAA Division I basketball program.

App. 42a-43a. It is Brian's loss of these athletic-related benefits, among other benefits, that provide him with statutory standing to bring suit. However, a close vote of 5-5 (with four judges recused) was insufficient for a rehearing en banc. App. 2a. This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because (1) the Fourth Circuit's decision conflicts with *Alston* on the important question of whether college student-athletes have business or property interests in their NCAA eligibility and competition, and (2) in finding Petitioner had no business or property interest in his NCAA eligibility and competition, the Fourth Circuit decided a critical federal question that, in light of *Alston*, should be settled by this Court. *See* Sup. Ct. R. 10.

I. The Fourth Circuit's decision conflicts with *Alston*'s implicit recognition that student-athletes have a business or property interest in their NCAA eligibility.

The Fourth Circuit's failure to find a cognizable "business or property" interest in Brian's NCAA eligibility conflicts with *Alston* in three critical ways: (1) *Alston*'s portrayal of the marketplace for elite college athletes preparing for professional athletic

careers as having no viable substitute renders Brian's loss of access to this sole, unique market an injury to business or property interests; (2) because the term "business or property" carries the same meaning under RICO as it does in the antitrust statutes, Brian's business and property interests, being aligned with the student-athletes in *Alston,* are entitled to the same recognition; and (3) *Alston*'s characterization of student-athletes as laborers in an unduly restrained market shows that student-athletes have fixed and tangible business or property interests in their athletic labor—labor made possible only through NCAA eligibility.

A. The Fourth Circuit's decision disregards the central tenet of *Alston*.

Alston is an antitrust case filed against the NCAA and major collegiate athletic conferences by Division I basketball and football college athletes under the Sherman Act and the Clayton Act, the latter of which authorizes "any person who shall be injured in his *business or property* by reason of anything forbidden in the antitrust laws" standing to sue. *See* 15 U.S.C. § 15(a) (emphasis added). The college athletes contended that the NCAA's restrictions barring them from receiving fair market compensation for their labor violated federal antitrust laws. The district court recognized the college athletes' business and property rights in their labor (*i.e.*, their statutory standing) and enjoined NCAA rules restricting education-related benefits that may be provided to those athletes. *See In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019).

The Ninth Circuit affirmed. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1266 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021). In a concurring opinion, Judge Smith

wrote that "the freedom guaranteed each and every business, no matter how small, is the freedom to compete" and that "[t]hose protections extend to sellers of goods and services—such as Student-Athletes—to the same extent they do buyers, consumers, or competitors." 958 F.3d at 1267 (Smith, Circuit Judge, concurring).

In affirming the Ninth Circuit, this Court acknowledged that "[t]he most talented athletes are concentrated in the markets for Division I basketball and FBS football," and concluded that "[t]here are no 'viable substitutes'" for talented athletes preparing for their professional sports careers "as the NCAA's Division I essentially *is* the relevant market for elite college football and basketball." *Id.* at 2152. Critically, *Alston* recognized that "student-athletes have nowhere else to sell their labor" other than to NCAA athletic programs. *Id.* at 2156. Given this context, the *Alston* college athletes plainly suffered injury to their "business or property" arising from NCAA rules that limited the compensation they could receive in exchange for their athletic labor. *See NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1062.

In this case, the business or property injury is especially apparent where there is "no 'viable substitute,'" *Alston*, 141 S. Ct. at 2152, to Division I basketball for athletes, like Petitioner, pursuing professional careers in the NBA. This is so because the NBA's collective bargaining agreement requires players to sit out one year after high school before entering the NBA draft, and no player may contract with an NBA team unless he first participates in the NBA draft. These constraints render participation in NCAA Division I college basketball especially critical for elite athletes on their way to professional careers. Indeed, players coming out of high school cannot simply take a year off

from serious competition before entering the NBA draft without significantly diminishing their skills while their college-bound peers hone their skills from the unique athletic-related benefits only players on top Division I teams receive. Petitioner's NCAA eligibility was, thus, necessary to his pursuit of a professional athletic career.

In justifying its departure from *Alston*, the Fourth Circuit deemed *Alston* inapplicable on the basis that it focused on one subset of restraints—education-related benefits—and not restraints on athletic-related benefits. App. 18-20. But, for purposes of determining whether student-athletes have a business or property interest in their athletic labor, this is a distinction without a difference. The *Alston* Court, including Justice Kavanaugh's concurrence, made clear that the horizontal restraints imposed on student-athletes affect *all* interests. *Alston*, 141 S. Ct. at 2167. And should the Court review a later challenge to restraints on college players' athletic-related benefits, it too would be subject to a rule of reason analysis under antitrust law *as the restraints imposed on education-related benefits and athletic-related benefits are equally subject to antitrust scrutiny*. *Id*. In other words, participation in college athletics is a business and property interest to the young athletes who devote their labor to it.

B. Business and property interests are identical under the antitrust statutes and RICO.

This Court has repeatedly recognized that the RICO Act is modeled on the Sherman and Clayton Acts. *See Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). RICO Act § 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any

appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). In *Holmes v. Sec. Inv. Prot. Corp.*, this Court examined the standing requirement under the RICO Act and the language from § 1964(c):

> We have repeatedly observed . . . that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act, which reads in relevant part that:
>
> "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.
>
> . . .
>
> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. *See Cannon v. University of Chicago*, 441 U.S. 677, 696–698, 99 S. Ct. 1946, 1957–1958, 60 L.Ed.2d 560 (1979). It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes, 503 U.S. at 268.

Thus, the term "business or property" under the Sherman and Clayton Acts means the same under the RICO Act. And, like the *Alston* plaintiffs who suffered

antitrust injury as NCAA college athletes, Brian's same interests were injured, albeit from illegal bribery, fraud, and money laundering rather than from illegal anticompetitive activity. This Court did not require the *Alston* plaintiffs to demonstrate a constitutionally-protected business or property interest; indeed, there was no constitutional guarantee that they would be paid anything—they received the benefit of the bargain as college athletes but had standing nonetheless because the conduct at issue impacted their interests.

Moreover, in deciding *Alston*, this Court did not question whether the student-athlete plaintiffs had established the requisite business or property injury required to bring suit. Not even the NCAA or athletic conference defendants argued that the college athletes lacked a business or property interest in playing Division I sports. The only entity to raise that argument is Respondent Adidas in this case and, in accepting that argument uncritically, the Fourth Circuit's decision suggests that this Court committed legal error in deciding the *Alston* case. Clearly it did not.

This Court's unanimous affirmance in *Alston* demonstrates the Fourth Circuit's error in rejecting Petitioner's cognizable business and property interests. The Division I basketball and football plaintiffs in *Alston* were required under antitrust law to have suffered an injury to their business or property interests; had they not, they would have lacked standing to sue. *See also O'Bannon v. NCAA*, 802 F.3d 1049, 1066 (9th Cir. 2015) ("[T]he labor of student-athletes is an integral and essential component of the NCAA's product.").

Both Brian and the *Alston* plaintiffs premised their claims on a business or property injury related to lost compensation. The *Alston* plaintiffs alleged their

education-related benefits were unjustly limited based on artificial restraints that violated antitrust laws; Brian alleges his athletic-related benefits were destroyed by Respondents' bribery scheme that violated the RICO Act. That Brian's compensation was in the form of athletic-related benefits does not diminish the business nature of his injury. Brian's business *is* athletics and basketball skill is his product. Brian's lost compensation was his loss of the athletic benefits he was receiving as a player on UofL's team, *i.e.*, the product he was selling in the NCAA and would go on to sell in the NBA.

C. The athletic-related benefits provided to eligible athletes in the NCAA labor market are tangible and fixed.

The Fourth Circuit's depiction of Brian's loss of athletic benefits as mere expectancy is misplaced. It also conflicts with *Alston*. One reason the NCAA enjoys monopsony power in the market for athletic labor in college basketball and football is due to the concrete athletic-related benefits student-athletes receive as players on those teams: world-class coaching, elite training and nutrition services, the highest levels of competition, and the pressure of performing their labor before sold-out arenas and in nationally televised games. App. 40a-41a. As the Fourth Circuit dissent recognized, because Respondents destroyed Brian's eligibility, he "missed 18 months of competition after high school," *i.e.*, the period of development "that is critical to a young player" who only has a fixed time to earn a living in the basketball profession. App. 32a. Brian was also deprived of a "level of coaching that . . . can't be matched anywhere else"—and he "wasn't able to play against the best competition and improve his basketball skills." App. 32a-33a. In minimizing these athletic benefits as mere expectancy interests, the Fourth

Circuit ignored that they are often the sole reason elite athletes waiting to advance to the NBA and NFL commit to Division I programs.

Alston, however, grasps this understanding. Despite the NCAA's limits on other forms of compensation, *Alston* recognized that many student-athletes provide their athletic labor to universities precisely for the coaching and playing experience they receive in return. As this Court observed, "the NCAA enjoys near complete dominance of, and exercise[s] monopsony power in," the market for athletic labor in basketball and football. *See* 141 S. Ct. at 2151-52 (internal quotation marks omitted, alteration original). In exchange, NCAA Division I programs attract "the most talented athletes." *Id.* at 2150 (internal quotation marks omitted). The NCAA has been successful in "restrain[ing] student-athlete compensation," *id.* at 2152, precisely because elite student-athletes advancing to professional leagues receive tangible and fixed value from these athletic-related benefits.

II. The Fourth Circuit's decision has adverse implications for the rights of student-athletes nationwide.

The adverse effects of the Fourth Circuit's decision are two-fold. First, because this Court has recognized that the term "business or property" carries the same meaning in the RICO Act as it does under antitrust law, if left undisturbed the Fourth Circuit's denial of standing in this case—in conflict with *Alston*'s implicit acceptance of the *Alston* student-athletes' identical business or property injuries—will sow confusion in the lower courts and lead to the absurd result whereby two student-athletes could suffer injury to the same interest, one an antitrust injury and the other a

racketeering injury, but only one would have standing to bring suit.

Second, the Fourth Circuit's decision bears no connection to the realities of the college sports industry described in *Alston* and, instead, perpetuates the outdated myth that student-athletes have no business or property interest in the extraordinary labor they provide to their schools—labor that generates billions of dollars in revenue for their universities and for their sponsors like Respondent Adidas.

Rather, the Fourth Circuit rested on outdated cases involving non-elite student-athletes participating in non-professional track athletic programs to hold that no student-athlete in America has a business or property interest in his or her NCAA eligibility. Remarkably, the Fourth Circuit simply concluded that Brian's loss of his eligibility to play NCAA basketball and concomitant loss of the valuable athletic-related benefits that are afforded to Division I athletes is not an injury to "business" or "property." App. 18a. The Fourth Circuit reached this conclusion despite *Alston*'s recognition of the absence of any "viable substitute" for elite Division I athletes seeking the necessary training, coaching, and preparation for a professional sports career. *Alston*, 141 S. Ct. at 2152. As the dissent aptly stated: "it is absurd to say that a person can be left without a market for his labor without sustaining a business or property injury." App. 39a.

And, although *Alston* expressly rejected "a sort of judicially ordained immunity" placed on athletic "amateurism" simply because an athlete's labor falls "at the intersection of higher education, sports, and money," *Alston*, 141 S. Ct. at 2159, the Fourth Circuit nevertheless embraced this immunity, finding that

because Brian continued to receive *tuition* benefits from UofL after he was declared ineligible to participate in the NCAA, "he continued to receive the maximum compensation allowed" in exchange for his labor. App. 18a. Yet, the record below proves that the tuition benefit given to Brian was neither the sole nor the most valuable benefit Brian bargained for in exchange for providing UofL his athletic labor; rather, Brian provided his athletic labor in exchange for the professional athletic-related benefits that UofL offered him and every member of its top-tier basketball program: elite coaching, athletic training, and high-pressure competition crucial to his transition to a professional career in the NBA.

Critically, the Fourth Circuit concluded that although student-athletes provide extraordinarily demanding labor to benefit their universities and their team's athletic apparel sponsors—labor upon which the entire intercollegiate athletic industry is built—the student-athletes have no legally cognizable interest in their labor. App. 17a-18a. Put plainly, the Fourth Circuit's holding echoes long-abandoned views of non- and under-compensated labor in this country. As Justice Kavanaugh explained in *Alston*:

> The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the

> revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.

Alston, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

The Fourth Circuit's rejection of the principles set forth in *Alston* and its disregard for the modern-day realities of the collegiate sports marketplace will be precedent to suppress student-athletes' rights absent this Court's review.

III. The Fourth Circuit's decision cannot be reconciled with the Second Circuit's affirmance of Respondents' convictions.

Respondents' destruction of Brian's NCAA eligibility served as the lynchpin of the criminal convictions of Adidas's agents for the predicate acts of wire fraud in the parallel criminal case. *See Gatto*, 986 F.3d at 109-110. Their convictions and guilty pleas were premised on their causing UofL (and other schools) to award scarce scholarship funds to recruits like Brian who were subsequently rendered ineligible under NCAA bylaws due to the bribery scheme. This resulted in UofL being denied the valuable athletic skills and labor Brian would have otherwise supplied had Respondents not destroyed his NCAA eligibility.

Indeed, UofL was awarded criminal restitution for having allocated one of its scholarships to Brian precisely because the bribery scheme robbed him of his NCAA eligibility and, therefore, denied UofL the benefit of his athletic skills and labor. *Id.* at 112-13, 126 ("The Universities would not have awarded the Recruits this aid had they known the Recruits were ineligible to compete."); *see also id.* at 116-17 ("[I]f the Recruits' ineligibility had been discovered by the schools, . . . the Recruits would have never been

permitted to play in the NCAA for Adidas-sponsored schools, defeating the purpose of the payments and potentially derailing the Recruits' professional careers."). In other words, had Adidas's scheme not destroyed Brian's NCAA eligibility, UofL would not have suffered a loss.

Yet, under the Fourth Circuit's rationale, that Petitioner and the other affected student-athletes were rendered ineligible was simply an unfortunate yet non-legally redressable side effect of the bribery scheme. The Fourth Circuit's holding that NCAA eligibility is of no value to a student-athlete implies that a servant providing labor suffers no cognizable business or property loss when he is injured, but the master receiving the servant's labor does. This flawed, oppressive logic necessitates correction by this Court.

IV. This case is an ideal vehicle to provide clarity in the wake of *Alston* by expressly recognizing the business and property interests of student-athletes.

Certiorari is further warranted because the Fourth Circuit has written an opinion that has the potential to sow massive confusion both within the judiciary and among the public on the rights of NCAA college athletes. The issues in this case are of exceptional importance to the over 500,000 student-athletes presently participating in NCAA athletics nationwide and to the athletic recruiting ability of the thousands of NCAA member institutions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM W. WILKINS
MAYNARD NEXSEN PC
104 South Main Street
Suite 900
Greenville, SC 29601
(864) 370-2211
bwilkins@maynardnexsen.com

COLIN V. RAM
Counsel of Record
W. MULLINS MCLEOD, JR.
KRISTEN F. COOPER
MCLEOD LAW GROUP LLC
3 Morris Street, Suite A
Charleston, SC 29403
(843) 277-6655
colin@mcleod-lawgroup.com

Counsel for Petitioner

February 20, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: November 21, 2023]

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No. 21-1764 (L)
(3:18-cv-03118-JFA)

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BRIAN BOWEN, II,

Plaintiff-Appellant,

v.

ADIDAS AMERICA INC; JAMES GATTO;
CHRISTIAN DAWKINS; MUNISH SOOD;
THOMAS GASSNOLA; CHRISTOPHER RIVERS,

Defendants-Appellees.

———

No. 21-2029
(3:18-cv-03118-JFA)

———

BRIAN BOWEN, II,

Plaintiff-Appellant,

v.

ADIDAS AMERICA INC.; JAMES GATTO;
CHRISTIAN DAWKINS; MUNISH SOOD;
THOMAS GASSNOLA; CHRISTOPHER RIVERS,

Defendants-Appellees.

———

ORDER

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Diaz and Judges Agee, Harris, Rushing, and Heytens voted to deny rehearing en banc. Judges King, Gregory, Wynn, Thacker, and Benjamin voted to grant rehearing en banc. Judges Wilkinson, Niemeyer, Richardson, and Quattlebaum were recused and did not participate in the poll.

Entered at the direction of Judge Rushing.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1764

BRIAN BOWEN, II,

Plaintiff-Appellant,

v.

ADIDAS AMERICA INC; JAMES GATTO;
CHRISTIAN DAWKINS; MUNISH SOOD;
THOMAS GASSNOLA; CHRISTOPHER RIVERS,

Defendants-Appellees.

No. 21-2029

BRIAN BOWEN, II,

Plaintiff-Appellant,

v.

ADIDAS AMERICA INC.; JAMES GATTO;
CHRISTIAN DAWKINS; MUNISH SOOD;
THOMAS GASSNOLA; CHRISTOPHER RIVERS,

Defendants-Appellees.

Appeals from the United States District Court for
the District of South Carolina, at Columbia
Joseph F. Anderson, Jr., Senior District Judge.
(3:18-cv-03118-JFA)

Argued: September 16, 2022
Decided: October 12, 2023

Before KING, RUSHING, and HEYTENS, *Circuit Judges*.

Affirmed by published opinion. Judge Rushing wrote the majority opinion, in which Judge Heytens joined. Judge King wrote a dissenting opinion.

ARGUED: William Walter Wilkins, NEXSEN PRUET, LLC, Greenville, South Carolina, for Appellant. William H. Taft, V, DEBEVOISE & PLIMPTON LLP, New York, New York, for Appellees. ON BRIEF: W. Mullins McLeod, Jr., Colin V. Ram, MCLEOD LAW GROUP LLC, Charleston, South Carolina, for Appellant. Matthew T. Richardson, Mary Lucille Dinkins, WYCHE, Columbia, South Carolina; Andrew M. Levine, Nathan S. Richards, Matthew D. Forbes, DEBEVOISE & PLIMPTON LLP, New York, New York, for Appellee adidas America, Inc. Cory E. Manning, Columbia, South Carolina, Robert L. Lindholm, Charlotte, North Carolina, Wesley T. Moran, NELSON MULLINS RILEY & SCARBOROUGH, LLP, Myrtle Beach, South Carolina, for Appellee Christopher Rivers. Terry A. Finger, FINGER, MELNICK, BROOKS & LABRUCE, Hilton Head Island, South Carolina, for Appellee Christian Dawkins. Deborah B. Barbier, DEBORAH B. BARBIER, LLP, Columbia, South Carolina, for Appellee James Gatto. Richard J. Zack, Thomas H. Cordova, TROUTMAN PEPPER HAMILTON SANDERS LLP, Philadelphia, Pennsylvania; Wilbur E. Johnson, CLEMENT RIVERS, LLP, Charleston, South Carolina, for Appellee Munish Sood.

RUSHING, Circuit Judge:

In 2017, Brian Bowen II was a promising high-school basketball player who aspired to play professionally. At the end of high school, Bowen committed to play NCAA Division I basketball for the University of Louisville (Louisville) in exchange for a full, four-year scholarship. Bowen hoped that by playing Division I basketball, he could become a top NBA prospect. Those hopes were dashed when a college basketball bribery scheme unraveled, exposing that Bowen's father, Brian Bowen Sr., accepted a bribe in connection with Bowen's decision to play for Louisville. As a consequence, Bowen lost his NCAA eligibility, and Louisville cut him from the team. Bowen sued the central figures in the bribery scheme under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, to recover treble damages, including lost future professional earnings and the attorney's fees and costs he incurred trying to restore his NCAA eligibility. The district court granted summary judgment to the defendants, concluding that Bowen did not demonstrate an injury to his business or property, as required for a private civil RICO claim. The district court later denied Bowen's motion for reconsideration. Bowen appeals both rulings, and we affirm.

I.

A.

In high school, Bowen was an exceptional basketball player. As a McDonald's All-American and five-star recruit, Bowen was a sought-after prospect for many NCAA Division I schools. At one point, ESPN ranked Bowen thirteenth overall in the 2017 class. Bowen Sr. and an aspiring sports agent, Christopher Dawkins, helped Bowen during the recruitment process and

accompanied him on university visits. Dawkins hoped that by helping Bowen get to the NCAA, he could later represent Bowen in the NBA. One of the schools recruiting Bowen was Louisville. As an assistant coach told Bowen in a text message, Louisville wanted him to have "immediate playing time" and be a "featured scorer" on the team. J.A. 1702.

Bowen committed to play basketball for Louisville and signed a scholarship agreement to that effect in June 2017. Under the agreement, Louisville awarded Bowen a full, four-year scholarship covering tuition, fees, books, housing, meals, and miscellaneous expenses in exchange for Bowen's commitment to play on the men's basketball team. By signing the agreement, Bowen certified he understood the agreement could "be immediately reduced or canceled at any time if' he became ineligible to compete or voluntarily withdrew from the team. J.A. 292. The scholarship agreement also promised that Bowen's scholarship would "not be reduced, canceled, or non-renewed at any time" because of his "athletics' ability, performance, condition, or contribution [to] the team's success," or "for any other athletics reason." J.A. 292.

To play NCAA Division I basketball, Bowen had to comply with the NCAA's eligibility rules, including its amateurism rules. *See* NCAA Bylaws § 12.01.1 (2016) ("Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."). Under the amateurism rules, "student-athletes -- and their families -may not accept payments of any form for the student-athletes' playing or agreeing to play their sport," subject to certain exceptions. *United States v. Gatto,* 986 F.3d 104, 111 (2d Cir. 2021). Shortly after committing to play for Louisville, Bowen affirmed that, "to the best of [his] knowledge, [he had] not

violated any amateurism rules." J.A. 297. The NCAA Eligibility Center certified Bowen's eligibility to play, and his eligibility remained intact through August and early September 2017 as Bowen began practicing with the team.

But before Bowen could play his first college game, his plans were derailed. In September 2017, federal prosecutors unveiled a criminal complaint against Dawkins, James Gatto, Merl Code, and Munish Sood. The complaint charged that these defendants (and one other) facilitated bribes to student-athletes or their family members to entice the athletes to play basketball at Division I schools sponsored by apparel company Adidas America, Inc. Prosecutors separately charged Thomas Gassnola for his role in the scheme.

Gatto was Adidas's director of global sports marketing for basketball. He "managed the sports marketing budget," and his responsibilities included "ensur[ing] the success of the sponsorship agreements Adidas had signed with" universities like Louisville. *Gatto,* 986 F.3d at 111. Gassnola and Code were both Adidas consultants. *See id.* Sood was a financial advisor. Gatto, Gassnola, and Code colluded with Sood and Dawkins to pay "the families of top-tier high school basketball recruits" to persuade the players to enroll at Adidas-sponsored universities. *Id.* Their goal was to "lur[e] the best basketball players to Adidas-sponsored schools to better market [the Adidas] brand." *Id.* at 116.

The criminal complaint accurately charged that Bowen's decision to play for Louisville was tainted by one such bribe. Around the same time Bowen committed to play for Louisville, Bowen Sr. agreed to accept $100,000 from Adidas, which Dawkins facilitated. *See id.* at 112. On July 13, 2017, Sood delivered the first payment—$19,400 in cash—to Bowen Sr. The FBI

arrested Gatto, Dawkins, and Code before they made any additional payments. *See id.* Evidence suggests Bowen was ignorant of his father's misdeeds. Nevertheless, Bowen Sr.'s decision to accept the bribe and his receipt of the first installment violated NCAA rules and undermined Bowen's eligibility to play NCAA basketball. *See* NCAA Bylaws §§ 13.01.1, 16.01.1, 16.02.3, 16.02.4 (2016).

When the criminal investigation became public, Louisville withdrew Bowen from the men's basketball team. Louisville declined to officially declare Bowen ineligible and then seek his reinstatement with the NCAA. In a letter, the interim athletics director explained that Bowen would "not be allowed to practice with or compete for [the] men's basketball team at any point in the future." J.A. 751. However, Louisville allowed Bowen to "continue to receive [his] athletics scholarship" if he chose to remain enrolled. J.A. 751.

Bowen did not stay at Louisville. Instead, he voluntarily withdrew after his first semester and transferred to the University of South Carolina, where he began practicing with the basketball team. The University of South Carolina declared Bowen ineligible and petitioned the NCAA to reinstate his eligibility, but to no avail. Bowen and his family incurred nearly $30,000 in legal fees for their failed effort to restore his eligibility. After twice declaring for the NBA draft, briefly playing professionally in Australia, and playing several seasons on NBA two-way contracts, Bowen's professional basketball career has not taken off as he had hoped.

B.

In August 2019, Bowen filed an amended complaint in the District of South Carolina against Adidas

America, Inc., Gatto, Code,[1] Dawkins, Sood, Gassnola, and Christopher Rivers,[2] alleging two substantive RICO violations, *see* 18 U.S.C. § 1962(a), (c), and two RICO conspiracies, *see id. §* 1962(d). The defendants moved to dismiss. They argued, in part, that Bowen had not alleged a cognizable injury to his business or property as necessary to pursue a private civil RICO claim under 18 U.S.C. § 1964(c), and that even if he had, he had not plausibly alleged that the defendants proximately caused his injuries. The district court granted the motion in part; however, the court determined that Bowen "alleged sufficient facts concerning causation and injury required for RICO to enable him to proceed beyond the pleading stage of this case." *Bowen v. Adidas America, Inc.,* No. 3:18-3118-JFA, 2020 WL 13076108, at *11 (D.S.C. Feb. 27, 2020).

After discovery, the defendants moved for summary judgment, again arguing Bowen had not demonstrated that they proximately caused a cognizable injury to his business or property under Section 1964(c). This time, the district court agreed and granted summary judgment in the defendants' favor. *Bowen v. Adidas America, Inc.,* 541 F. Supp. 3d 670 (D.S.C. 2021). The court later denied Bowen's motion for reconsideration. *Bowen v. Adidas America, Inc.,* No. 3:18-3118-JFA, 2021 WL 3711131 (D.S.C. Aug. 20, 2021).

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[1] Code is not a party on appeal.

[2] Rivers was an Adidas employee who Bowen alleges was part of the bribery scheme and knew about the efforts to influence Bowen to attend Louisville. Rivers was not criminally prosecuted.

II.

A.

We review de novo a district court's decision to grant summary judgment, applying the same legal standards as that court. *See Ballengee v. CBS Broad., Inc.,* 968 F.3d 344, 349 (4th Cir. 2020). Viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Ballengee,* 968 F.3d at 349. "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.,* 597 F.3d 570, 576 (4th Cir. 2010). If the nonmoving party "has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof," summary judgment is appropriate. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

B.

Congress made the civil RICO cause of action for treble damages available only to plaintiffs "injured in [their] business or property" by a defendant's RICO violation. 18 U.S.C. § 1964(c); *see Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 495-497 (1985); *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.,* 262 F.3d 260, 264 (4th Cir. 2001).[3] Without an injury to "his business

[3] Section 1964(c)'s injury and proximate cause requirements are sometimes called "standing" requirements. *See, e.g., Potomac Elec. Power Co.,* 262 F.3d at 264. Despite that label, those statutory requirements do not implicate a court's subject-matter

or property," even a plaintiff who can prove he suffered some injury as a result of a RICO violation lacks a cause of action under this statute. 18 U.S.C. § 1964(c).

The "word 'property' has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage 'property' comprehends anything of material value owned or possessed." *Reiter v. Sonotone Corp.,* 442 U.S. 330, 338 (1979) (interpreting "business or property" in Section 4 of the Clayton Act and citing Webster's Third New Int'l Dictionary (1961)); *see Holmes v. Sec. Inv. Prot. Corp.,* 503 U.S. 258, 267 (1992) ("Congress modeled § 1964(c) on . . . § 4 of the Clayton Act"). The word "business" in this context connotes "a commercial or industrial enterprise" or "commercial or mercantile activity customarily engaged in as a means of livelihood." Webster's Third New Intl Dictionary 302 (1971). Although a plaintiff's "business" and his "property" may overlap, Section 1964(c) covers two distinct types of injury. *See Reiter,* 442 U.S. at 338-339.

The phrase "business or property" does not, however, encompass all possible injuries. It excludes, for example, personal injuries and "pecuniary losses occurring therefrom." *Bast v. Cohen, Dunn, & Sinclair, PC,* 59 F.3d 492, 495 (4th Cir. 1995); *see Reiter,* 442 U.S. at 339. Courts have also held that injuries "to mere expectancy interests" do not suffice. *HCB Fin. Corp. v. McPherson,* 8 F.4th 335, 345 (5th Cir. 2021) (internal quotation

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jurisdiction because they do not concern a court's power to adjudicate a civil RICO case. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 128 n.4 (2014). Instead, injury to business or property and proximate causation are elements a plaintiff must prove to avail himself of RICO's private cause of action. *See CGM, LLC v. BellSouth Telecomms., Inc.,* 664 F.3d 46, 52-53 (4th Cir. 2011) (discussing "statutory standing" generally).

marks omitted); *see Regions Bank v. J.R. Oil Co.,* 387 F.3d 721, 728-729 (8th Cir. 2004).

Bowen contends the defendants caused him to suffer three cognizable business or property injuries: (1) loss of benefits secured by his scholarship agreement with Louisville; (2) loss of his NCAA eligibility; and (3) loss of money spent on attorney's fees attempting to regain his eligibility. We consider each argument in turn.

1.

Bowen first claims a business or property interest "in the contractual benefits he secured from [Louisville] through his" scholarship agreement. Opening Br. 28. According to Bowen, that agreement obligated Louisville to provide him with certain basketball-related benefits—including "elite coaching, preferred playing positions on the court, athletic training, strength and nutrition services, competitive playing time, and experience reading game film," Opening Br. 29—that he lost because the defendants' conduct disqualified him from playing on the team.

We may grant that Bowen had a business or property interest in the contractual benefits of his scholarship agreement with Louisville. *See O'Bannon v. NCAA,* 802 F.3d 1049, 1065 (9th Cir. 2015) (concluding the "transaction" between a student-athlete and a university offering a scholarship is commercial because "both parties to that exchange anticipate economic gain from it"); *Diaz v. Gates,* 420 F.3d 897, 900 (9th Cir. 2005) (en banc) (concluding RICO plaintiff alleged harm to a property interest because his allegations amounted to tortious interference with a contract under state law). But Bowen has not demonstrated an injury to that interest because the benefits he lost were not promised in the scholarship agreement. To the

contrary, Bowen received everything to which his scholarship entitled him.

As the parties agree, to determine whether Bowen has shown an injury under this theory, we must interpret Bowen's scholarship agreement according to Kentucky contract law. Under Kentucky law, "in the absence of ambiguity, a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Maze v. Bd. of Dirs. for Commonwealth Postsecondary Educ. Prepaid Tuition Tr. Fund,* 559 S.W.3d 354, 363 (Ky. 2018) (internal quotation marks omitted). If a contract is unambiguous, a court "look[s] only as far as the four corners of the document to determine the parties' intentions." *Id.* (internal quotation marks omitted). By contrast, "[w]here a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties.'" *In re Conco, Inc.,* 855 F.3d 703, 711 (6th Cir. 2017) (quoting *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.,* 94 S.W.3d 381, 385 (Ky. Ct. App. 2002)).

The agreement between Bowen and Louisville was entitled "Athletics Financial Aid Agreement for Student-Athletes." J.A. 291. It listed Bowen's sport as "Men's Basketball." J.A. 291. In exchange for committing to play basketball, the agreement promised Bowen the maximum compensation then allowed under NCAA rules: a full, four-year scholarship covering tuition and fees, books, room and board, and miscellaneous expenses. *See* Oral Arg. at 02:00-02:22 (Bowen's counsel acknowledging Bowen received the maximum compensation

allowed under NCAA rules). Nowhere did the agreement promise athletic training or services, elite coaching, preferred positions, or playing time.

Bowen did not suffer any injury under the scholarship agreement's unambiguous terms. After federal prosecutors exposed the defendants' bribery scheme, Louisville allowed Bowen to keep his scholarship, even though it withdrew him from the team. Louisville continued to give Bowen exactly what the agreement promised. Bowen relinquished the scholarship when he transferred to the University of South Carolina, and he cannot now sue under RICO to recover benefits he voluntarily surrendered.

Resisting this conclusion, Bowen argues that although "the agreement is silent as to the basketball related benefits promised," we should "'imply an obligation to carry out the purpose for which the contract was made,'" which he claims was "the provision of basketball career development to [Bowen] in exchange for his commitment to play for [Louisville]." Opening Br. 34 (quoting *In re Conco,* 855 F.3d at 712). In support, Bowen cites parol evidence, such as the text message an assistant coach sent him during recruiting saying Louisville wanted Bowen to get "immediate playing time" and be a "featured scorer" for the team. J.A. 1702.

But unlike *In re Conco,* on which Bowen relies, the agreement here is not "silent or ambiguous" as to what Louisville promised Bowen in exchange for his commitment to play basketball for the school. 855 F.3d at 712. Indeed, Bowen's articulation of the "obvious purpose" of the agreement contradicts the agreement's terms. Reply Br. 7. Louisville did not promise Bowen career development and immediate playing time in exchange for his commitment to play for the school. Rather, the agreement unambiguously promised Bowen

the full cost of tuition and fees, room and board, books, and miscellaneous expenses in exchange for his commitment. Because the scholarship agreement is unambiguous on this point, we must construe it according to its terms and "without resort to extrinsic evidence." *Maze,* 559 S.W.3d at 363 (internal quotation marks omitted).

Bowen emphasizes that the scholarship agreement required him to offer his athletic labor to the school. But that obligation on Bowen did not impose a reciprocal obligation on Louisville to use his labor or provide him with certain athletic benefits to improve his skills. *See, e.g., Giuliani v. Duke Univ.,* No. 1:08CV502, 2010 WL 1292321, at *6 (M.D.N.C. Mar. 30, 2010) ("[E]ven contractual athletic scholarships do not ensure a student's right to play a sport but only constitute a promise by the university to provide the student with financial assistance in exchange for the student's maintenance of athletic eligibility."); *Jackson v. Drake Univ.,* 778 F. Supp. 1490, 1493 (S.D. Iowa 1991) (holding an unambiguous scholarship agreement that was silent on "the right to play basketball" did not implicitly contain such a right).

We don't doubt that, as Bowen contends, the best college basketball recruits choose among the schools vying for their labor based on a comparison of coaching staff, predicted playing time, anticipated training, and the like, rather than by comparing financial aid packages. None of those enticements, however, are guaranteed in the written agreement. If Bowen didn't receive immediate playing time, or if Coach Pitino left the school, Bowen would have had no breach of contract claim based on this scholarship agreement. Although the prospect of those benefits motivated Bowen to agree to play basketball at Louisville, those

additional benefits are not listed in the agreement. And, under Kentucky law, "[t]he fact that one party may have intended different results . . . is insufficient to construe a contract at variance with its plain and unambiguous terms." *Maze,* 559 S.W.3d at 363 (internal quotation marks omitted).

Because the scholarship agreement is unambiguous, we decline to consider parol evidence to interpret it. And because Louisville allowed Bowen to keep his scholarship even after withdrawing him from the team, he did not suffer an injury to his business or property interest in the agreement. Accordingly, the district court correctly concluded that Bowen has not demonstrated he suffered a cognizable injury under his scholarship agreement with Louisville.

2.

Next, Bowen contends that the loss of his NCAA eligibility was a cognizable business or property injury for purposes of Section 1964(c). We disagree.

We may easily dispose of the argument that Bowen had a property interest in his NCAA eligibility. A student-athlete's eligibility is a status, not a thing "of material value" the athlete "own[s] or possess[es]." *Reiter,* 442 U.S. at 338. For example, there is no indication Bowen could sell, lease, or otherwise transfer his eligibility to another person. *See Property,* Webster's Third New Int'l Dictionary 1818 (1971) (defining "property" as "something that is or may be owned or possessed" and "the exclusive right to possess, enjoy, and dispose of a thing"); *cf. United States v. Adler,* 186 F.3d 574, 577 (4th Cir. 1999) (interpreting the word "property" in the wire fraud statute according to "the common sense notion that property is anything in which one has a right that could be assigned, traded,

bought, and otherwise disposed of (internal quotation marks omitted)). Although eligibility may be valuable to the individual student-athlete, it is not property.

Moreover, being eligible to play Division I college basketball did not confer on Bowen a right—much less a property right—to do so. Rather, Bowen's eligibility gave him only the opportunity to play college basketball. And we have previously concluded, consistent with the decisions of other courts, that student-athletes do not have "a property interest in intercollegiate athletic participation." *Equity in Athletics, Inc. v. Dep't of Educ.,* 639 F.3d 91, 109 (4th Cir. 2011) (emphasis omitted).[4] Bowen does not identify any courts that have held to the contrary.

As for whether loss of his NCAA eligibility injured Bowen "in his business," 18 U.S.C. § 1964(c), his claim is a moving target. To the extent Bowen claims he was in the business of playing college basketball, he

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[4] Our ruling in *Equity in Athletics* came in the context of resolving a due process claim. Bowen would have us disregard that decision and others like it because RICO does not require a plaintiff to show a *constitutionally* protected property interest. But the property interests protected by the Fourteenth Amendment must "stem from an independent source such as state law." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972). In *Equity in Athletics,* for example, we agreed with the district court's conclusion that state law did not recognize a property interest in intercollegiate athletic participation. *See* 639 F.3d at 109; *Equity in Athletics, Inc. v. Dep't of Educ.,* 675 F. Supp. 2d 660, 680-681 (W.D. Va. 2009). Courts have similarly consulted state law when assessing claimed property interests for purposes of Section 1964(c), and we think a limited recourse to decisions assessing state property law for guidance is not inappropriate here. *See Jackson v. Sedgwick Claims Mgmt. Servs., Inc.,* 731 F.3d 556, 565 (6th Cir. 2013) (en bans); *DeMauro v. DeMauro,* 115 F.3d 94, 96-97 (1st Cir. 1997).

suffered no cognizable injury because, despite losing his eligibility, he continued to receive the maximum compensation allowed at that time to a student-athlete: a full scholarship. If he had retained his eligibility and continued playing, Bowen could not have received any greater compensation than that for playing college basketball. And his voluntary surrender of the full scholarship does not create an injury.

In support of this version of his claim, Bowen relies heavily on the Supreme Court's decision in *NCAA v. Alston,* 141 S. Ct. 2141 (2021). There, a group of student-athletes filed an antitrust action challenging the "NCAA rules that limit the compensation they may receive in exchange for their athletic services." 141 S. Ct. at 2151 (internal quotation marks omitted). The district court enjoined certain NCAA rules that limited the education-related benefits schools could offer student-athletes but left undisturbed rules limiting athletic scholarships and compensation related to athletic performance. *See id.* at 2147. The Supreme Court affirmed. *See id.* at 2166. In doing so, the Court acknowledged that "the NCAA's Division I essentially *is* the relevant market for elite college football and basketball" and "student-athletes have nowhere else to sell their labor." *Id.* at 2152, 2156 (internal quotation marks omitted). According to Bowen, because the Supreme Court never questioned whether the *Alston* plaintiffs had suffered a business or property injury, which is a prerequisite to maintaining an antitrust action, the Court implicitly recognized that "the labor and skill provided by NCAA athletes" is a business or property interest. Opening Br. 26.

Even so, none of this helps Bowen. In *Alston,* the student-athletes (whose eligibility was not in question) claimed NCAA rules unlawfully limited the compensation

they could receive for their labor. *See* 141 S. Ct. at 2147, 2152. Lost compensation is a concrete injury to business or property. *See Reiter,* 442 U.S. at 338 ("Money, of course, is a form of property."). Bowen, however, does not assert the loss of compensation for services rendered playing NCAA basketball—after all, he continued to receive the maximum compensation allowed and does not challenge the NCAA compensation limits that applied to him. Rather, he asserts the loss of his eligibility to participate in the NCAA labor market, untethered to any concrete interest like compensation.

Much of Bowen's argument, however, reaches beyond the business of college athletics. His main theory is that losing his NCAA eligibility prevented him from playing college basketball, thereby improving his basketball skills, and increasing his prospects of being selected in the NBA draft. This is not the sort of tangible business loss that supports a RICO cause of action. Bowen did not have an existing or prospective business relationship with any NBA team. Bowen emphasizes his expectation, shared by an NBA scout, that if he had retained his eligibility and played two years for Louisville, he would have been drafted by an NBA team and enjoyed a profitable professional basketball career. But injury to a "mere expectancy" or the loss of an opportunity is insufficient for a civil RICO cause of action. *HCB Fin. Corp.,* 8 F.4th at 345 (internal quotation marks omitted); *see, e.g., id.* at 344-345 (lost investment opportunity); *In re Taxable Mun. Bond Sec. Litig.,* 51 F.3d 518, 522-523 (5th Cir. 1995) (lost opportunity to obtain a loan); *Taylor v. Bettis,* 976 F. Supp. 2d 721, 737-738 (E.D.N.C. 2013) (delayed or hindered realization of expected damages recovery in other litigation), *aff'd,* 693 Fed. App. 190 (4th Cir. 2017) (per curiam); *Strates Shows, Inc. v. Amusements of Am., Inc.,* 379 F. Supp. 2d 817, 826828 (E.D.N.C. 2005) (not

being awarded an expected contract or lease that was "highly certain" based on past awards). The problem is not that Bowen lacks evidence demonstrating his expectancy or fails to articulate the damages flowing from his claimed injury. Rather, the problem "is the nature of th[e] loss." *HCB Fin. Corp.,* 8 F.4th at 345 (internal quotation marks omitted). Harm to Bowen's anticipated future professional basketball career due to the loss of his NCAA eligibility and consequent opportunity to improve his skills while playing college basketball is not an "injur[y] in his business or property" cognizable under Section 1964(c).

Accordingly, we affirm the district court's determination that Bowen's lost NCAA eligibility cannot support his RICO action against the defendants.

3.

Finally, Bowen contends that the nearly $30,000 in attorney's fees and costs he and his family incurred trying to restore his NCAA eligibility is an injury sufficient to maintain a RICO cause of action. Certainly, lost money is a concrete injury to business or property. *See Reiter,* 442 U.S. at 338. But pecuniary losses flowing from a non-cognizable injury do not satisfy Section 1964(c)'s requirement. *See, e.g., Bast,* 59 F.3d at 495; *Jackson,* 731 F.3d at 564-565 & n.4; *Dickerson v. TLC The Laser Eye Ctr. Inst., Inc.,* 493 Fed. App. 390, 394 (4th Cir. 2012) (per curiam). Because Bowen's lost NCAA eligibility is not an injury to a business or property interest under Section 1964(c), the legal fees and expenses he incurred attempting to restore his eligibility are similarly not cognizable.

III.

Bowen also appeals the district court's denial of his motion for reconsideration, which we review for abuse

of discretion. *See United States ex rel. Carter v. Halliburton Co.,* 866 F.3d 199, 206 (4th Cir. 2017). Where, as here, "the district court's initial decision was correct, the denial of a motion to reconsider cannot be clearly erroneous or manifestly unjust." *Wojcicki v. SCANA/SCE&G,* 947 F.3d 240, 246 (4th Cir. 2020). Accordingly, we affirm the district court's denial of Bowen's motion for reconsideration.

IV.

We have no doubt that Bowen Sr.'s decision to accept a bribe, and the defendants' corrupt decision to offer one, upended Bowen's basketball career and dramatically altered his life. But RICO is not the avenue through which Bowen may seek relief. Thus, for the foregoing reasons, the judgment of the district court is

AFFIRMED.

KING, Circuit Judge, dissenting:

The main issue we must resolve today is whether plaintiff Brian Bowen, II — a former McDonald's All-American high school basketball player who lost his NCAA eligibility when his father was bribed by defendant Adidas America Inc. and its associates satisfies the statutory injury requirement for his claims against Adidas and the other defendants under the civil provisions of the RICO Act. On the premise that Brian cannot satisfy RICO's injury requirement, the district court and the panel majority have deemed the defendants to be entitled to summary judgment. As explained further herein, however, I would rule that Brian's loss of NCAA eligibility constitutes an injury under RICO. I would therefore vacate the summary judgment award and remand for further proceedings. As such, I respectfully dissent from the decision of my friends in the majority.

I.

I will begin by summarizing the facts pertinent to Brian Bowen, II's civil RICO claims. And I do so in the light most favorable to Brian. *See Aleman v. City of Charlotte,* 80 F.4th 264, 270 n.1 (4th Cir. 2023) ("Of course, pursuant to the applicable summary judgment standard, we must view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.").

A.

For at least a couple of years before and during 2017, Brian — at 6'7" or 6'8" was an exceptionally talented young basketball player in Michigan and Indiana. Brian's athletic skills were widely noticed, and he collected an impressive array of accolades, including being a McDonald's All-American high school player

and a 5-star (on a 1 to 5 scale) college recruit. What's more, it was universally forecast that Brian would be selected in the first round of the NBA draft, just as soon as he became eligible. Brian was a good student as well, and he received more than 25 scholarship offers from major NCAA Division I basketball programs.

By his senior year of high school, Brian had narrowed his college basketball options to about a dozen major Division I programs. After nearly opting to attend the University of Oregon, Brian decided, in late May 2017, to devote his basketball skills to the University of Louisville ("UofL").

1.

Unbeknownst to Brian, defendant Adidas and several of its employees and advisors, including defendants James Gatto, Christian Dawkins, Munish Sood, Thomas Gassnola, Christopher Rivers, and Merl Code (collectively the "Adidas Schemers"), were involved in an ongoing fraud and bribery scheme involving NCAA college basketball.[1] The primary goal of that scheme was to target elite young talent in the basketball world and have the best high school athletes commit to NCAA university programs that were sponsored by Adidas. At those universities, Adidas athletic shoes and apparel were — by virtue of contractual arrangements — the mandated gold standard.

An impetus for the fraud and bribery scheme was that Adidas had fallen behind its major competitors, particularly Nike and Under Armour, in the multibillion-dollar athletic shoe and apparel market. To remedy its poor performance in that market, Adidas was seeking

[1] Although Code was initially named as an appellee herein, Brian later voluntarily dismissed Code from this appeal.

to increase its brand loyalty in the United States through athlete and celebrity endorsements.

By successfully placing the most outstanding young basketball players at Adidas-sponsored NCAA universities — which included, inter alia, UofL, Kansas, and North Carolina State — Adidas would secure and utilize the contractual right to display the Adidas logo by way of those athletes during their college basketball careers. Adidas would also gain a valuable opportunity to ingratiate its brand with the basketball players themselves, thereby affording Adidas the likelihood of obtaining additional sponsorships if the players later moved on to the NBA.

The Adidas Schemers primarily targeted the parents and guardians of talented young African American athletes — largely from poor backgrounds — and used an array of unlawful means to secure their attendance at Adidas-sponsored NCAA universities. With an utter lack of tact, the Schemers described their secret strategy as the "Soul Patrol" and the "Black Ops."

In executing the fraud and bribery scheme, the Adidas Schemers travelled extensively to meet with the targeted players and their families. The Schemers would then sometimes secretly offer and make monetary payments to the players' family members. In order for those payments to be covertly made, the Schemers would sometimes disguise Adidas funds by passing them through youth basketball teams in the Amateur Athletic Union ("AAU").

2.

Adidas and its associates were aware by 2015 of Brian's stellar prospects as a basketball player. And Brian was identified by early 2017 as one of the top uncommitted high school players that Adidas sought

to have enroll at one of its sponsored NCAA universities. Brian was then considering playing basketball at several non-Adidas-sponsored schools, however, including the University of Oregon, which was sponsored by Nike. When the Adidas Schemers learned that Brian might not commit to an Adidas-sponsored university, they scrambled to arrange otherwise. Their efforts included a plan to funnel a $100,000 payment to Brian's father to secure Brian's commitment to UofL, which was then under contract as Adidas's business partner in a major sponsorship agreement worth approximately $160 million over a 10-year period. The Schemers communicated to Brian's father a promise to make the bribe payment, without specifying the amount.

On June 1, 2017, when he was 18 years of age, Brian committed to UofL and signed an "Athletics Financial Aid Agreement for Student Athletes" (the "UofL Agreement"). *See* J.A. 291.[2] Pursuant to the UofL Agreement, Brian expected to exchange his athletic labor for, among other things, the best possible coaching and playing experience, plus a scholarship covering tuition and other costs for four years. To play college basketball, Brian was obliged to comply with the NCAA's eligibility requirements. In fact, Brian had been certified by the NCAA as an eligible amateur before he committed to UofL, and he confirmed in the UofL Agreement that, "to the best of [his] knowledge, [he had] not violated any amateurism rules." *Id.* at 297.

Brian made his decision to commit to UofL based on basketball reasons alone. That is, Brian had been advised by UofL coaches that he would promptly be in the Louisville starting lineup and would see immediate

[2] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

playing time. Meanwhile, Brian was unaware of the payment that the Adidas Schemers had promised his father.

From the perspective of the Adidas Schemers, it was essential to keep Brian in the dark about the bribe payment. And the Schemers needed to keep UofL in the dark as well. The Schemers needed to prevent public disclosure of the bribery not only to protect themselves from criminal liability, but also to keep Brian from being declared ineligible to play NCAA basketball. Put simply, a declaration of Brian's loss of NCAA eligibility would undermine the Adidas fraud and bribery scheme. Again, the scheme's primary purpose was to earn Adidas large sums of money by associating it with stellar college basketball players on the very best teams, such as UofL.[3]

3.

In July of 2017, about a month after Brian committed to UofL, the Adidas Schemers began coordinating by text and phone to make a $25,000 first installment on the bribe payment to Brian's father. They soon faced difficulties, however, in implementing their plan to funnel Adidas's money through an AAU team, the "Karolina Khaos" in South Carolina. Lacking sufficient funds and not knowing that they were then being actively investigated by the FBI, Schemers Dawkins and Sood borrowed $25,000 in cash from an under-

[3] Brian's father confirmed under oath — in testifying for federal prosecutors in a 2019 criminal trial of three of the Adidas Schemers in New York — that he had hidden the bribery effort from Brian. And he had done so because of the danger that Brian would be declared ineligible to play NCAA basketball.

cover FBI agent. On July 13, 2017, $19,400 of that cash hoard was delivered by Sood to Brian's father.[4]

Less than a month thereafter, on August 1, 2017, through the use of fraudulent invoices (fake expense reports) sent by email, the Karolina Khaos received a $30,000 wire transfer from Adidas. And on the very day of the Adidas payment to the Karolina Khaos, a $25,000 check from the Karolina Khaos was issued to Dawkins. The payment to Dawkins was meant to be used to repay the cash loan made to Dawkins and Sood by the undercover FBI agent.

Around the same time, the Adidas Schemers planned to engage in a similar fraudulent process and make a second installment on the bribe payment to Brian's father. Before the next installment could be paid, however, several of the Schemers were arrested on criminal charges in the Southern District of New York. Those charges were lodged against five Schemers — Gatto, Dawkins, Sood, and Gassnola, and Code — and publicly revealed on September 25, 2017.

On November 22, 2017, after public disclosure of the Adidas fraud and bribery scheme and the payment promised to Brian's father, UofL declared Brian ineligible to play NCAA basketball and banned him from practicing or playing basketball there. Under the NCAA rules, UofL's decision to declare Brian ineligible meant he was barred from playing any college basketball, unless the NCAA reinstated him at the request of a member institution.

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[4] The sum of $5,600 was skimmed by the Adidas Schemers from the $25,000 cash loan made by the undercover FBI agent. Of that $5,600, $2,600 was used for flight expenses of the Schemers, and the other $3,000 was deposited into a Dawkins bank account.

Seeking to salvage his basketball career, Brian transferred to the University of South Carolina, which had offered to request his reinstatement. On May 25, 2018, the NCAA declined to reinstate Brian. During the process of challenging the loss of his NCAA eligibility, Brian hired a lawyer and incurred more than $28,000 in fees and costs. Being denied the opportunity to utilize his athletic labor in NCAA basketball, Brian played in minor basketball markets — particularly in Australia — and was never drafted by the NBA.[5]

B.

Ultimately, the five indicted Adidas Schemers were convicted of criminal offenses in the Southern District of New York. Gatto, Dawkins, and Code were convicted after a jury trial in January 2019, and Sood and Gassnola pleaded guilty. Gatto was convicted of two wire fraud offenses under 18 U.S.C. § 1343, plus conspiracy to commit wire fraud. Dawkins and Code were each also convicted of § 1343 wire fraud, plus conspiracy to commit wire fraud. Sood was convicted of bribery, conspiracy to commit bribery, and conspiracy to commit wire fraud, and Gassnola was convicted of conspiracy to commit wire fraud alone. Each of the charges of conspiracy to commit wire fraud alleged that an object of the Schemers' conspiracy was the coverup of bribe payments made to the families of student-athletes. The victims of the criminal offenses were specified as the defrauded universities, including UofL.

In the sentencing proceedings in March 2019, however, the New York district court recognized the adverse impact and serious injuries that the Adidas Schemers had inflicted upon Brian and the other

[5] Brian briefly played in the NBA on contracts that allow undrafted players to join NBA team rosters on a short-term basis.

college basketball players. Strikingly, it was Brian who the court emphasized and singled out. The veteran and distinguished presiding jurist, Judge Kaplan, pronounced that "probably the worst victim, [the] most seriously injured victim, of the Louisville scheme was [Brian] Bowen." *See United States v. Gatto,* No. 1:17-cr-00686, at 39 (S.D.N.Y. Mar. 11, 2019), ECF No. 297 (the "N.Y. Sentencing Transcript").[6]

Gatto, Dawkins, and Code appealed their convictions and sentences to the Second Circuit. Resolving those appeals, the court of appeals affirmed the convictions and sentences of each defendant. *See United States v. Gatto,* 986 F.3d 104 (2d Cir. 2021). As the court related, the defendants "admitted [at trial] that they engaged in the scheme and broke NCAA rules, but argued that what they did was not criminal." *Id.* at 110. On appeal, the defendants reiterated that they intended to help, rather than defraud, the universities "by bringing them top recruits to ensure winning basketball programs." *Id.*

C.

Repetition generally being helpful to explaining a complex multi-party conspiracy, the pertinent facts relating to the fraud and bribery scheme and Brian's innocent role therein are partially summarized:

- The Adidas Schemers had a compelling financial interest in having Brian play basketball for UofL;

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[6] Of the five Adidas Schemers convicted in the New York proceedings, Gatto received the most substantial punishment, that is, a prison term of nine months. Dawkins and Code each received six months. Sood and Gassnola, who testified for the prosecution and pleaded guilty, were treated more leniently.

- The Schemers planned to make a $100,000 payment, in multiple cash installments, to Brian's father — without Brian's or UofL's knowledge — to secure Brian's commitment to play basketball for UofL;
- Brian thereafter committed to UofL, where, pursuant to the UofL Agreement, he expected to exchange his athletic labor for college basketball coaching and playing experience, plus a scholarship covering four years of tuition and other costs;
- Brian's decision to commit to UofL was based solely on basketball reasons, and not on the Schemers' promise of a payment to his father;
- It was an essential aspect of the fraud and bribery scheme that neither Brian nor UofL would know of the bribe payment;
- UofL and Brian had no knowledge of the fraud and bribery scheme until the September 2017 arrests of several Schemers;
- Upon disclosure of the fraud and bribery scheme, UofL declared Brian to be ineligible to play NCAA basketball; and
- As recognized by the New York district court, Brian was "probably the worst victim, [the] most seriously injured victim, of the Louisville scheme."

II.

A.

In November of 2018, Brian Bowen, II initiated this lawsuit against the Adidas Schemers in the District of South Carolina, principally seeking damages with respect to the fraud and bribery scheme. The operative

Amended Complaint was filed in August 2019, after the New York trial and sentencing proceedings of several Schemers had been concluded. *See Bowen v. Adidas Am. Inc.,* No. 3:18-cv-03118 (D.S.C. Aug. 23, 2019), ECF No. 84 (the "Complaint"). In the Complaint, Brian alleges four civil RICO claims under § 1964(c) of Title 18 based on violations of subsections (a), (c), and (d) of § 1962, including both substantive and conspiracy offenses.[7]

The Adidas Schemers promptly filed a motion to dismiss the Complaint, arguing to the district court in South Carolina that Brian cannot satisfy RICO's injury and causation requirements under § 1964(c). In setting forth those requirements, § 1964(c) limits a civil RICO recovery to "[a]ny person injured in his business or property by reason of a violation of section 1962." *See* 18 U.S.C. § 1964(c).[8] In February 2020, the court rejected the Schemers' dismissal effort, but advised the parties and counsel that the Schemers could reassert their contentions as to the injury and causation requirements after discovery was completed.

The parties thereafter engaged in extensive discovery proceedings. Multiple depositions were taken and approximately 300,000 documents were exchanged.

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[7] Section 1964(c) provides for a damages recovery by a successful RICO plaintiff that is "threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *See* 18 U.S.C. § 1964(c). That provision provides a mix of compensatory and punitive damages to a successful RICO plaintiff. *See PacifiCare Health Sys., Inc. v. Book,* 538 U.S. 401, 406 (2003).

[8] As the panel majority recognizes, some federal courts have used the term "standing" to refer to RICO's injury and causation requirements. The use of "standing" in that way is somewhat of a misnomer, however, and should not be confused with constitutional standing to sue.

Among the various depositions, Brian and his father were each examined.

Of significance, the discovery proceedings included a report from an expert named Michael Bratz, who had 36 years of experience in the NBA as a player, coach, scout, and manager. Bratz's unchallenged opinions included his view that "NCAA basketball is the proving ground for a player's career," and that "[t]here is no other comparable product in North America where a player can get premium training and acquire experience playing against the best players in their age group." *See* J.A. 1218. Describing UofL in particular, Bratz related that

> Louisville is a top tier basketball program, one of the blue blood schools in the nation. It is a place where elite prospects want to play. Louisville is a member of the Atlantic Coast Conference, the ACC, one of the best basketball conferences in the country. The team plays its home games in the state of the art KFC Yum! Center, which seats 22,090 fans, the 3rd largest arena in college basketball. Forbes Magazine ranked the Louisville basketball program as the most valuable in college basketball. No college basketball team makes more money.

Id. at 1208. Bratz also opined that, had Brian not lost his NCAA eligibility, he "would have been a first round pick in the NBA draft." *Id.* at 1219. But because of the NCAA eligibility bar, Brian "missed 18 months of competition after high school," i.e., the period of development "that is critical to a young player. *Id.* Moreover, Brian was deprived of college coaching — a "level of coaching that . . . can't be matched anywhere else" — and he "wasn't able to play against the best

competition and improve his basketball skills." *Id.* According to Bratz's expert evidence, Brian's loss of NCAA eligibility was accompanied by the loss of highly valuable college basketball coaching and playing experience.

Following the discovery proceedings, the Adidas Schemers moved the district court for an award of summary judgment. In pursuing that motion, they again contended that Brian cannot satisfy RICO's injury and causation requirements. In response, as to the injury requirement, Brian asserted multiple injuries to a business or property interest. Those included the loss of his NCAA eligibility, as well as the loss of the contractual benefits of college basketball coaching and playing experience that he expected to receive under the UofL Agreement.

In May 2021, the district court filed its Memorandum Opinion and Order awarding summary judgment to each of the Schemers, ruling therein that Brian has not sustained a qualifying injury. *See Bowen v. Adidas Am. Inc.,* No. 3:18-cv-03118, at 8-14 (D.S.C. May 26, 2021), ECF No. 265. For its conclusion that Brian's loss of NCAA eligibility does not constitute an injury to a business or property interest under RICO, the court invoked authority "in the due-process context" that "flatly reject[ed] the notion that student-athletes' expectations of future athletic careers are constitutionally protected" or that there is "a constitutionally protected property interest in intercollegiate athletic competition." *Id.* at 10. Additionally, with respect to the loss of contractual benefits under the UofL Agreement, the court determined that because the Agreement made no explicit promise of college basketball coaching and playing experience, Brian had a mere expectancy interest in those lost benefits that cannot satisfy RICO's

injury requirement. Finally, although it criticized Brian's theory of causation, the court declined to decide whether he can satisfy RICO's separate causation requirement, as its ruling on the injury requirement was "fatal to his RICO claims." *Id.* at 14-15.

B.

Less than a month thereafter — on June 21, 2021 — the Supreme Court handed down its landmark decision in *NCAA v. Alston,* 141 S. Ct. 2141 (2021). The *Alston* plaintiffs were NCAA Division I basketball and football players who initiated a federal antitrust action against the NCAA in California to contest its restrictions on student-athlete compensation as violative of the Sherman Act. *Id.* at 2151. That is, the plaintiffs challenged the "NCAA rules that limit the compensation they may receive in exchange for their athletic services." *Id.* (internal quotation marks omitted). The unanimous *Alston* Court affirmed the judgment of the California district court that certain restrictions on benefits that NCAA member schools can provide to student-athletes contravene the antitrust laws.

In so ruling, it was significant to the Supreme Court that the NCAA accepted "that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition." *See Alston,* 141 S. Ct. at 2156.[9] As the Court explained, the NCAA did not dispute the proposition "that student-athletes have nowhere else [other than NCAA member schools] *to sell their labor." Id.* (emphasis added). Or, in the words

[9] In an economic monopsony, a single buyer controls and dominates the demand for goods and services. *See Alston,* 141 S. Ct. at 2154. In a monopoly, on the other hand, a single seller retains the control. *Id.*

of the California district court, the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball," such that there are no "viable substitutes." *Id.* at 2152 (quoting *In re NCAA Athletic Grant-inAid Cap Antitrust Litig.,* 375 F. Supp. 3d 1058, 1067, 1070 (N.D. Cal. 2019)).

Largely relying on the Supreme Court's *Alston* decision, Brian and his counsel sought the South Carolina district court's reconsideration of its summary judgment award to the Adidas Schemers in these proceedings. Brian argued in his motion for reconsideration that, inter alia, *Alston* "confirm[ed] that Division I athletes have valuable business and property interests in their NCAA eligibility." *See Bowen v. Adidas Am. Inc.,* No. 3:18-cv-03118, at 1 (D.S.C. July 6, 2021), ECF No. 274. The motion underscored that Sherman Act claims are subject to an injury requirement like RICO's — allowing an antitrust claim to be brought by "any person who shall be injured in his business or property," *see* 15 U.S.C. § 15(a) — yet neither the NCAA nor any court, including the Supreme Court, questioned whether the *Alston* plaintiffs had sustained a qualifying injury to a business or property interest. According to the motion, the district court consequently erred in ruling that Brian's loss of NCAA eligibility is not an injury to a business or property interest in satisfaction of RICO's injury requirement.

Nevertheless, by its Memorandum Opinion and Order of August 2021, the district court denied Brian's motion for reconsideration. *See Bowen v. Adidas Am. Inc.,* No. 3:18- cv-03118 (D.S.C. Aug. 20, 2021), ECF No. 286. Regarding the Supreme Court's *Alston* decision, the district court determined that *Alston* "did not address, let alone change, the law on [RICO's injury requirement] or whether NCAA eligibility is a business

or property interest." *Id.* at 8. Accordingly, the court rejected *Alston* as a basis for reconsideration and denied Brian any relief.

C.

On appeal, Brian challenges both the district court's award of summary judgment to the Adidas Schemers and its denial of reconsideration in the wake of the Supreme Court's *Alston* decision. Our panel majority has decided to affirm, agreeing with the district court that Brian cannot satisfy RICO's injury requirement, without ruling on whether he can make a sufficient showing of causation.

With respect to Brian's loss of NCAA eligibility, the panel majority reasons that it is not a cognizable property injury in that, "[a]lthough eligibility may be valuable to the individual student-athlete, it is not property." *See ante* at 14-15. The majority further reasons that Brian's loss of NCAA eligibility is not a cognizable business injury in that, "despite losing his eligibility, he continued to receive the maximum compensation allowed at that time to a student-athlete: a full scholarship." *Id.* at 15. It is on that basis that the majority distinguishes *Alston* and deems it wholly unhelpful to Brian. As the majority explains:

> In *Alston,* the student-athletes (whose eligibility was not in question) claimed NCAA rules unlawfully limited the compensation they could receive for their labor. Lost compensation is a concrete injury to business or property. [Brian], however, does not assert the loss of compensation for services rendered playing NCAA basketball — after all, he continued to receive the maximum compensation allowed and does not challenge the

> NCAA compensation limits that applied to him. Rather, he asserts the loss of his eligibility to participate in the NCAA labor market, untethered to any concrete interest like compensation.

Id. at 16-17 (citations omitted).

Relatedly, the panel majority acknowledges Brian's argument "that losing his NCAA eligibility prevented him from playing college basketball, thereby improving his basketball skills, and increasing his prospects of being selected in the NBA draft." *See ante* at 17. The majority concludes, however, that — unlike lost compensation — "[t]his is not the sort of tangible business loss that supports a RICO cause of action." *Id.* In so doing, the majority emphasizes that Brian "did not have an existing or prospective business relationship with any NBA team," while nonetheless insisting that the problem for Brian is "the nature of the loss" rather than a lack of "evidence demonstrating his expectancy [of a profitable professional basketball career]" or a failure "to articulate the damages flowing from his claimed injury." *Id.* at 17-18.

Of course, I see things differently. For the reasons explained below, I would rule that Brian's loss of NCAA eligibility satisfies RICO's injury requirement.[10]

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[10] In light of my view that Brian's loss of NCAA eligibility constitutes a qualifying injury to a business or property interest, I have not unnecessarily considered whether the loss of contractual benefits he expected to receive under the UofL Agreement specifically, college basketball coaching and playing experience — also constitutes such an injury. Like the district court, however, the panel majority has concluded that Brian cannot show a qualifying injury based on the lost contractual benefits because the UofL Agreement did not explicitly promise them.

III.

In § 1964 of Title 18, which is entitled "Civil remedies," the Criminal Code spells out four statutory subsections that govern the conduct of civil RICO proceedings. Subsection (c) thereof is important here, in that it identifies the elements of a civil RICO claim. Generally, in order to establish a civil RICO claim, a plaintiff must show the following: (1) a violation of RICO, specifically 18 U.S.C. § 1962; (2) an injury to a business or property interest; and (3) that the injury was caused by the RICO violation. *See Brandenburg v. Seidel,* 859 F.2d 1179, 1187 (4th Cir. 1988) ("To make out a civil action for damages under the RICO statute a private plaintiff must demonstrate not only that the defendants have violated § 1962, but also that he has been 'injured in his business or property by reason of [the alleged] violation of section 1962." (alteration in original) (quoting 18 U.S.C. § 1964(c)).

A.

The second element of a civil RICO claim, the injury requirement, is where the district court and the panel majority have focused. RICO's injury requirement is derived from the statute itself, which limits a RICO civil remedy to "[a]ny person *injured in his business or property." See* 18 U.S.C. § 1964(c) (emphasis added).

Among the injuries alleged by Brian, I readily and easily see his loss of NCAA eligibility as a qualifying injury to a business or property interest. And that is because, as the Supreme Court recently related in its *Alston* decision, the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball," and "student-athletes have nowhere else [other than NCAA member schools] *to sell their labor." See* 141 S. Ct. 2141, 2152, 2156 (2021) (internal

quotation marks omitted) (second emphasis added). In other words, without NCAA eligibility, a young athlete has absolutely no market for his athletic labor. Consequently, that athlete most certainly has a business or property interest in his NCAA eligibility. Indeed, it is absurd to say that a person can be left without a market for his labor without sustaining a business or property injury.

Yet the panel majority says just that, reasoning that Brian suffered no "concrete injury" such as lost compensation (as he "continued to receive the maximum compensation allowed at that time to a student-athlete: a full scholarship"). *See ante* at 15-17. The majority acknowledges Brian's loss of college basketball coaching and playing experience, but deems that loss to be "not the sort of tangible business loss that supports a RICO cause of action" (particularly since he "did not have an existing or prospective business relationship with any NBA team"). *Id.* at 17.

The panel majority's fundamental error is its failure to appreciate that Brian's scholarship was only part of the compensation he received from UofL in exchange for his valuable athletic labor. Of great significance to Brian, he was also compensated with college basketball coaching and playing experience. Brian has been clear that he did not commit to UofL simply to obtain a scholarship and pursue an academic degree. Rather, he committed to UofL because he would be compensated with, inter alia, elite coaching and immediate playing time that would prepare him for a career in the NBA. That compensation was exceedingly valuable to Brian — regardless of whether he had an existing or prospective NBA contract — and it was something Brian was actively receiving before he was stripped of his NCAA eligibility. But along with the NCAA

eligibility bar, Brian lost all compensation in the form of college basketball coaching and playing experience, thereby suffering a "concrete" and "tangible business loss" in satisfaction of RICO's injury requirement.[11]

There is ample support for the proposition that college basketball coaching and playing experience constituted valuable compensation to Brian, including the expert evidence of Michael Bratz. Based on his 36 years of NBA experience, Bratz described NCAA Division I basketball as "the proving ground for a player's career," where the player would receive an unmatched "level of coaching" and would be "able to play against the best competition and improve his basketball skills." *See* J.A. 1218-19.[12]

Moreover, the value of Brian's lost college basketball coaching and playing experience was obviously apparent to the New York district court in the Adidas

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[11] That is not to say Brian had a contractual or constitutional right to college basketball coaching and playing experience. But it cannot be disputed that he agreed to provide his athletic labor in exchange for such compensation, and one need not have a contractual or constitutional right to compensation in order for its loss to satisfy RICO's injury requirement. Indeed, as the Supreme Court has instructed, "RICO is to be read broadly." *See Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 497-98 (1985) (underscoring "Congress' self-consciously expansive language and overall approach," as well as "its express admonition that RICO is to be liberally construed to effectuate its remedial purposes" (internal quotation marks omitted)).

[12] Although the Adidas Schemers indicated in the district court that they intended to move to exclude Bratz from testifying at trial, they relied in the summary judgment proceedings on aspects of Bratz's expert report that they deemed to be helpful to them. As such, it is appropriate to consider the report herein. *See Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.,* 790 F.3d 532, 538-39 (4th Cir. 2015).

Schemers' federal criminal proceedings. That is, Judge Kaplan pronounced at sentencing that "probably the worst victim, [the] most seriously injured victim, of the Louisville scheme was [Brian] Bowen." *See* N.Y. Sentencing Transcript 39. And the court did not perceive Brian to be unharmed because he kept his UofL scholarship.

The Supreme Court's *Alston* decision similarly evinces an understanding that — despite the NCAA's limits on other forms of compensation — many student-athletes opt to provide their athletic labor to universities for the coaching and playing experience that they can get in return. As the *Alston* Court recognized, "the NCAA enjoys near complete dominance of, and exercise[s] monopsony power in," the market for athletic labor in basketball and football. *See* 141 S. Ct. at 2151-52 (internal quotation marks omitted, alteration original). At the same time, NCAA Division I schools are able to attract "the most talented athletes." *Id.* at 2150 (internal quotation marks omitted). And the NCAA has been able to do those things while "restrain[ing] student-athlete compensation." *Id.* at 2152 (internal quotation marks omitted). Plainly, that is because there are student-athletes — particularly those aspiring to professional athletic careers — who see great value in coaching and playing experience that they cannot obtain anywhere else.[13]

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[13] According to Brian, the *Alston* precedent further suggests that he can satisfy RICO's injury requirement because no court, including the Supreme Court, questioned whether the *Alston* plaintiffs satisfied the similar injury requirement for their Sherman Act claims. *See* 15 U.S.C. § 15(a) (allowing an antitrust claim to be brought by "any person who shall be injured in his business or property"); *see also Holmes v. Sec. Inv. Prot. Corp.,* 503 U.S. 258, 268 (1992) (explaining that, because Congress "used the

To be sure, it may be difficult to assess the specific damages that Brian has suffered as a result of his NCAA eligibility bar and the accompanying loss of college basketball coaching and playing experience. But even the panel majority recognizes that any failure "to articulate the damages flowing from his claimed injury" is not a problem for Brian, *see ante* at 17-18, and at least on that point I agree with my colleagues. As our Court has recognized, 18 U.S.C. § 1964(c) authorizes a civil RICO claim by "'any person injured in his business or property,' not any person who can quantify the amount of the injury." *See Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.,* 262 F.3d 260, 265 (4th Cir. 2001). For it is "[t]he best reading of § 1964(c)'s injury to business or property requirement . . . that it refers to the fact of injury and not the amount." *Id.*[14]

At bottom, when Brian lost his NCAA eligibility, he was grievously "injured in his business or property." *See* 18 U.S.C. § 1964(c). It takes a tortured reading of the term "business or property" to maintain that the term does not include Brian's ability to participate in

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same words" for the injury requirements in 18 U.S.C. § 1964(c) (RICO) and 15 U.S.C. § 15(a) (antitrust), "we can only assume it intended them to have the same meaning"). I do not delve into that theory because *Alston* otherwise establishes Brian's loss of NCAA eligibility as a qualifying injury to a business or property interest.

[14] An aspect of his damages that Brian does quantify is the more than $28,000 in attorney's fees and costs he incurred in challenging the loss of his NCAA eligibility. The panel majority rules that those expenses are unrecoverable "pecuniary losses flowing from a non-cognizable injury." *See ante* at 18. But because I see Brian's loss of NCAA eligibility as a qualifying injury, I would allow him to recover the attorney's fees and costs along with other damages.

the sole market for his athletic labor and to obtain valuable compensation in the form of the elite coaching and playing experience offered nowhere but an NCAA Division I basketball program.

B.

Finally, although the district court and the panel majority have not ruled on the other elements of a civil RICO claim, I believe they merit brief discussion. Notably, the Adidas Schemers have not even argued that they are entitled to summary judgment based on an insufficient showing on the first element, i.e., a RICO violation. I am confident that is because Brian has compelling evidence to support his allegations of violations of subsections (a), (c), and (d) of 18 U.S.C. § 1962. For example, central to each of the alleged RICO violations is proof of a "pattern of racketeering activity," which is defined in § 1961 of Title 18 as "at least two acts of racketeering activity" that may include wire fraud under 18 U.S.C. § 1343 and bribery. Those are some of the very crimes that the Schemers were convicted of committing in the Southern District of New York.

As for the third element of a civil RICO claim — the causation requirement — the Schemers have raised it as an alternative basis for summary judgment. Specifically, the Schemers argue that they are entitled to summary judgment because Brian cannot make the mandatory showings of "but for" and proximate causation. *See Holmes v. Sec. Inv. Prot. Corp.,* 503 U.S. 258, 268 (1992) (explaining that, in order to satisfy the causation requirement, a plaintiff must show "that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well").

According to the Schemers, Brian cannot show that any of their RICO violations was a "but for" cause of his loss of NCAA eligibility because — by the time the first installment of their bribe payment was delivered to his father in July 2017 — Brian had been rendered ineligible to play NCAA basketball due to earlier violations of NCAA amateurism rules that occurred while he was in high school. The Schemers interpose that ground for summary judgment notwithstanding that the alleged violations of the amateurism rules went undiscovered and have never been the basis for an ineligibility determination by the NCAA or an NCAA member school (and despite that Brian contests that the alleged violations occurred as a matter of both fact and interpretation of the relevant amateurism rules).

Meanwhile, the Adidas Schemers contend that Brian cannot establish proximate cause because it was the discovery that the Schemers had bribed Brian's father — and not the bribe itself — that injured Brian, by resulting in UofL's declaration of his ineligibility to play NCAA basketball. Without support from any controlling authority, the Schemers argue that "a plaintiff's claimed harms are indirect if they were caused by reason of the fraud's discovery, not the fraud itself." *See* Br. of Appellees 47 (internal quotation marks omitted).

Strikingly, the Adidas Schemers' proximate causation argument (that Brian's injury was caused *by the discovery of the bribe,* not the bribe itself) is directly at odds with their "but for" causation argument (that Brian was already ineligible to play college basketball by the time the first installment of the bribe was paid, on account of prior NCAA rules violations *that had not then been discovered).* Suffice it to say I am not at all impressed with those "heads I win, tails you lose" theories as to RICO's causation requirement. In any

event, I adamantly disagree with the rulings of the district court and the panel majority that the Schemers are entitled to summary judgment based on Brian's failure to satisfy the injury requirement.

IV.

Pursuant to the foregoing, I would vacate the district court's award of summary judgment to the Adidas Schemers and remand for further proceedings. I therefore respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

C/A No.: 3:18-3118-JFA

BRIAN BOWEN, II,

Plaintiff,

v.

ADIDAS AMERICA, INC., JAMES GATTO, MERL CODE, CHRISTIAN DAWKINS, MUNISH SOOD, THOMAS GASSNOLA, AND CHRISTOPHER RIVERS,

Defendants.

v.

BRIAN BOWEN SR.

Crossdefendant.

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff's Motion for Reconsideration and Relief from Judgment of the Court's Order Granting Defendants Summary Judgment (ECF No. 274). Brian Bowen, II ("Plaintiff" or "Bowen Jr.") files this motion pursuant to Rules 59(e) and 60(b)(3) of the Federal Rules of Civil Procedure and seeks to have this Court alter or amend its previous order filed May 24, 2021 (the "Order") (ECF No. 265) wherein this Court adjudicated Adidas America, Inc.'s ("Adidas") motion for summary judgment (ECF No. 212). Having been fully briefed, this motion is ripe for

review.[1] For the reasons stated below, the Court finds no basis for disturbing its earlier decision. Accordingly, the motion to reconsider is respectfully denied. (ECF No. 274).

I. FACTUAL AND PROCEDURAL HISTORY

The relevant factual and procedural history is outlined in the Court's Order at issue and is incorporated herein by reference. (ECF No. 265). By way of brief recitation, the Court determined Plaintiff's claimed harms were not to cognizable business or property interests and thus insufficient to confer standing under the Racketeer Influenced and Corrupt Organizations Act's ("RICO") statutory requirements. Accordingly, the Order granted summary judgment in favor of the defendants and dismissed Plaintiff's claims in their entirety.

II. LEGAL STANDARD

Rule 59 allows a party to seek an alteration or amendment of a previous order of the court. Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may "alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010*; see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of these three grounds in order to obtain relief under Rule 59(e). *Loren Data Corp. v. GXS, Inc.*, 501 Fed.Appx.

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[1] Adidas filed a response in opposition (ECF No. 281) to Plaintiff's motion that was joined by defendant Christopher Rivers ("Rivers") (ECF No. 284). Defendant James Gatto ("Gatto") also filed a response in opposition (ECF No. 283). Plaintiff timely filed a reply (ECF No. 285).

275, 285 (4th Cir. 2012). The decision whether to reconsider an order pursuant to Rule 59(e) is within the sound discretion of the district court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). A motion to reconsider should not be used as a "vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind." *Lyles v. Reynolds*, C/A No. 4:14- 1063-TMC, 2016 WL 1427324, at *1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)).

Rule 60(b) allows the court to relieve "a party . . . from a final judgment, order, or proceeding" due to (1) "mistake, inadvertence, surprise, or excusable neglect"; (2) "newly discovered evidence"; (3) "fraud . . ., misrepresentation, or misconduct"; (4) a void judgment; (5) a satisfied, released, or discharged judgment; or (6) "any other reason that justifies relief." Fed. R. Civ. P. 60(b); *see also United States v. Winestock*, 340 F.3d 200, 203–4 (4th Cir. 2003). Rule 60(b) "does not authorize a motion merely for reconsideration of a legal issue." *United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982). "Where the motion is nothing more than a request that the district court change its mind . . . it is not authorized by Rule 60(b)." *Id.* at 313. "A motion for reconsideration under Rule 60(b) is addressed to the sound discretion of the district court and...[is] generally granted only upon a showing of exceptional circumstances." *Lyles*, 2016 WL 1427324, at *1 (citation and internal quotation marks omitted).

Rule 60(b)(3) gives district courts the power to relieve a party from an adverse judgment because of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct *of an adverse party."* Fed.R.Civ.P. 60(b)(3) (emphasis added). In *Schultz v. Butcher,* the Fourth Circuit held

that a moving party must establish three factors in order to state a successful Rule 60(b)(3) motion: "(1) the moving party must have a meritorious [claim]; (2) the moving party must prove misconduct by clear and convincing evidence; and (3) the misconduct prevented the moving party from fully presenting its case." 24 F.3d 626, 630 (4th Cir. 1994) (citing *Square Constr. Co. v. Washington Metro. Area Transit Auth.,* 657 F.2d 68, 71 (4th Cir. 1981)). Essentially, Rule 60(b)(3) provides an avenue for revisiting judgments that were obtained unfairly, not judgments which the moving party merely believes were erroneous. *Schultz,* 24 F.3d at 630.

III. DISCUSSION

Plaintiff seeks reconsideration of the Court's Order pursuant to Rule 59(e) because he alleges that the Court "misconstrues the law governing standing, disregards significant evidence, and improperly substitutes its own findings for those of the jury." (ECF No. 274). Further, Plaintiff alleges that the "Order must be revisited to conform to binding precedent." (*Id.*). Plaintiff also moves the Court to set aside the Order pursuant to Rule 60(b)(3) on the ground that "Adidas and its counsel misrepresented material facts to the Court in obtaining summary judgment on the issue of standing." (*Id.* at 24–25). The Court addresses each of Plaintiff's specific criticisms below.

In his motion for reconsideration, Plaintiff challenges the Court's finding that his NCAA eligibility is not a cognizable business or property interest for the purposes of RICO standing. Plaintiff argues that the Court failed to cite to any controlling authority to support its holding and instead referred to "decisions in the due process context." (*Id.* at 6). However, the issue as to whether NCAA eligibility is a business or property

interest sufficient to confer RICO standing has already been argued and decided. Plaintiff cannot now re-litigate that issue. Accordingly, the Court denies Plaintiff's motion as to this point.

Furthermore, courts have employed competing theories of interpretation of the meaning of "business or property" for the purposes of determining what is a compensable harm under RICO. In defining what "business or property" must be injured to confer standing under civil RICO, courts have taken varying approaches. This includes relying on the primacy of legislative intent, looking to the plain language of the statute itself and ending the inquiry there, and interpreting the civil RICO provision in tandem with the Clayton Act. Finding civil RICO's legislative history insufficient, courts have also looked elsewhere to aid their inquiry. Courts relying on other sources of law have examined state law definitions of property to determine what constitutes "business or property" for purposes of civil RICO. Other courts interpreting "business or property" have relied on due process precedent for guidance, as this Court did in its Order. *See Deck v. Engineered Laminates*, 349 F.3d 1253 (10th Cir. 2003). Thus, Plaintiff's critique of this Court's reference to decisions in the due process context is not a basis upon which it should amend its ruling.

Next, Plaintiff contends that the Court committed clear error in failing to find he had a property interest in the contractual benefits that he had secured through the Athletic Tender Agreement. (ECF No. 274 at 12). Plaintiff argues the Court erred in failing to interpret the contract's overriding purpose as being to develop Plaintiff's basketball career. (*Id.* at 14). Plaintiff acknowledges he already made this argument to the Court and "[r]econsideration is not warranted

on the basis of alleged clear error when the court has already 'squarely addressed and rejected' the arguments the party raises in its motion seeking reconsideration." *United States v. Clenney*, 2009 WL 10677501, at *2 (E.D. Va. July 15, 2009). Plaintiff's motion merely recycles arguments the Court has previously addressed and rejected; thus, it does not justify Plaintiff's arrogation of limited judicial resources.

Plaintiff also argues that the Court erred in finding that his legal fees—incurred while attempting to regain his NCAA eligibility—could not constitute an injury sufficient to confer standing. Specifically, Plaintiff contends the Court erred in finding that he did not pay the legal fees and costs by overlooking evidence and testimony regarding the existence of an engagement agreement between Plaintiff and the attorney who was retained to seek his NCAA eligibility reinstatement. However, Plaintiff's lengthy arguments ignore the Court's determination that even if Plaintiff had paid the legal fees, they are not recoverable because they derive from a non-cognizable harm, and a RICO plaintiff cannot recover for derivative injuries. (ECF No. 265 at 12).

Additionally, Plaintiff challenges the Court's holding that Plaintiff's lost professional earnings are an unrecoverable expectancy interest rather than an injury to his business or property. Plaintiff avers that the Court erred in finding his reduced basketball skills constitute a personal injury. (ECF No. 274 at 26). Plaintiff also takes issue with the Court's determination that his lost professional earnings are speculative because he "provided substantial proof . . . of his certainty to have been drafted in the NBA." (*Id.* at 28). This is merely a restatement of Plaintiff's prior arguments and their repetition is a misuse of Rule 59(e).

The Court adequately addressed this issue in its Order and therefore declines to alter its findings.

Plaintiff also seeks relief from the judgment under Rule 60(b)(3) on the ground that "Adidas and its counsel misrepresented material facts to the Court in obtaining summary judgment on the issue of standing." (ECF No. 274 at 24–25). Specifically, Plaintiff alleges Adidas falsely represented to the Court that Plaintiff did not retain or pay Setchen's firm for legal services provided in connection with his efforts to regain his NCAA eligibility. Plaintiff's arguments fail to satisfy the demanding standard for setting aside a judgment pursuant to Rule 60(b)(3). Plaintiff fails to coherently explain how the alleged misconduct impacted the Court's resolution of his claims, as the Order held that even if Plaintiff had incurred and paid the fees, they are not recoverable because they are derivative from a non-cognizable harm, and a RICO plaintiff cannot recover for derivative injuries. Furthermore, Plaintiff does not prove by clear and convincing evidence that the alleged misconduct prevented him from fully presenting his case. As a result, Plaintiff's claims of fraud are insufficient to merit relief from judgment under Rule 60(b)(3).

Plaintiff seeks to rely on the Supreme Court's recent decision in *NCAA v. Alston* as a *deus ex machina* in this case, citing it as an intervening change in controlling law. 141 S. Ct. 2141 (2021). In *Alston*, the Supreme Court held that the district court's injunction pertaining to certain NCAA rules limiting the education-related benefits that schools may make available to student-athletes is consistent with established antitrust principles. *Id. Alston* is not binding precedent for the specific issues in this case. Plaintiff's argument that the Court must have implicitly reached the issue of

standing under an "independent obligation to determine whether subject-matter jurisdiction exists" strains credulity, as statutory standing "does not implicate subject-matter jurisdiction." *Lexmark Int'l, Inc. v. Static Control Components, Inc* 134 S. Ct. 1377, 1387–88 & n.4 (2014).

Plaintiff appears to rely on an implicit holding in *Alston* as to a point that was neither argued nor decided in the opinion. Such silent holdings (even if relevant here) are no holdings at all. *See Webster v. Fall,* 266 U.S. 507, 510 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). The Supreme Court did not address, let alone change, the law on RICO standing or whether NCAA eligibility is a business or property interest. While Justice Kavanaugh's concurrence advanced the national debate regarding amateurism in college sports and underscored questions that the NCAA's remaining rules related to compensation raise under anti-trust laws, it also emphasized the narrow scope of the case. *See Alston*, 141 S. Ct. 2141, 2166–67 (2021). To the extent Plaintiff contends that *Alston* warrants this Court's reconsideration of its Order, this argument is without merit.

Plaintiff's motion is conspicuously a "vehicle for rearguing the law, raising new arguments, [and] petitioning [the Court] to change its mind." *Lyles v. Reynolds*, 2016 WL 1427324, at *1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)). Plaintiff has failed to show an intervening change in controlling law, clear error, or a manifest injustice warranting reconsideration under Rule 59(e). Further, the Court finds no evidence of

fraud which would satisfy Rule 60(b)(3). Although Plaintiff disagrees with the Court's analysis, the Court finds that Plaintiff's motion has failed to present the Court with any basis upon which it should amend its ruling. It is, therefore, respectfully denied.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion to alter or amend the judgment (ECF No. 274) is denied.

IT IS SO ORDERED.

August 20, 2021
Columbia, South Carolina

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No.: 3:18-3118-JFA

BRIAN BOWEN, II,

Plaintiff,

v.

ADIDAS AMERICA, INC., JAMES GATTO, MERL CODE, CHRISTIAN DAWKINS, MUNISH SOOD, THOMAS GASSNOLA, AND CHRISTOPHER RIVERS,

Defendants.

v.

BRIAN BOWEN, SR.

Cross-defendant

MEMORANDUM OPINION & ORDER

This case is set against the backdrop of corruption in National Collegiate Athletic Association ("NCAA") Division I college basketball. The Court is mindful of the public discourse about the exploitation of student-athletes and here, Brian Bowen, II ("Plaintiff" or "Bowen Jr.") was a small spoke in a much larger wheel of the broader recruitment scandals and challenges currently facing college basketball. First and foremost, the Court does not doubt that Bowen Jr.'s life was upended by the revelation of payments to his father and the University of Louisville's decision to withhold him from NCAA competition. Nor does the Court

ignore the prosecution of certain individuals involved in making those payments to Bowen Jr.'s father. But while Plaintiff devotes most of his arguments to these undisputed facts, they are not relevant to the Racketeer Influenced and Corrupt Organizations Act's ("RICO") statutory standing requirements. That a fraud has been committed, and that Plaintiff has been negatively impacted by that fraud, does not suffice to confer standing to seek treble damages under civil RICO. Rather, to bring "the litigation equivalent of a thermonuclear device," *Bendfeldt v. Window World, Inc.*, No. 17-CV-39, 2017 WL 4274191, at *7 (W.D.N.C. Sept. 26, 2017) (internal quotation marks omitted), a plaintiff must allege a tangible harm to a property right or business interest directly caused by the defendant's alleged RICO violation. In this key respect, Plaintiff's allegations fail.

Pending before the Court is defendant Adidas America, Inc.'s ("Adidas") motion for summary judgment. (ECF No. 205). Adidas's motion was joined by defendants Christopher Rivers ("Rivers") (ECF No. 207), defendants Merl Code ("Code") and Christian Dawkins ("Dawkins") (ECF No. 210), and defendant James Gatto ("Gatto") (ECF No. 212). Plaintiff's amended complaint asserted claims against seven defendants—Adidas, Gatto, Code, Dawkins, Rivers, Munish Sood ("Sood"), and Thomas Gassnola ("Gassnola") (collectively, "Defendants").[1] (ECF No. 84). Plaintiff timely filed a response opposing summary judgment (ECF No. 224) followed by Adidas's reply in support (ECF No. 242).[2]

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[1] Thus far, Gassnola has not appeared by counsel in this case, filed any responsive pleadings, moved to dismiss the claims, or otherwise responded to this lawsuit.

[2] Defendants Rivers and Gatto joined in Adidas's reply brief and incorporated the arguments therein. (ECF Nos. 244 & 245).

All briefing is complete and the motions are ripe for disposition. After careful consideration of the motions, responses, replies, relevant authority, and for the reasons discussed below, the Court grants Defendants' motions for summary judgment (ECF Nos. 205, 207, 210, 212) and dismisses Plaintiff's claims in their entirety.

I. FACTUAL BACKGROUND

By way of background, the NCAA's avowed purpose is to preserve intercollegiate athletics as the domain of the amateur. As a private organization that oversees collegiate sports in America, it promulgates rules that its member universities must follow, among which is the requirement that all student-athletes remain amateurs to be eligible to compete for their schools. This means that the student-athletes—and their families—may not accept payments of any form for the student-athletes' playing or agreeing to play their sport. This rule extends from the time when the student-athletes are still in high school and are being recruited to play at the collegiate level.

Here, Plaintiff alleges Defendants derailed his promising career when they engaged in racketeering activity by conspiring to bribe, and bribing, his father to persuade Plaintiff to play basketball for the University of Louisville ("UofL")—an Adidas-sponsored university. (ECF No. 84). The gravamen of Plaintiff's complaint is that Defendants committed predicate acts of wire fraud against student-athletes and universities by offering payments to the families of high-school basketball players for those players to attend such universities on scholarships, which allegedly rendered false the certifications of NCAA eligibility that those players made to the universities. (*Id.*). Plaintiff alleges Adidas spearheaded this purported RICO enterprise. Adidas disputes Plaintiff's account, asserting it was the victim

of a scheme perpetrated by Bowen Sr., two rogue mid-level Adidas employees, and others, including Sood, to misappropriate Adidas's funds.

Plaintiff is a 22-year-old professional basketball player. Defendant Adidas, a sports apparel company, is a corporation registered in Oregon with its principal place of business in Oregon. Defendants Gatto and Rivers are former employees of the Adidas department responsible for grassroots basketball marketing. Defendant Code, an independent contractor to Adidas, and defendants Dawkins and Gassnola are affiliated with several amateur and high school basketball programs. Defendant Sood is a former financial advisor who aspired to build a clientele of professional athletes. Cross-Defendant Brian Bowen Sr. ("Bowen Sr.") is a resident of Michigan and the father of Plaintiff.

While Bowen Jr. was in high school, and, as early as the end of his sophomore year in 2015, he was considered among the top high-school basketball players in the United States. By the time he began his senior year in 2016, publications that rank amateur-basketball talent placed him between the 14th and 21st best recruit in his high school class. Plaintiff's basketball courtship was a central thread in the government's case against Gatto, Code, and Dawkins, who were convicted of engaging in a scheme to defraud three universities by paying tens of thousands of dollars to the families of high school basketball players to induce them to attend the universities, which were sponsored by Adidas, and covering up the payments so that the recruits could certify to the universities that they had complied with rules of the NCAA barring student-athletes and recruits from being paid.

Gatto worked with Code and Gassnola, both Adidas consultants. He also worked informally with Dawkins

and Sood. Together, these men paid the families of top-tier high school basketball recruits, including Bowen Jr., to entice those players to enroll at one of the universities. 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. As a result, payments were concealed by falsifying Adidas invoices to make it seem as though the payments were going to youth basketball teams affiliated with the Amateur Athletic Union ("AAU"), a non-profit, multi-sport organization that, among other things, facilitates youth basketball tournaments. In reality, the money was being funneled through AAU teams with which some Defendants were affiliated to the families of top basketball prospects. To mask these payments, fake expense reports were created.

During his time in high school, Bowen Jr.'s parents received payments from multiple parties. At the time, Dawkins was an aspiring sports agent at ASM Sports, a then-premier sports agency. The Bowens received money and other benefits from Dawkins as inducements for him to serve as Bowen Jr.'s representative. Throughout 2016 and into 2017, Dawkins made repeated payments to Bowen Sr. In addition to payments and other benefits provided by Dawkins and ASM in return for representing Bowen Jr., the Bowens also received payments from the head basketball coach at La Lumiere high school, where Plaintiff transferred in 2015, in return for Bowen Jr. playing on the school's basketball team.

On May 31, 2017, Bowen Sr. accepted a cash offer for $100,000, to be paid in four installments, for Bowen Jr. to attend UofL, and Bowen Jr. committed to the university ("May 2017 Agreement"). These payments

were to be funneled through an AAU program with which Code was affiliated. Within ten days, Bowen Jr. signed forms accepting athletic-based aid and indicating that he was compliant with the NCAA eligibility rules. Bowen's father was paid the first installment of $25,000, but Gatto, Code, and Dawkins were arrested before any other payments were made. In late September 2017, the U.S. Attorney's Office for the Southern District of New York announced charges of fraud and corruption in college basketball against Code, Dawkins, Gatto, and others.

Since the SDNY's allegations implicated parties involved in Plaintiff's recruitment, UofL withheld Bowen Jr. from all men's basketball team practices and games. In January 2018, just before his second semester of college, Bowen Jr. transferred to the University of South Carolina ("USC"), where he again received a scholarship covering his full cost of attendance. He practiced with USC's basketball team but was not allowed to play in games due to the NCAA's transfer rule, which required him to complete one full academic year of residence at USC before being eligible to compete. In addition, Bowen Jr.'s eligibility to play was still uncertain. Rather than returning to USC, whose March 2018 request to reinstate Bowen Jr.'s eligibility had not yet been finally adjudicated by the NCAA, Bowen Jr. signed a contract with Australia's National Basketball League and moved to Australia to join the Sydney Kings, an Australian professional basketball team. After one season in Australia, Bowen Jr. entered the 2019 NBA draft, but was not selected. With this background, the Court considers the pending motions.

II. PROCEDURAL BACKGROUND

Previously, this Court, on two sets of motions to dismiss, pared Bowen Jr.'s allegations but permitted him to engage in discovery on his alleged standing to bring RICO claims. As to RICO standing, in ruling on the motions to dismiss Bowen Jr.'s original complaint, the Court "reserved its decision on whether Plaintiff's allegations satisfied the RICO standing requirements 'due to the leave granted to Plaintiff to amend his pleadings.'" (ECF No. 82). When Defendants raised the issue again in moving to dismiss the amended complaint, the Court recognized that "Defendants' standing arguments may have merit," but declined to dismiss Bowen Jr.'s claims on that ground at "this early stage in the proceedings." (*Id.*). The Court reasoned that, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" and that Defendants' standing arguments "remain[] open to review at all stages of the litigation." (*Id.*). At a February 3, 2021 discovery conference, the Court granted Adidas's request for leave to file summary judgment in two phases, with the first motion focused on RICO standing.

III. LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute of material fact is "genuine" if sufficient evidence favoring the non-moving party exists for the trier of

fact to return a verdict for that party. *Anderson*, 477 U.S. at 248–49.

The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323. If the moving party meets that burden and a properly supported motion is before the court, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 323. All inferences must be viewed in a light most favorable to the non-moving party, but the non-moving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

IV. DISCUSSION

Bowen Jr. alleges four counts of violations of RICO: two counts of substantive RICO violations (Am. Compl. ¶¶ 274–82, Aug. 23, 2019, ECF No. 84; *id.* ¶¶ 291–99 (alleging violations of 18 U.S.C. § 1962(a) and (c)), and two counts of conspiracy to commit RICO violations (*id.* ¶¶ 283–90; *id.* ¶¶ 300–06 (alleging violations of 18 U.S.C. § 1962(d)). The civil RICO statute provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). A private RICO plaintiff must show damage to "business or property" proximately caused by the defendant's RICO violation to have standing to bring suit. *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.,* 262 F.3d 260, 264 (4th Cir.2001). "A defendant who violates section 1962 is not liable for treble damages to everyone he might

have injured by other conduct, nor is the defendant liable to those who have not been injured." *Sedima, S.P.R.L. v. Imrex,* 473 U.S. 479, 496–97 (1985) (internal citations omitted). Allegations of personal injuries and the pecuniary losses incurred therefrom do not qualify as injury to "business or property." *Bast v. Cohen, Dunn & Sinclair, PC,* 59 F.3d 492, 495 (4th Cir.1995).

a. RICO's Injury Requirement

Bowen Jr. claims that, as a result of the alleged acts of racketeering, he suffered "three . . . categories" of damages: "(1) damage to his protected property interest and the services guaranteed therein via the June 1, 2017 contract with the University of Louisville; (2) damage to his NCAA eligibility; and (3) damage to his earnings as a professional basketball player." (ECF No. 205-33). The Court will review each of Bowen Jr.'s claimed harms *ad seriatim* to determine whether they individually satisfy RICO's injury requirement.

i. Louisville Scholarship

Turning, first, to Bowen Jr.'s allegations that he lost the benefits of his UofL scholarship as a direct and proximate result of Defendants' RICO violations—here, the record belies Plaintiff's contention. It is indisputable that UofL did not withdraw Bowen Jr.'s scholarship and Plaintiff acknowledged that he was permitted to remain on scholarship at UofL despite being withheld from the basketball team. Adidas posits "Bowen Jr. only 'lost' his Louisville scholarship when he voluntarily relinquished it, transferred to USC, and effectively exchanged it for another full scholarship from that institution." (ECF No. 205).

Plaintiff's opposition brief fails to offer a rebuttal to these specific factual arguments raised by Adidas. (ECF No. 224). Instead, Plaintiff's argument pivots,

asserting that he nevertheless lost a contractual right under his scholarship to "prepare for the NBA" at UofL. (*Id.*). Plaintiff asserts "[t]he bargained for exchange that occurred between [Bowen Jr.] and UofL had nothing to do with tuition, room, board or the books offered by the university" because the "transaction was not about an academic scholarship, but about [Bowen Jr.] providing basketball labor to the school in exchange for his receiving athletic development, preparation, and entry into the NBA." (*Id.*). As a practical matter, Plaintiff cannot claim damages for what he voluntarily relinquished. Moreover, Bowen Jr.'s scholarship promised him cost of attendance—"Tuition & Fees," "Books," "Housing," "Meals," and "Misc. Expenses." (ECF No. 205-50). The June 1, 2017 contract with UofL did not guarantee a right to "professional development, nutritional support, strength training, and playing time," as Plaintiff suggests. (ECF Nos. 224, 205-50).

Plaintiff's argument is impassioned, but unsupported by sound legal principles. Although Plaintiff sets forth a compelling story of a young athlete's promising career, reciting evidence to show that he and UofL's coaching staff expected Bowen Jr. would be a member of the men's basketball team, those expectations do not amount to a contractual right to play basketball at UofL. The proposition that a college athlete's scholarship creates a protectable property interest in participation in college athletics was rejected in *Colorado Seminary (University of Denver) v. NCAA,* 417 F.Supp. 885 (D.Colo.1976),[3] *aff'd,* 570 F.2d 320 (10th Cir.1978). In *Colorado Seminary,* the court held that the "interest" in playing intercollegiate athletics which the college

[3] While the decisions of other district courts are not binding, the Court finds their reasoning persuasive given the dearth of appellate authority directly addressing the issue in this Circuit.

athletes contended was created by their scholarships was "too speculative to establish a constitutionally protected right," and commented that "the athlete on scholarship has no more 'right' to play than the athlete who 'walks on.'" *Id.* at 895 n. 5. A RICO plaintiff's claimed "injury to mere expectancy interests or to an intangible property interest" cannot confer RICO standing. *Taylor v. Bettis*, 976 F. Supp. 2d 721, 737 (E.D.N.C. 2013) (dismissing for lack of RICO standing), *aff'd*, 693 F. App'x 190 (4th Cir. 2017) (affirming for the reasons stated by the district court). Because the plain language of § 1964(c) limits actionable harms to injuries to business or property, and Plaintiff's claims with respect to his UofL scholarship are neither, Plaintiff lacks standing as to this claim.

ii. NCAA Eligibility

Bowen Jr. next claims "damage to his NCAA eligibility," under which he also groups certain alleged costs of an attorney helping Bowen Jr. to attempt to return to college basketball. (ECF No. 205-33). Neither is a cognizable injury here. Notwithstanding the personal value Plaintiff undoubtedly ascribed to his eligibility to play NCAA basketball, it is not a cognizable interest upon which he can assert RICO claims. Unfortunately, Plaintiff's response, in large part, lacks relevant law directed to the arguments raised and authority advanced by Defendants. As such, it is of limited value on the precise questions before the Court.

Courts have referred to decisions in the due-process context for discerning whether a claimed harm constitutes injury to "business or property" under RICO. *E.g.*, *Strates Shows, Inc. v. Amusements of Am., Inc.*, 379 F. Supp. 2d 817, 828 (E.D.N.C. 2005) (citing *Ricker v. Edmisten*, No. 931756, 1994 WL 32807, at *1–2 (4th Cir. 1994)). The Fourth Circuit has previously held

that there is no right to "participation in interscholastic athletics." *Denis J. O'Connell High Sch. v. Va. High Sch. League*, 581 F.2d 81, 84 (4th Cir. 1978). Caselaw flatly rejects the notion that student-athletes' expectations of future athletic careers are constitutionally protected. *See, e.g., Parish v. NCAA,* 506 F.2d 1028, 1034 n. 17 (5th Cir.1975), *rev'd on other grounds, McCormack v. NCAA,* 845 F.2d 1338 (5th Cir.1988); *see also Colorado Seminary,* 417 F.Supp. 885 (D.Colo.1976), *aff'd,* 570 F.2d 320 (10th Cir.1978).

The prevailing judicial approach does not recognize a constitutionally protected property interest in intercollegiate athletic competition and rejects arguments that such participation is necessary to develop the skills necessary for a future professional sports career. Likewise, persuasive authority has held "hoped for careers in basketball" are too speculative to comprise a constitutionally protected property right. *Parish,* 506 F.2d at 1034 n. 17. "While participation in intercollegiate basketball has been recognized as a training ground for a professional basketball career, the possibility of obtaining that professional basketball career is too speculative to even constitute a present economic interest." *Knapp v. Northwestern Univ.,* No. 95 C 6454, 1996 WL 495559, at *2 (N.D.Ill. Aug.28, 1996), *rev'd on other grounds,* 101 F.3d 473 (7th Cir.1996), *cert. denied,* 520 U.S. 1274 (1997).

The Court's task is not to determine whether Bowen Jr.'s "NCAA eligibility and basketball services are essentially worthless," as Plaintiff's brief suggests. (ECF No. 224). Plaintiff cites no authority holding that a student-athlete has a business or property right in NCAA eligibility and the undersigned's extensive research revealed no authority supporting that proposition. As such, the Court declines to expand RICO's

reach and finds the loss of Plaintiff's NCAA eligibility insufficient to confer RICO standing and thus, not an actionable harm.

iii. Legal Fees and Costs

Plaintiff cites legal fees and costs of $28,342.48 incurred attempting to regain his NCAA eligibility under the same genre of damages as his loss thereof. (ECF No. 205-33). Bowen Jr.'s claimed legal fees cannot constitute an injury sufficient to confer standing because they fail to qualify as an injury to "business or property" and as such, are not compensable under the RICO statute.

First, Bowen Jr.'s claimed legal fees are insufficient to confer RICO standing because he did not pay the fees and costs in question. In his deposition, Plaintiff admitted that his father, Bowen Sr., paid Setchen for the "legal fees and costs" for advice during Bowen Jr.'s efforts to regain his NCAA eligibility. In rebuttal, Plaintiff offers portions of deposition testimony stating he is reimbursing his parents for the legal costs he incurred in connection with his efforts to restore his NCAA eligibility, characterizing these as expenses that were advanced to his lawyer on his behalf by his parents when he was in college and had no money. Plaintiff also cites Setchen's deposition, which occurred after Adidas filed the motion for summary judgment on RICO standing. Bowen Jr. does not dispute that his father, not he, retained Setchen and paid his fees; however, he contends he can still claim those fees as *his* injury for two reasons: he purportedly chose to pay Setchen $750 two years *after* this litigation began and he claims he will now repay his father. (ECF No. 224). The Court finds neither is sufficient because Bowen Jr. has provided no evidence that he is legally obligated to do either.

Second, even if Plaintiff had paid the fees, they are not recoverable for the additional reason that they derive from an attempt to remedy non-cognizable harm—a claimed inability to compete in NCAA basketball. Such derivative injuries, even if nominally to business or property, do not suffice for RICO standing. *E.g.*, *Bast*, 59 F.3d at 495 (holding that a RICO plaintiff cannot recover "pecuniary losses" as a result of "personal injury"); *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992) (although "[m]ost personal injuries . . . will entail some pecuniary consequences," those resulting pecuniary harms "are not compensable under RICO").

The RICO statute does not contemplate an injury in the form of legal fees and costs. Plaintiff cites to *Stochastic Decisions, Inc. v. DiDomenico*, among other out-of-circuit decisions, for the uncontroverted proposition that legal fees can be recovered under RICO so long as they were proximately caused by a RICO violation. 995 F.2d 1158, 1167 (2d Cir. 1993), *cert denied*, 510 U.S. 945, (1993). However, Plaintiff's citation to *Stochastic* to supplement his argument is unavailing because that case holds that legal fees may constitute as RICO damages—not as a RICO injury, as is asserted here. Plaintiff conflates injury and damages under the RICO statute. Persuasive authority in this Circuit provides that legal fees and costs that a plaintiff chose to incur are an indirect injury from a defendant's conduct. *See Strates Shows v. Amusement of Am.*, 379 F. Supp. 2d. 817, 833 (E.D.N.C. 2005). *Strates* held that a plaintiff who chooses to incur legal fees to mitigate a defendant's conduct, where it is not automatically incurred, cannot recover under the RICO statute. *Id.* at 833. Here, similar to *Strates*, Plaintiff chose to incur the aforesaid legal fees and related costs. They were not automatically incurred. Plaintiff voluntarily chose to mitigate the effects of

Defendants' alleged conduct and the legal fees and related costs are, at most, an indirect injury. As such, Plaintiff cannot state a RICO claim on the basis of the claimed legal fees.

iv. Professional Earnings

Bowen Jr.'s claim of lost professional earnings is likewise deficient because it is not an injury to his "business or property," but an unrecoverable expectancy interest. Bowen Jr. asserts that the May 2017 Agreement eventually caused him to not be selected in the first round of the NBA draft, thereby hurting his future "career earnings." (ECF No. 205-33). Defendants argue Bowen Jr. cannot claim a business or property interest in the supposed lost professional earnings he hoped to obtain as a first-round NBA draft pick. The Court agrees Plaintiff had no right or guarantee to be drafted, only an expectation. Student-athletes do not have a property right in their anticipated professional careers. Furthermore, because Bowen Jr. asserts that he lost future earnings due to a personal harm—a purported reduced ability to play basketball from not playing in the NCAA—those claimed lost earnings would still not be cognizable under RICO. Bowen Jr. had a mere expectation of (and not an entitlement to) a lucrative professional career, and that expectation—no matter its likelihood—is not a cognizable business or property interest under RICO.[4] *Strates Shows*, 379

[4] This rule is undoubtedly premised on the fact that future expectations are just that—expectations. It bears mention that, while many promising athletes fulfill predictions of high draft status followed by rewarding professional careers, such is not always the case. To take a recent example, a highly-touted offensive lineman for a major university in South Carolina set school records for career starts and snaps played; was a three-time first-team All-Atlantic Coast Conference (ACC) selection;

F. Supp. 2d at 827–28 (plaintiff lacked interest in expectation of being awarded a state contract, even though it had been awarded the contract "as a matter of course in past years" and "could expect to a high degree of certainty that it would be awarded the contract in the future").

Plaintiff's opposition brief indicates that his claimed reason for why he was not drafted was that he was unable to develop his basketball skills at UofL. (*E.g.*, ECF No. 224 at 28 (claiming loss of "basketball development services at [UofL]"), *id.* at 32 (claiming inability to "develop" at a "top tier college program"), *id.* at 37 (claiming lack of opportunity to "improve his basketball skills"), *id.* at 38 (claiming importance to Bowen Jr. of "develop[ing his] basketball skills under elite coaching, precise strength and conditioning and proper nutrition support" for his "preparation for the NBA")). But reduced basketball skills is undeniably a personal injury, and the Fourth Circuit has held that "[a]n allegation of personal injury and pecuniary losses occurring therefrom are not sufficient to meet the statutory requirement of injury to 'business or property'" under RICO. *Bast*, 59 F.3d at 495. That alone precludes Bowen Jr.'s reliance on his claimed lost earnings as a basis for his RICO claims.

b. RICO's Causation Requirement

In light of the above disposition, there is no need to address the remaining arguments of the parties on causation. However, to the extent considered, the undersigned finds Plaintiff's causal theory lacks merit and observes that his attenuated causal chain "oversimplifies" how an amateur basketball player is

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and twice won the Jacobs Blocking Trophy as the best blocker in the ACC, yet went undrafted following his senior year.

drafted in the NBA. *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 495 (4th Cir. 2018) (refusing to "assume" that "potential intervening causes" in an indirect causal chain would not have reduced plaintiff's insurance claim regardless of the alleged fraud). Defendants advance alternative arguments, including, *inter alia*, that Bowen Jr. cannot show that the May 2017 Agreement was a but-for cause of losing his NCAA eligibility, because his family's earlier, independent acceptance of improper benefits from non-Adidas entities had already caused Bowen Jr. to lose his NCAA eligibility. It is unnecessary for the Court to address the merits of these arguments, as Plaintiff's failure to show an injury to his business or property interests is fatal to his RICO claims.

c. Injunctive Relief

Plaintiff's prodigious request for injunctive relief asks this Court for an order enjoining Adidas from sponsoring any NCAA Division I men's basketball programs. (ECF No. 84). In broad strokes, Plaintiff asserts that "absent injunctive relief, RICO would be rendered hollow as it applies to illegal bribery schemes by corporate sponsors to influence intercollegiate recruiting for profit. Preventive injunctive relief is the sole vehicle to provide meaningful impact on the livelihood and development of student-athletes, like [Bowen Jr.], who have been exploited by corrupt enterprises motivated by corporate and institutional gain." (ECF No. 224 at 54). This argument lacks merit, for the reasons described below.

Plaintiff's brief notes that "[w]hile the Fourth Circuit has not weighed in on the availability of injunctive relief to private parties under RICO, oral argument on this issue was recently held" and "the Fourth Circuit is expected to issue a ruling within the

coming months." (ECF No. 224 (citing *Hengle v. Treppa*, 433 F. Supp. 3d 825 (E.D. Va. 2020) (Appeal Nos. 20-1062(L), 20-1063, 20-1358, 20-1359)). However, whether the Fourth Circuit determines RICO authorizes private plaintiffs to seek injunctive relief will have no impact on the Court's disposition on the instant matter. Plaintiff's request for injunctive relief was predicated on the alleged RICO violations, and because none of Bowen Jr.'s claimed harms satisfy RICO standing, then he cannot recover any relief, even injunctive, under the statute. *E.g.*, *Dickerson v. TLC The Laser Eye Ctr. Inst., Inc.*, 493 F. App'x 390, 396 (4th Cir. 2012) (explaining that because plaintiff "has not sufficiently pled a RICO claim" he could not "be entitled to injunctive relief"); *Nunes v. Fusion GPS*, No. 1:19-cv-1148, 2021 WL 1225983, at *13 (E.D. Va. Mar. 31, 2021) (expressing doubt "that equitable relief is available to a private RICO plaintiff," but dismissing claim for equitable relief because plaintiff failed to state a RICO claim). As determined above, Plaintiff lacks standing for his RICO claims, and resultantly, he is foreclosed from injunctive relief on that basis.

The Court extended Plaintiff latitude in permitting the opportunity to establish factual support for his allegations in discovery before entertaining Adidas's arguments on RICO standing, but discovery has confirmed Plaintiff cannot make the required showing. Zeal alone cannot cure the deficiencies in Plaintiff's RICO claims. The availability of civil relief under RICO is narrowly circumscribed, and the record makes clear that Bowen Jr.'s claimed harms were not to cognizable business or property interests. Nor were the claimed harms actually or proximately caused by the alleged RICO violations. Each of these twin flaws is, on its own, a sufficient basis to dismiss Bowen Jr.'s RICO claims. Plaintiff's arguments to the contrary

being unavailing, and there being no genuine dispute as to any material fact in this case, the Court concludes Plaintiff lacks statutory standing for his claims under RICO and summary judgment in favor of Defendants is appropriate.[5]

V. CONCLUSION

For the aforementioned reasons, the following motions for summary judgment are hereby granted: ECF Nos. 205, 207, 210, and 212. Defendants are entitled to summary judgment as a matter of law. Because the material facts demonstrating the lack of cognizable RICO injury may not be genuinely in dispute, the Court exercises its discretion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure to grant summary judgment on behalf of the nonmoving defendants—Gassnola and Sood.[6] Plaintiff's claims are dismissed, with prejudice, in their entirety.

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[5] Because Plaintiff has not established a viable claim under the substantive provisions of RICO, his RICO conspiracy claims likewise fail. *See Walters v. McMahen*, 684 F.3d 435, 445 (4th Cir. 2012) (holding that, as a matter of law, plaintiffs' RICO conspiracy claim failed where the underlying substantive claim was deficient); *cf. Robinson v. Fountainhead Title Grp. Corp.*, 252 F.R.D. 275, 283 n.9 (D. Md. 2008) (citing *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993) ("Any claim under section 1962(d) based on a conspiracy to violate any of the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient.")).

[6] The Fourth Circuit has observed "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence." *Hughes v. Bedsole,* 48 F.3d 1376, 1379 (4th Cir.1995) (quoting *Celotex,* 477 U.S. at 326). Other courts have "distinguished between *sua sponte* grants of summary judgment in cases involving purely legal questions based on complete evidentiary records, and cases involving

IT IS SO ORDERED.

May 26, 2021
Columbia, South Carolina

/s/ Joseph F. Anderson
Joseph F. Anderson, Jr.
United States District Judge

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factual disputes where the non-moving party has not been afforded an adequate opportunity to develop the record." *Artistic Entertainment, Inc. v. City of Warner Robins,* 331 F.3d 1196, 1201 (11th Cir.2003); *see also Jones v. Fulton County, Ga.,* 2011 WL 5244788, *1 (11th Cir. Nov. 2, 2011) ("formal notice may not be necessary where a legal issue has been fully developed and the evidentiary record is complete"). This case falls squarely within the former category.

APPENDIX E

18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

15 U.S.C. § 15(a)

Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only–

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct

primarily for the purpose of delaying the litigation or increasing the cost thereof.