John E. MacDonald (Pa Bar No. 82828)
jmacdonald@constangy.com
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
989 Lenox Drive
Suite 206 (2nd Floor)
Lawrenceville, New Jersey 08648
Telephone: (609) 454-0096
Facsimile: (609) 844-1102

Donald S. Prophete (admitted *pro hac vice*)
dprophete@constangy.com
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
2600 Grand Boulevard, Suite 750
Kansas City, Missouri 64108-4600
Telephone: (816) 472-6400
Facsimile: (816) 472-6401

Steven B. Katz (admitted *pro hac vice*)
skatz@constangy.com
Sarah Kroll-Rosenbaum (admitted *pro hac vice*)
skroll-rosenbaum@constangy.com
Naveen Kabir (admitted *pro hac vice*)
nkabir@constangy.com
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
2029 Century Park East, Suite 1100
Los Angeles, California 90067
Telephone: (310) 909-7775
Facsimile: (424) 465-6630

Philip J. Smith (admitted *pro hac vice*)
psmith@constangy.com
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
351 California, Suite 200
San Francisco, California 94104
Telephone: (415) 918-3002
Facsimile: (415) 918-3003

Counsel for National Collegiate Athletic Association and Villanova University

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE "POPPY" LIVERS, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a/k/a the NCAA, et al. Defendants.	Civil Action No. 2:17-cv-04271-MMB **MEMORANDUM AND STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS**

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STATEMENT OF UNDISPUTED FACTS

Pursuant to Section D(1) of the Court's *Pretrial and Trial Procedures—Civil Cases*, Defendants set forth below all material facts that they contend are undisputed and relevant to this Motion for Summary Judgment:

1. Plaintiff's participation as a member of Defendant Villanova University's football team ended on December 13, 2014. (ECF 68, p. 7 & n.1.)

2. The original Complaint in this action was filed on September 26, 2017. (ECF 68, p.7; ECF 1, p. 1.)

MEMORANDUM

I.
SUMMARY OF MOTION FOR SUMMARY JUDGMENT.

Plaintiff alleges that his *alma mater* Villanova University should have paid him minimum wages for the time he spent playing football for the school, suing Villanova and the National Collegiate Athletic Association under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* It is undisputed that Plaintiff filed this action more than two years after he played his last game of football, and that this suit is timely ***only if*** plaintiff can establish a "willful violation" of the FLSA under 29 U.S.C. § 255(a). (ECF 68, p. 7 & n.1.) On July 26, 2018, this Court entered an Order inviting a summary judgment motion on the issue, ordering that it "must be filed within 75 days." (ECF 69.) In accord with that Order, Defendants move for summary judgment on the ground that since Plaintiff cannot establish a triable issue of willfulness, his claim is time-barred.

The Third Circuit has long set a high bar for finding a "willful violation" of the FLSA, and the Supreme Court adopted the Third's standard, rather than a lower bar set by other circuits. To establish a "willful violation," a plaintiff must prove that his or her employer harbored "a disregard for the governing statute and an indifference to its requirements" (*Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127, 105 S. Ct. 613, 83 L. Ed. 2d 523 [1985]) so great that it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the" FLSA. *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988) (*affirming Brock v. Richland Shoe* Co., 799 F.2d 80 [3d Cir.1986]). Simply being mistaken about the precise requirements of the FLSA or pertinent facts—or even being ignorant of one or both—is not enough. (*See* pages 4-5, *infra*.)

To meet this high bar, there must exist clear authority putting an employer on notice that its conduct violates the FLSA. If the employer's indifference to this authority is more than merely negligent—*i.e.*, if the employer intentionally or recklessly disregards the authority—then a "willful violation" occurs. But if there is no authority, or if there is contradictory authority, or if the existing authority arguably supports the employer's position (albeit ultimately rejected by the court), a violation of the FLSA cannot be "willful" as a matter of law. (*See* pages 15-18, *infra*.)

This is such a case. Up to the end of Plaintiff's college football career, no federal court had ever addressed the key question here—whether student-athletes are *ipso facto* employees of their schools. But more than 50 years' worth of state court decisions had addressed the question under state and common law, and consistently held that they were not. In addition, Department of Labor guidance specifically addressing "interscholastic athletics" concluded student-athletes were ***not*** *ipso facto* employees. In the years following Plaintiff's graduation, the Seventh Circuit, and then the Northern District of California, addressed the question under the FLSA and agreed with the DOL that student-athletes are not *ipso facto* employees. In order to find that there is a triable issue of willfulness in this case, this Court would have to conclude that the Seventh Circuit, in *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016), adopted an unreasonable interpretation of the existing authorities. Regardless of whether this Court would or would not follow *Berger*, Defendants could not have intentionally ignored, or acted with reckless indifference to, a hypothetical ***future*** ruling departing from existing authorities. (*See* pages 10-15, *infra*.)

This Court has expressed doubts in other cases about the propriety of granting summary judgment to a plaintiff on willfulness, where the caselaw and regulations clearly forbade the employer's conduct, and willfulness turned on the employer's subjective awareness (or not) of the law. *Acosta v. Osaka Japan Restaurant, Inc.*, No. CV 17-1018, 2018 WL 3397337 (E.D. Pa. July 12, 2018). But it—and other courts in the Third Circuit and elsewhere—have not hesitated to grant summary judgment to a defendant, where there was no guidance on the application of the FLSA to the circumstances, or where different authorities came to different conclusions. *See, e.g.*, *Lugo v. Farmer's Pride Inc*., 802 F. Supp. 2d 598 (E.D. Pa. 2011). This case merits summary judgment to an even greater degree than the latter cases, because the authorities are neither absent nor conflicting here—***they unanimously validate Defendants' position***. (*See* pages 4-8, *infra*.)

Because Plaintiff cannot establish a triable issue going to willfulness in the face of these authorities, this Court should grant summary judgment to Defendants and dismiss Plaintiff's Amended Complaint (ECF 53) as time-barred.

II.
SUMMARY JUDGMENT IS A SUITABLE VEHICLE FOR RESOLVING PLAINTIFF'S CLAIM THAT DEFENDANTS *WILLFULLY* VIOLATED THE FLSA.

"A motion for summary judgment . . . is not an inappropriate means of challenging time-barred FLSA claims." *Thompson v. Real Estate Mortgage Network, Inc*., Civ. No. 2:11-1494 (KM)(MAH), 2018 WL 4604310, *2 (D.N.J. Sept. 24, 2018). Although this Court recently announced that it was "wary" of granting summary judgment to ***plaintiffs*** because of "the paucity of binding Third Circuit precedent in which a court granted a plaintiff's motion for summary judgment on the issue of willfulness in an FLSA case" (*Osaka Japan Restaurant,* 2018 WL 3397337, *11), the same wariness does not accompany granting a ***defendant's*** motion. This Court has done so under appropriate circumstances. *See Lugo,* 802 F. Supp. 2d at 618. So have other courts within the Third Circuit. *See, e.g., Tyger v. Precision Drilling Corp.,* 308 F. Supp.3d 831, 851 (M.D. Pa. 2018); *Baugh v. CVS Rx Services, Inc*., Civil Action No. 15-00014-MAK, 2015 WL 12552067, *2 (E.D. Pa. July 24, 2015); *Spady v. Wesley College*, Civil Action No. 09-834, 2010 WL 3907357, *4 (D. Del. Sept, 29, 2010); *Hanscom v. Carteret Mortgage Corp*., Civil Action No. 1:06-CV-2483, 2008 WL 4845832, *3-5 (M.D. Pa. Nov. 5, 2008); *Wolfslayer v. Ikon Office Solutions, Inc*., No. CIV.A. 03-6709, 2004 WL 2536833, at *10 (E.D. Pa., Nov. 8, 2004); *Gillott v. Powerex, Inc*., 904 F. Supp. 442, 450 (W.D. Pa. 1995); *Oakes v. Commonwealth of Pa*., 871 F. Supp. 797, 801 (M.D. Pa. 1995); *McIntyre v. Division of Youth Rehabilitation Services, Dept. of Services for Children, Youth and their Families, State of Del*., 795 F. Supp. 668, 674-5 (D. Del. 1992). And so have districts in other circuits. *See, e.g., Callari v. Blackman Plumbing Supply, Inc*., 988 F. Supp. 2d 261, 280-81 (E.D.N.Y. 2013); *Scruggs v. Skylink, Ltd*., Civil Action No. 3:10-0789, 2011 WL 6026152, *10 (S.D.W. Va. Dec. 2, 2011).

This asymmetry in the suitability of willfulness issues for summary judgment stems from the character of the underlying standard. Before the Supreme Court settled the issue, there was a circuit split on the standard for willfulness under the FLSA. In *Coleman v. Jiffy June Farms, Inc*., 458 F.2d 1139 (5th Cir.1971), for example, the Fifth Circuit held that the test of willfulness was simply whether the employer knew the FLSA was "in the picture." *Id*. at 1142. In other words, mere awareness of the possible application of the FLSA would suffice to extend the statute of limitations from two to three years. But in *Brock*, the Third Circuit set a much higher bar, holding that the appropriate standard was whether an employer

knew its conduct violated the FLSA, or showed reckless disregard for that fact. *Brock,* 799 F.2d at 82-83. The Supreme Court agreed with the Third Circuit (*McLaughlin,* 486 U.S. at 132-34), and incorporated the standard of willfulness it articulated in *Trans World Airlines,* which requires "a disregard for the governing statute and an indifference to its requirements." *Trans World Airlines,* 469 U.S. at 127. *See also Martin v. Selker Bros., Inc*., 949 F.2d 1286, 1296 (3rd Cir. 1991). Only those employers who "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]" have willfully violated the statute. *McLaughlin,* 486 U.S. at 133. *See also generally Osaka Japan Restaurant,* 2018 WL 3397337, *11 (describing *McLaughlin* standard).

There are two broad categories of willfulness disputes:

One category is where the pay practices of the employer are clearly unlawful. There is little or no dispute that the employer's conduct violates the FLSA. In such cases, an employer has not violated the FLSA willfully unless it intentionally disregarded the clear legal mandate or its applicability to the facts, or its disregard of the clear legal mandate rises to the level of recklessness. A merely negligent disregard of a clear legal mandate is not a *willful* violation. The subjective intentions and beliefs of the employer are determinative. Such cases are often not suited to summary judgment because they turn on testimony about mental states, often calling for credibility determinations.

The other category is where the pay practices of the employer are arguably—but not clearly—unlawful. There may be an absence of controlling legal authority, or the authorities point to the conclusion the employer acted properly, or there may be multiple authorities pointing to different conclusions. In such cases, subjective intentions and beliefs play a much smaller role, because even if the employer was subjectively aware of the state of the authority, a trier of fact cannot conclude that there is a culpable "disregard for the governing statute" because of an uncertainty regarding what the "governing statute" actually requires. Such cases lend themselves to summary judgment because the determining factors are objective—the state of the authority.

Osaka Japan Restaurant—the case in which this Court declared itself "wary" of granting summary judgment on willfulness in favor of plaintiffs—falls into the first category of cases. There, the Department of Labor brought suit against the owner of a restaurant for a variety of FLSA violations, including improperly reducing the base wage for employees

below the minimum wage by taking an unlawful tip credit to which the employees did not consent. *Osaka Japan Restaurant*, 2018 WL 3397337, *2-3. There was no substantial dispute over the consent requirement, or that the employer failed to ask for consent, and this Court granted summary judgment on the issue. *Id.* at *5-7.[1] But this Court declined to grant summary judgment on willfulness because there were triable questions about the employer's subjective awareness of the law:

> "Plaintiff overstates his case that James' testimony established that Defendants acted willfully in failing to pay employees overtime. James actually gave contradictory testimony at his deposition regarding his knowledge of overtime requirements. . . . In light of Kwang's repeated testimony that he didn't know about the legal requirements for minimum wage and overtime . . . and his testimony that James—whom he later fired—had 'no power,' . . . a reasonable jury could find that these violations were not willful, particularly prior to the federal investigation. Kwang, an immigrant who did not speak English—and who told Plaintiff's counsel at deposition that he "still ha[d] questions" about compliance with minimum wage laws, and asked Plaintiff's counsel what the minimum wage was for servers—appears simply to have been ignorant of the requirements of the law, and a strong-willed businessman all too willing to dismiss his son's concerns." (*Id.* at *12.)

Lugo—a case in which this Court granted summary judgment on willfulness to a defendant—falls into the second category of cases. The central issue there was whether time spent by employees at a poultry processing plant donning and doffing safety gear and uniforms was compensable under the FLSA. After reviewing case law from courts in different circuits coming to varying conclusions (*Lugo*, 802 F. Supp. 2d at 602-09), this Court concluded that multiple disputed facts prevented it from granting summary judgment on the issue to either side. *Id.* at 610-14. The Court, nevertheless granted summary judgment on willfulness to the employer, for two reasons: First, there was an "absence of binding Third Circuit precedent on whether donning and doffing PPE is integral and

[1] As to a second, independent ground for invalidating the tip credit—based on the employer's mandatory tip pooling arrangement that permitted untipped employees to share tips—the Court noted an absence of Third Circuit authority on whether such an arrangement was permissible under the FLSA. Ultimately, this Court elected to follow unpublished opinions from other circuits holding that was ***im***permissible. *Osaka Japan Restaurant*, 2018 WL 3397337, *7-8.

indispensable to the principle activity of poultry processing . . . ." Second, "Defendant . . . had objectively reasonable grounds for believing it was in compliance," because, following a DOL investigation, it sought agency approval for its actions. *Id*. at 617-18. *See also Perez v. Mountaire Farms, Inc*., 650 F.3d 350, 375 (4th Cir. 2011) (affirming judgment in favor of employee collective on merits, and judgment in favor defendant on willfulness because "prior to the present case, this Court had not addressed the issue whether employees' acts of donning and doffing protective gear at the beginning and the end of their work shifts are 'integral and indispensable' to poultry processing, and our sister circuits have taken different approaches to this issue." [*Citations omitted*.] Because there was no binding authority directly addressing the issue of compensation for the donning and doffing of protective gear at the beginning and the end of work shifts, we hold that the district court did not clearly err in concluding that [the employer] did not willfully violate the FLSA by failing to compensate its employees for these activities.")

In *Tyger*, Judge Brann in the Middle District reached the same outcome in an oil rig donning-and-doffing case as did this Court in *Lugo*: although he denied cross-motions for summary judgment on the underlying merits, he granted defendant's motion as to willfulness:

> "[R]eaching the merits of this issue, I note the utter paucity of any evidence from which a reasonable jury could find, by a preponderance of the evidence, that Defendants either knew or suspected that their practices were violative of the FLSA or recklessly disregarded the possibility of same. Plaintiffs have failed to provide any such citations. Furthermore, and as exemplified above, there are no decisions in the Third Circuit concerning whether the donning and doffing of similar PPE or the joint changeover meetings are 'integral and indispensable' to the principal activity of drilling oil and gas wells." (*Tyger*, 308 F. Supp.3d at 850.)

Similarly, in *Baugh*, Judge Kearney granted summary judgment to the employer on willfulness because prior litigation involving a similar legal question was resolved in the employer's favor. *See Baugh*, 2015 WL 12552067, *2. In *Hanscom*, Judge Kane in the Middle District did the same because there existed a DOL opinion letter that could be read to support the employer's practice. *Hanscom*, 2008 WL 4845832, *4. In *Gillot*, Judge

Ambrose in the Middle District did the same because there was a split in the authorities over the question presented. *Gillot*, 904 F. Supp. at 449.

This case too falls into the second category. Because there is no authority stating that student-athletes are *ipso facto* employees of the schools for whom they play—***indeed the existing authorities draw the opposite conclusion***—there exists no law that Defendants could have disregarded, either intentionally, or merely recklessly. Even if this Court were inclined to make new law on this issue, it is impossible for Defendants to have *willfully* violated a new rule before it was ever announced.

As the Court noted in a previous ruling, "Plaintiff offers no binding precedent . . . for the proposition that the question of 'willfulness' is ***necessarily*** a fact-intensive inquiry . . . and this Court is aware of none." (ECF 47, p. 18 [emphasis added].) The Third Circuit recently held that a trial court can take the issue of willfulness away from a jury and grant judgment as a matter of law for the employer under Rule 50 "if 'there is no legally sufficient evidentiary basis for a reasonable jury to find for' the" employee. *Souryavong v. Lackawanna County*, 872 F.3d 122, 126 (3d Cir. 2017) (*quoting Rego v. ARC Water Treatment Co.*, 181 F.3d 396, 400 [3d Cir. 1999]). By simple parity of reasoning, a court can—and should—take willfulness away from the jury and grant summary judgment if the plaintiff cannot demonstrate there is a "legally sufficient evidentiary basis for a reasonable jury" to find that the employer was willful.

III.
PLAINTIFF'S CLAIMS ARE INDISPUTABLY TIME-BARRED UNLESS HE DEMONSTRATES A TRIABLE ISSUE AS TO WHETHER DEFENDANTS INTENTIONALLY DISREGARDED—OR WERE RECKLESSLY INDIFFERENT TO—LEGAL AUTHORITY STATING THAT STUDENT-ATHLETES ARE *IPSO FACTO* EMPLOYEES.

This Court recently summarized the applicable standard for granting summary judgment:

> "Summary judgment is appropriate if the movant can show 'that 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). A dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is 'material' if it 'might affect the outcome of the suit under the governing law.' *Id*.

> "A party seeking summary judgment bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). ***Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case."*** *Id*. at 325. Summary judgment is appropriate if the non-moving party fails to rebut the motion by making a factual showing "that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor." *Id*. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255." (*Osaka Japan Restaurant,* 2018 WL 3397337, *5 [emphasis added]. *Accord, e.g., Razak v. Uber Technologies, Inc.*, Civil Action No. 16-573, 2018 WL 1744467, *13 [E.D. Pa. Apr. 11, 2018]; *Lugo*, 802 F. Supp. 2d at 602.)

Plaintiff bears the burden of proving willfulness at trial. *See, e.g., Parada v. Banco Industrial De Venezuela, C.A.,* 753 F.3d 62, 71 (2d Cir. 2014); *Stokes v. BWXT Pantex, L.L.C.*, 424 Fed.Appx. 324, 326 (5th Cir. 2011); *Adams v. United States,* 350 F.3d 1216, 1229 (Fed. Cir. 2003); *Baugh*, 2015 WL 12552067, *1; *Jackson v. Art of Life, Inc.,* 836 F. Supp. 2d 226, 237 (E.D. Pa. 2011); *Spady*, 2010 WL 3907357, *4; *Wolfslayer*, 2004 WL 2536833, *10; *Gillott*, 904 F. Supp. at 449 (1995); *Oakes*, 871 F. Supp. at 801 (1995); *McIntyre*, 795 F. Supp. at 674 (1992).

Accordingly, Plaintiff bears the burden of demonstrating a triable issue in order to survive summary judgment. *See, e.g., Lopez v. Corporacion Azucarera de P.R.*, 938 F.2d 1510, 1515-16 (1st Cir.1991) (plaintiff cannot survive a motion for summary judgment on willfulness unless he or she "make[s] a competent demonstration that there [is a] trialworthy issue as to whether [the employer] 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.'") (*quoting McLaughlin,* 486 U.S. at 133); *Hanscom*, 2008 WL 4845832, *3 ("Because Carteret has moved for partial summary judgment, Hanscom must show that there is a genuine issue of material fact-that a reasonable juror could find Carteret acted willfully.").

Where, as here, the moving party does not bear the burden of proof, it satisfies its obligation of "pointing out to the district court that there is an absence of evidence" under

Celotex simply by outlining the pertinent issues—it is ***not*** obligated "to support the motion with affidavits or other materials that negate[] the opponent's claim." *McGrath v. City of Philadelphia*, 864 F. Supp. 466, 473 (E.D. Pa. 1994).

For the reasons set forth below, Plaintiff cannot possibly demonstrate a triable issue of willfulness, because there is no authority stating that student-employees are *ipso facto* employees that Defendants could have intentionally or recklessly disregarded.

IV.
THERE EXISTS NO LEGAL AUTHORITY STATING THAT STUDENT-ATHLETES ARE *IPSO FACTO* EMPLOYEES.

"'[T]here is no legally sufficient evidentiary basis for a reasonable jury to find for'" Plaintiff on the issue of willfulness (*Souryavong*, 872 F.3d at 126) here because "the courts have been consistent finding that student-athletes are not recognized as employees under any legal standard." Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 Marq. Sports L. Rev. 287, 297 (2016).

First, there is no Third Circuit authority holding that student athletes are *ipso facto* employees.

Second, the judicial authority outside the Circuit unanimously ***rejects*** the proposition that student athletes are *ipso facto* employees ***and holds to the contrary***. In *Berger*, the Seventh Circuit squarely held that student-athletes are not *ipso facto* employees of their schools under the FLSA. In *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp.3d 401 (N.D. Cal. 2017), the Northern District of California reached the same conclusion.

Moreover, there are over 60 years of state cases, "albeit in different contexts," holding "that student athletes are not employees." *Berger*, 843 F.3d at 291. *See, e.g.*, *Kavanagh v. Trs of Boston Univ.*, 440 Mass. 195, 199, 795 N.E.2d 1170, 1175 (2003) ("a scholarship or other financial assistance does not transform the relationship between the academic institution and the student into any form of employment relationship"); *Korellas v. Ohio State Univ.*, 121 Ohio Misc.2d 16, 18, 779 N.E.2d 1112, 1114 (2002) (football student-athlete was not an employee of Ohio State University); *Shephard v. Loyola Marymount Univ.*, 102 Cal. App. 4th 837, 844–46, 125 Cal. Rptr. 2d 829, 833–35 (2002) (student athlete not an "employee" for purpose of applying state antidiscrimination laws); *Waldrep v. Texas*

Employers Ins. Ass'n, 21 S.W.3d 692, 701 (Tex. App. 2000) (rejecting argument that football student-athlete was an employee of his school); *Townsend v. State of California*, 191 Cal. App. 3d 1530, 1537, 237 Cal. Rptr. 146, 150 (1987) (holding "as a matter of law" that a student-athlete "was not an employee" of his university for purposes of the state Tort Claims Act, Cal. Gov't Code § 810); *Rensing v. Indiana State Univ. Bd. of Trs*, 444 N.E.2d 1170, 1175 (Ind. 1983) ("the appellant shall be considered only as a student athlete and not as an employee within the meaning of the Workmen's Compensation Act"); *Coleman v. Western Michigan University*, 125 Mich. App. 35, 44, 336 N.W.2d 224, 228 (1983) ("[W]e conclude that the WCAB did not err in finding that our plaintiff was not an 'employee' of defendant within the meaning of the act."); *St. Compensation Ins. Fund v. Indus. Commission*, 135 Colo. 570, 573-74, 314 P.2d 288, 290 (1957) (rejecting workers' compensation claim on the ground that student-athlete was not an employee). *See also* Ohio Rev. Code Ann. §3345.56 ("a student attending a state university … is not an employee of the state university based on the student's participation in an athletic program offered by the state university"); Mich. Comp. Laws Ann. § 423.201(1)(e)(iii) ("a student participating in intercollegiate athletics on behalf of a public university in this state … is not a public employee entitled to representation or collective bargaining rights").

Third, the published views of the Department of Labor, the agency charged by Congress with interpreting the FLSA, agree with *Berger* and *Dawson* that student-athletes fall outside the statute's reach. In Section 10b24(a) of the DOL's *Field Operations Handbook* ("FOH")—"an operations manual that provides [Department] investigators and staff with interpretations of statutory provisions … and general administrative guidance," *Berger*, 843 F.3d at 292—the Department states that "[u]niversity or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the Act." U.S. Dep't of Labor, *Field Operations Handbook* § 10b24(a) (*available at* https://www.dol.gov/whd/FOH/FOH_Ch10.pdf.) FOH § 10b24(a) expressly incorporates "the examples listed in FOH [§] 10b03(e)," which provides:

> "As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and ***interscholastic athletics*** and other similar endeavors. ***Activities of students in such programs***,

> conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, ***are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school or institution***." (*Id*., § 10b03(e) [emphasis added].)

In recent years, both the Seventh Circuit, and the Northern District of California, have held that FOH § 10b03(e) means exactly what it says: "interscholastic athletics . . . are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school" or institution. *See Berger*, 843 F.3d at 293 ("Because NCAA-regulated sports are 'extracurricular,' 'interscholastic athletic' activities, we do not believe that the Department of Labor intended the FLSA to apply to student athletes. We find the FOH's interpretation of the student-athlete experience to be persuasive."); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp.3d 401, 406-07 (N.D. Cal. 2017 ("Moreover, the Department of Labor has indicated that student athletes are not employees under the FLSA.").

Plaintiff will doubtlessly argue—as he has in the past—"that the inclusion of 'interscholastic athletics' in the FOH could conceivably be in reference to student-run interscholastic athletics, rather than NCAA-regulated athletics. [*Citation omitted*.] Plaintiff asserts that the fact that most of the other activities listed in Section 10b03(e) are student-run groups makes this interpretation more likely." (ECF 47, p. 20.)

Plaintiff's construction of FOH § 10b03(e) flies in the face of established principles of statutory construction.[2] A reasonable interpretation of the section would, as this Court has observed, "likely require the Court to rule that Defendants acted reasonably in making the judgment that they need not compensate student athletes pursuant to the FLSA, and therefore that Defendants did not willfully violate the FLSA." (ECF 47, p. 20.) Moreover, it is not just the FOH that so requires. The entire precedential record concerning the (lack of) employment status for student-athletes compels the same ruling.

[2] The rules of statutory construction apply to administrative regulations as well. *See, e.g.*, *Sekula v. F.D.I.C.*, 39 F.3d 448, 453 (3d Cir. 1994) ("We also will examine the regulation in view of the accepted standards of statutory construction."); *Advanced Career Training v. Riley*, No. CIV.A . 96-7065, 1997 WL 476275, at *8 (E.D. Pa., Aug. 18, 1997) (following *Sekula*.)

Plaintiff's strained interpretation of the FOH § 10b03(e) assumes that the general phrase "conducted primarily for the benefit of the participants as a part of the educational opportunities provided" in the second sentence limits the scope of the specific list of activities in the first sentence. Accordingly, the phrase "intramural and interscholastic athletics" must be construed to mean "intramural and interscholastic ***club*** athletics." Plaintiff makes two errors in statutory construction.

Plaintiff's first error is that he ignores the plain meaning of the FOH. In construing statutory language, "[w]e are to begin with the text of a provision and, if its meaning is clear, end there." *Price v. Del. St. Police Fed. Credit Union*, 370 F.3d 362, 368 (3d Cir. 2004). "[I]ntramural and interscholastic athletics" does not just mean "intramural and interscholastic [***club***] athletics." "Interscholastic" means exactly that—"existing or carried on between schools . . . ." (*Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/interscholastic.) The phrase "interscholastic athletics" means athletic completion between schools—regardless of whether the sport is NCAA-governed or a club sport. Indeed, Plaintiff conceded in earlier briefing that "NCAA-regulated sports are, *generically*, 'interscholastic athletics.'" (ECF 28, p. 20 [emphasis in original].) When words are not specifically defined in a statute or regulation, they are construed "in accordance with [their] ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete." *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010) (emphasis added) (*quoting Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 [1992]).

That FOH § 10b03(e) uses the phrase "interscholastic athletics" in its ordinary, unrestricted sense—referring to all forms of athletic competition between schools—is further underscored by the fact in the first sentence "interscholastic" is joined with "intramural" to provide that "intramural and interscholastic athletics" both are school-sponsored activities to which the FLSA does not apply. "Intramural" means "competed only within the student body . . . ." (*Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/ intramural.) "Intramural" contrasts with "interscholastic," and

complements it, so that the conjoined phrase "intramural and interscholastic athletics" covers the entirety of school-sponsored sports, regardless of whether the competitors are drawn from the student body of a single school ("intramural"), or from multiple schools ("interscholastic"). This Court correctly observed that it provides "relatively straightforward FOH guidance to schools that student athletes are not FLSA covered employees." (ECF 47, p. 20.)

Plaintiff's second error is that he tries to make the general prevail over the specific, when the rules of construction require the converse. The phrase "intramural and interscholastic athletics" specifically refers to all forms of school sports, and appears as a part of a list of other specific activities schools typically offer "[a]s part of their overall educational program," including, "dramatics, student publications, glee clubs, bands, choirs, debating teams, [and] radio stations." FOH § 10b03(e). To permit the general language in the second sentence of § 10b03(e)—"conducted primarily for the benefit of the participants as a part of the educational opportunities provided"—to somehow limit "interscholastic athletics" to "interscholastic [club] athletics" (excluding NCAA-governed "interscholastic athletics") is to ignore the "commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012) (*quoting Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384, 112 S. Ct. 2031, 119 L. Ed. 2d 157 [1992]). *Accord, e.g.*, *Epic Systems Corp. v. Lewis*, — U.S. —, 138 S. Ct. 1612, 1625, 200 L. Ed. 2d 889 (2017) ("[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'") (*quoting Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115, 121 S. Ct. 1302, 149 L. Ed. 2d 234 [2001]); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208, 52 S. Ct. 322, 323, 76 L. Ed. 704 (1932) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling."); *Philadelphia Newspapers,* 599 F.3d at 306 ("It is 'a well-settled maxim that specific statutory provisions prevail over more general provisions.'") (*quoting In re: Combustion Eng'g*, 391 F.3d 190, 237 n.49 [3d Cir. 2004]).

"The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. ***To***

eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel*, 566 U.S. at 645 [emphasis added]. Assuming for the sake of argument that the general reference to activities "conducted primarily for the benefit of the participants as a part of the educational opportunities provided" contradicts the specific reference to "interscholastic athletics," the proper resolution of the contradiction is not to limit the specific reference in favor of the general (as Plaintiff argues)—rather, "[t]o eliminate the contradiction, the specific provision is construed as an ***exception*** to the general one." *Id* [emphasis added]. Accordingly, a school activity that is not "conducted primarily for the benefit of the participants as a part of the educational opportunities provided" and also not enumerated in the first sentence—like work-study in the school bookstore—would clearly not be subject to the FOH's conclusion that it "do[es] not result in an employer-employee relationship between the student and the school." But "interscholastic athletics" are subject to that conclusion, because FOH § 10b03(e) says exactly that.

This Court should now rule, as it previously observed was "likely," that the FOH "require[s] the Court to rule that Defendants acted reasonably in making the judgment that they need not compensate student athletes pursuant to the FLSA, and therefore that Defendants did not willfully violate the FLSA." (ECF 47, p. 20.)

V.
IN THE ABSENCE LEGAL AUTHORITY CLEARLY STATING THAT STUDENT-ATHLETES ARE *IPSO FACTO* EMPLOYEES, PLAINTIFF CANNOT DEMONSTRATE A TRIABLE ISSUE OF WILLFULNESS.

As discussed above, "[a]n FLSA violation 'is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA.' [*Citations omitted.*]" (ECF 47, p. 18.) The Third Circuit recently held that "[w]illful FLSA violations require a more specific awareness of the legal issue." *Souryavong*, 872 F.3d at 126. "Generally the employee must show that the employer had some reason to know that its conduct violated the FLSA beyond mere ignorance of the law . . . ." *Ford v. Houston Independent School Dist.*, 97 F. Supp.3d 866, 877 (S.D. Tex. 2015). *Accord, Mohnacky v. FTS Intern. Services, LLC*, No. SA-13-CV-246-XR, 2014 WL 4967097, at *6 (W.D. Tex., Oct. 2, 2014) ("In general, to show reckless disregard of the FLSA, an employee must show that the employer had some reason to know that its conduct violated the FLSA beyond mere ignorance of the law.") The precedents available to Defendants concerning whether student-

athletes are subject to the FLSA are ***unanimous***—they say student-athletes are not. Even if this Court were to conclude that the Department of Labor, the Seventh Circuit, the Northern District of California, and state appellate courts in California, Colorado, Indiana, Michigan, Ohio and Texas are wrong on the law, it still could not find that "Defendants acted intentionally or with reckless disregard to their obligations under the FLSA." (ECF 47, p.19.)

As in *Lugo*, Defendants "had objectively reasonable grounds for believing [they were] in compliance" with the FLSA. *Lugo*, 802 F. Supp. 2d at 617. The FOH—and decades of state court cases—support the conclusion that student-athletes were ***not*** *ipso facto* employees. And two subsequent federal court decisions—*Berger* and *Dawson*—underscore the reasonableness of this conclusion. Furthermore, also as in *Lugo*, there was an "absence of binding Third Circuit precedent" on the question. *Id.* at 618. Summary judgment is certainly no less appropriate here than it was in *Lugo*, and it is arguably more appropriate here.

The Third Circuit's decision in *Reich v. Gateway Press, Inc*., 13 F.3d 685 (3d Cir. 1994), also provides a useful comparison. There, the Circuit held that "violations [are] not willful … [where there are] 'close questions of law and fact'" based on opinion letters issued by the DOL. *Id*. at 702–03. *See also Reich v. Japan Enterprises Corp*. 91 F.3d 154 (9th Cir. 1996) (table) (applying *Gateway Press*). If there was no willfulness as a matter of law in *Gateway Press*, there could not possibly be a finding of willfulness here.

In *Gateway Press*, the employer owned and operated 19 weekly newspapers serving Pittsburgh suburbs. *Gateway Press*, 13 F.3d at 688-89. The DOL filed suit on behalf of salaried reporters for unpaid overtime in the Western District. The employer relied on two overtime exemptions under the FLSA: the small newspapers exemption, 29 U.S.C. § 213(a)(8), which applies to newspapers with circulations of less than 4,000, and the professional exemption, 29 U.S.C. § 213(a)(1).

To satisfy the small newspapers exemption, the employer relied on two opinion letters issued by the DOL's Wage and Hour Division in 1946 and 1965 which could be read to suggest that the circulation test for the small newspapers exemption applied separately to each publication, despite common ownership and control. The 1946 letter indicated that a publisher of more than one newspaper "may treat each paper separately for the purposes of

determining whether the circulation is less than the maximum" under some circumstances, and the 1965 letter stated that "when a company publishes more than one newspaper, each newspaper is tested separately in order to determine whether the circulation is less than four thousand, provided that, in addition to their separate mastheads, the several newspapers carry different local news items." *Gateway Press*, 13 F.3d at 692 (*quoting* opinion letters). The district court, convinced by the opinion letters, rejected the DOL's argument that the circulation test should be applied on an enterprise-wide basis, and held that the exemption was satisfied for 13 of the 19 publications.

The district court further found that the reporters for the other six papers did not meet the professional exemption, and awarded back pay. Finally, it held that the violation was not willful.

The Third Circuit reversed the district court's finding that the small newspapers exemption applied. It held that the circulation test for the exemptions should be applied on an enterprise-wide basis, under which the employer did not qualify for the exemption. *Id*. at 691-97. It reasoned that neither of the opinion letters "gives a reliable answer to [the] question." *Id*. at 691. The 1946 opinion letter "qualifie[d its] statement" in support of the employer's position, and thus "poses, without answering, the question presented here." *Id*. "The 1965 opinion letter is not helpful either," the Circuit wrote, leaving ambiguous a series of critical questions "apparently because the Administrator deliberately wanted to leave the standard unclear . . . ." *Id*. at 692. Finally, it pointed out that the 1965 letter was inconsistent with another one issued by the Wage and Hour Division just four years later, illustrating "the inconsistency and vagueness of the agency interpretations of this exemption." *Id*. Ultimately, the Circuit concluded that "inconsistency and vagueness" justified denying deference to any of the opinion letters. *Id*. at 692-93.

Notwithstanding the facial ambiguity and inconsistency accompanying the opinion letters on which the employer relied—and, ultimately, the fact that any reliance was erroneous—the Circuit nevertheless ***affirmed*** the district court's finding that the employer did not willfully violate the FLSA. *Id*. at 702-03. Observing that the evidence of willfulness was, at best, in equipoise, the Circuit held that "[m]ore importantly, the district court correctly observed that this case presents not only close questions of law and fact, but also a case of first impression with respect to one of the governing exemptions notwithstanding that

it has been on the books for 55 years." *Id*.; *see also Callahan v. City of Sanger*, No. 14-CV-600-BAM, 2015 WL 2455419, at *13 (E.D. Cal., May 22, 2015) (where Ninth Circuit had not addressed question and the relevant "statutory and regulatory language . . . is ambiguous," violation cannot be willful) (*quoting and citing Gateway Press*, 13 F.3d at 703); *Hanscom*, 2008 WL 4845832, at *5 (granting partial summary judgment on statute of limitations where Wage and Hour Division opinion letter supported employer's position. "Accordingly, the Court finds that its conduct, if violative of the FLSA, does not amount to a willful violation.").

"When the defendant shows that he reasonably believed he was complying with existing FLSA law, summary judgment for the employer is appropriate on the issue of willfulness." *Hanscom*, 2008 WL 4845832, *4. *See also id*., *5 ("[T]he Court is not aware of any decisions in this Circuit holding that a FLSA violation was willful when a defendant-employer relied on a reasonable interpretation of existing law."). With more than half a century of judicial and regulatory authority supporting Defendants' position that student-athletes are not *ipso facto* employees, and no authorities supporting the opposite conclusion, it cannot be said under any imaginable combination of facts that Defendants are not acting under a reasonable interpretation of existing law. Even if Plaintiff were able to persuade this Court that the law should change—and that is an extraordinarily big 'if'—it could not change the conclusion that Defendants acted in accord with "a reasonable interpretation of existing law" in the past, and were accordingly not willful.

VI.
CONCLUSION.

For the reasons set forth above, Defendants respectfully request that this Court grant them summary judgment on the ground that the Amended Complaint (ECF 53) is time-barred.

Dated: October 8, 2018

Respectfully submitted

s/ Steven B. Katz .

Steven B. Katz
Sarah Kroll-Rosenbaum
Naveen Kabir
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
2029 Century Park East, Suite 1100
Los Angeles, California 90067
Telephone: (310) 909-7775
Facsimile: (424) 465-6630

John E. MacDonald
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
989 Lenox Drive
Suite 206 (2nd Floor)
Lawrenceville, New Jersey 08648
Telephone: (609) 454-0096
Facsimile: (609) 844-1102

Donald S. Prophete (admitted *pro hac vice*)
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
2600 Grand Boulevard, Suite 750
Kansas City, Missouri 64108-4600
Telephone: (816) 472-6400
Facsimile: (816) 472-6401

Phillip J. Smith
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
351 California, Suite 200
San Francisco, California 94104
Telephone: (415) 918-3002
Facsimile: (415) 918-3003
Counsel for National Collegiate Athletic Association and Villanova University

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2018, the foregoing document was served on counsel by filing via the CM/ECF system, which will send an email notice to registered parties.

s/ Steven B. Katz .

Steven B. Katz
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP