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THE RETURN OF A BELOVED FRANCHISE: HOW VIDEO GAME DEVELOPERS AND
NIL LICENSING BROKERS CAN USE MEDIATION TO RESOLVE THEIR DISPUTES

Nicholas Wynne

As of June 30, 2021, the NCAA no longer prohibited collegiate athletes from profiting from their name, image, and likeness (NIL).¹ This was good news for EA Sports, a sports video game developer, considering that it announced in February of that year that it planned to bring back its college football game.² Prior to this news from the NCAA, EA Sports was planning on moving forward with the game without rosters that contained the names, images, or likenesses of any collegiate players, but remained hopeful that NIL rules would change in the future.³ Luckily for EA Sports, the NCAA rules did change, allowing EA Sports to engage with licensing brokers in efforts of reaching NIL deals with players and universities for its upcoming game.⁴ Despite the positive NIL news, EA Sports is currently facing a lawsuit from a group licensing broker with exclusive or preferred licensing rights with more than fifty schools with football programs.⁵ With major programs like Alabama, Ohio State, Georgia, and Michigan as Brandr Group clients,⁶ EA Sports potentially faces undesirable litigation.

Brandr Group filed its complaint against EA Sports because it believes that EA Sports has attempted to circumvent the licensing agreements Brandr Group has with universities as EA

¹ John T. Holder, Marc Edelman, & Michael A. McCann, *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How American Regulates College Sports' New Economic Frontier*, 57 *GEORGIA L. REV.* 1, 6 (2022).

² Chris Vannini, Nicole Auerbach, et al., *EA Sports Announces Return of College Football Video Game*, *THE ATHLETIC* (Feb. 2, 2021), <https://theathletic.com/4224226/2021/02/02/ea-sports-announces-return-of-college-football-video-game/> [<https://perma.cc/CB3U-EH33>].

³ *Id.*

⁴ Adam Wells, *EA Sports: College Football Video Game Won't Be Impacted by Recent Lawsuit*, *BLEACHER REP.* (June 22, 2023), <https://bleacherreport.com/articles/10080293-ea-sports-college-football-video-game-wont-be-impacted-by-recent-nil-lawsuit> [<https://perma.cc/A9XP-69K5>].

⁵ Chris Vannini, *EA Sports Sued by Brandr Group: What's the Future of the College Football Game?*, *THE ATHLETIC* (June 20, 2023), <https://theathletic.com/4626567/2023/06/20/ea-sports-college-football-lawsuit/> [<https://perma.cc/8APA-PT37>].

⁶ *Id.*

Sports seeks name, image, and likeness licensing agreements with the same schools and players individually.⁷ EA Sports has partnered with OneTeam Partners to facilitate its individual opt-in option for college players who wish to have their NIL appear in the game and be compensated for such, however, no official offers are on the table to these players yet.⁸ The Brandr Group's claim asserts that EA Sports initially promised to go through Brandr Group for all licensing agreements with Brandr's clients, however, EA Sports did not remain true to its word and exclusively partnered with OneTeam.⁹ Further, Brandr Group is taking issue with EA Sports' attempts to sign athletes individually because it operates as pressure on the schools to breach their contracts with Brandr Group.¹⁰ It is abundantly clear that an alternative dispute resolution method is needed if both parties wish to avoid the expensive consequences of litigation.

Mediation is an alternative to formal adversarial procedures (litigation),¹¹ and is a form of dispute resolution that utilizes a third-party mediator to help disputants resolve their conflict with a disputant-produced solution.¹² Mediation has the effect of restoring a good relationship between the disputants;¹³ additionally, mediation can allow parties to find solutions quicker than traditional litigation, thereby saving both parties time and expenses.¹⁴ Given these benefits, Brandr Group and EA Sports would be better off solving this dispute through mediation instead of going the litigation route.

Although EA Sports has not appeared worried about the lawsuit since it was filed, stating that it is confident the Brandr suit has no merit¹⁵ and assuring fans that it still plans on releasing

⁷ *Id.*

⁸ *Id.*

⁹ Vannini, *supra* note 5.

¹⁰ *Id.*

¹¹ Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 *MEDIATION Q.* 3, 3 (1983).

¹² *Id.* at 3–4.

¹³ Wong Yan Lung, *The Benefits of Mediation*, 8 *ASIAN DISP. REV.* 100, 100 (2006).

¹⁴ Christine L. Newhall, *Benefits and Opportunities in Mediation and Arbitration*, 74 *CPA J.* 62, 62 (2004).

¹⁵ Vannini, *supra* note 5.

the game in Summer 2024,¹⁶ it would greatly benefit from solving its current dispute with Brandr Group in mediation. With EA Sports bringing back its College Football franchise,¹⁷ and NIL matters only just getting started, both parties will likely face each other in the future regarding licensing agreements. Further, (without coming to some form of mutual agreement via mediation), EA Sports runs the risk of having some of the most pivotal college football programs absent from the game given Brandr Group's exclusive and preferred NIL licensing rights with those universities.¹⁸ So, it is imperative that EA Sports and Brandr Group resolve this issue amicably, out-of-court, and through mediation, to protect a relationship that could exist for decades to come.

Also, it is important to consider the interests of the players, as the new NIL rules allow players to earn money in a way that has always been foreclosed on them.¹⁹ Some believe that group licensing is more advantageous for players, especially those who are not the most popular in their respective sports.²⁰ Therefore, Brandr Group, the universities, and the players have a legitimate interest to protect in the form of providing the best opportunity for players to benefit from their NIL through mediation efforts. Relying on litigation, a zero-sum game, presents the potential for Brandr Group to lose completely,²¹ ultimately harming the people it seeks to advocate for and protect.

¹⁶ Tyler Conway, *EA Sports' College Football Video Game Still Planned for Summer 2024 Despite Lawsuit*, BLEACHER REP. (Aug. 8, 2023), <https://bleacherreport.com/articles/10085513-ea-sports-college-football-video-game-still-planned-for-summer-2024-despite-lawsuit> [<https://perma.cc/X6KB-B92N>].

¹⁷ Gia Silahian, *EA Sports: It's in the Federal Legislation*, 45 HASTINGS COMM. & ENT. L. J. 75, 77 (2023).

¹⁸ Vannini, *supra* note 5.

¹⁹ Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. L. REV. 53, 55 (2023).

²⁰ Taylor P. Thompson, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1382 (2022).

²¹ Roy Baharad, Chen Cohen, & Shmuel Nitzan, *Litigation with Adversarial Efforts*, 69 INT'L REV. OF L. & ECON. 1, 2 (2022).