IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

GARRETT SNODGRASS, GARRETT NELSON, ETHAN PIPER, NOA POLA-GATES, ALANTE BROWN, BRANT BANKS, BRIG BANKS, and JACKSON HANNAH,	)	CASE NO. CI20-3086
Plaintiffs,	)	**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LIMITED EXPEDITED DISCOVERY**
vs.	)	
THE BIG TEN CONFERENCE, INC.,	)	
Defendant.	)	

Plaintiffs Garrett Snodgrass, Garrett Nelson, Ethan Piper, Noa Pola-Gates, Alante Brown, Brant Banks, Brig Banks, and Jackson Hannah (collectively " Plaintiffs"), respectfully submit this Reply Brief in Support of their Motion for Limited Expedited Discovery. The Court should exercise its discretion and require The Big Ten Conference, Inc. ("Big Ten") to answer Plaintiffs' limited discovery requests on or before 12:00 p.m. on September 4, 2020.

ARGUMENT

I. Overview of Key Fact Disputes

Ninety percent of the Big Ten's Brief supports the Plaintiffs' argument that there are disputed questions of fact on which the Plaintiffs are entitled to discovery. The Big Ten has chosen to dribble out limited, additional information so it can wrongly claim it has answered certain discovery and can continue to hide relevant information while claiming it is being "transparent." For example:

A. The Vote

Plaintiffs' allegations: There was no vote. Two of the supposed Big Ten voters have publicly stated there was no vote.

Big Ten response: The Big Ten asks the Court to ignore the law and not accept the Plaintiffs' allegations as true at the pleadings stage. Instead, the Big Ten asks the Court to rely on the Big Ten's contrary version of facts, including an Affidavit from one voter who says there was a vote. Despite the fact that two voters claim there was **not** a vote (see Complaint, ¶¶ 24-25) and one voter now claims there **was** a vote (see Schapiro Affidavit), the Big Ten argues the case is resolved and no further discovery is needed on this issue.

Plaintiffs' Reply: Everyone agrees that whether a vote occurred (and the particulars of that vote) are relevant issues and that there is a factual dispute between the parties. The factual dispute demonstrates the Plaintiffs are entitled to complete answers to their very limited discovery requests (rather than just the cherry-picked information the Big Ten has chosen to disclose).

B. The Medical Evidence

Plaintiffs' allegations: The Big Ten relied on flawed medical data that, among other problems, was not applicable to the Plaintiff students. This reliance has been criticized by numerous medical professionals and reliance thereon is arbitrary and capricious.

Big Ten response: The Big Ten asks the Court, again, to ignore the law and not to assume the Plaintiffs' allegations are true at the pleading stage. The Big Ten argues that some of its decision-makers are also medical professionals and that the decision was vaguely "based on multiple factors" and on "sound feedback, guidance and advice from medical experts." The Big Ten argues that its factual allegations (including allegations from outside the pleadings such as information from NPR and the New York Times) are more believable than the Plaintiffs' allegations, so no further discovery is needed on this issue either.

Plaintiffs' Reply: Everyone agrees this is a relevant area for discovery and that there is a factual dispute between the parties. This factual dispute demonstrates the Plaintiffs are entitled

to the requested discovery. The Big Ten cannot be permitted to cherry-pick those portions of the data relied upon and continue to conceal the remaining data.

C. The Documents

Plaintiffs' allegations: The Big Ten forces the Plaintiffs to agree to and comply with the Big Ten Bylaws and other Governing Documents. (See Exhibit 2; Complaint, ¶ 47).

Big Ten response: Maybe so, but the Big Ten is not required to provide a copy of those documents to the Plaintiffs, and worse yet the Big Ten can cherry-pick helpful excerpts from those documents to use against the Plaintiffs without disclosing the remaining portions.

Plaintiffs' Reply: It is unreasonable to hold a party to a contract but refuse to provide the contract documents to that party.

II. The Existence of Fact Disputes Necessitates Limited Discovery Rather than Obviating its Need as claimed by the Big Ten.

By offering evidence outside the pleadings in an attempt to convince the Court that, factually, the Big Ten is right and the Plaintiffs are wrong, the Big Ten has highlighted the very reason why expedited discovery is necessary. The parties' conflicting allegations -- including Plaintiffs' well-pleaded allegations that are in direct conflict with Mr. Schapiro's affidavit -- only buttress the Plaintiffs' urgent need for discovery.

Importantly, the Big Ten does not dispute the basic facts evidencing the reasonableness of Plaintiffs' limited discovery requests and why the Plaintiffs need this discovery to be expedited, including:

- It is not a burden for the Big Ten to respond to Plaintiffs' limited discovery requests in a very short time frame;
- The 2020 fall football season was scheduled to begin on September 3 (two days from today);
- Two of the Big Ten's own (supposed) voting members have publicly stated there was no vote; and

- Plaintiffs will be irreparably harmed if they do not get the information now, as opposed to later.

Specifically, the Affidavit of Garrett Snodgrass, which was received without objection from the Big Ten as Exhibit No. 1, discusses the timeline of recent events and explains the reason why expedited discovery is necessary to avoid rendering the Plaintiffs' desired relief moot:

> If the Big Ten is permitted to wait 45 days or more before responding to Plaintiffs' Limited Discovery Requests, the Plaintiffs will have no opportunity to secure meaningful relief in this action because the 2020 fall football season will already be well underway. Thus, it is imperative that the Plaintiffs be afforded the opportunity to conduct expedited discovery so that the ultimate relief sought herein will not be rendered moot by any delays associated with the Big Ten's discovery responses.

(Exhibit 1, p. 2, ¶ 6). The Big Ten has not submitted any evidence contesting the statements in Exhibit No. 1, and the Big Ten does not dispute the timing which forms the basis for the urgent need of expediting responses to the Plaintiffs' narrow discovery requests. The key dates which demonstrate this urgency include the following:

- August 5, 2020: The Big Ten announces the fall football schedule, including an initial conference game of September 3, 2020.
- August 11, 2020: The Big Ten cancels the 2020 fall football season.
- September 3, 2020: The date of the first scheduled Big Ten football game.

If responses to the Plaintiffs' limited discovery requests are not expedited, the Plaintiffs' claims may be rendered moot because it will be at least October before the Big Ten must respond to discovery. The Big Ten should not be permitted to run out the clock.[1]

[1] The Big Ten requests an expedited briefing schedule on its Motion to Dismiss, but has tactically decided to delay filing the Motion. The practical effect of that tactic is to delay the litigation past the point where the Plaintiffs can achieve their desired relief. Any potential motion to dismiss should not delay the requested discovery.

III. The Nebraska Rules of Discovery expressly permit pre-answer discovery and grant the Court discretion to shorten a party's discovery response deadline.

A. Rules 6-333(a) and 6-334(b) give the Court discretion to grant Plaintiffs' requested relief.

Under the Nebraska Court Rules of Discovery in Civil Cases, a plaintiff is expressly permitted to serve discovery requests contemporaneously with the Complaint, before a defendant has answered the Complaint. The only issue now before the Court relates to whether the Court should exercise its discretion to shorten the Big Ten's deadline for responding to Plaintiffs' Limited Discovery Requests. Rules 6-333(a) and 6-334(b) both grant the Court **discretion** to shorten a party's deadline for responding to Interrogatories and Requests for Production of Documents. Thus, the Plaintiffs' Motion for Limited Expedited Discovery is governed by an abuse of discretion standard.

Ignoring this broad grant of discretion, the Big Ten erroneously argues the Plaintiffs are required to show "probability of success on the merits" before the Court may order expedited discovery. (E.g., Defendant's Brief, p. 12). But "likelihood of success on the merits" is a standard applicable to a motion for temporary injunction, not to a motion for expedited discovery. Such a rule would impose an even higher burden to a discovery motion than the standard that applies to a motion to dismiss under Rule 6-1112(b)(6), which merely requires a plaintiff to satisfy the plausibility standard. See, e.g., Knights of Columbus Council 3152 v. KFS Bd., Inc., 280 Neb. 904 (2010) ("To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face. When a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal

evidence of the element or claim."). The present motion, like most discovery matters, is discretionary with the court. Neb. Ct. R. Disc. §§ 6-333(a) and 6-334(b).

B. The Big Ten misstates the standard for authorizing expedited discovery.

1. Federal law is inapposite because federal courts do not generally allow pre-answer discovery, while Nebraska's discovery rules expressly allow for same.

The Big Ten cites three "tests" which it claims have been applied by federal courts in determining whether expedited discovery is appropriate. While application of federal case-law is often appropriate in interpreting the Nebraska Rules of Discovery, the Big Ten's reliance on federal law is misplaced here. Specifically, while the Nebraska state discovery rules expressly authorize parties to conduct discovery at the very commencement of the case (and plaintiffs may serve discovery requests contemporaneously with their Complaint), the Federal Rules of Discovery provide otherwise and do not generally allow parties to conduct discovery, absent leave of court, until after the parties have participated in an initial Rule 26(f) conference. In other words, the federal cases upon which the Big Ten relies are applying rules that are unlike Nebraska's discovery rules for purposes of the present Motion.

2. Courts routinely apply the "good cause" test, not the Notaro test advanced by the Big Ten.

But even if federal law could be applied here, the Plaintiffs easily satisfy any of the three "tests" advanced by the Big Ten. Notably, the Big Ten focuses almost exclusively on the "probability of success on the merits" test articulated by the New York court in Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982), but that test has been widely discredited and is highly disfavored. See, e.g., Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 275-76 (N.D.Cal. 2002) (criticizing Notaro because it does not focus on orderly case management, it would not accommodate expedited discovery in circumstances even where such discovery would

facilitate case management and expedite the case with little or no burden to the defendant, and it unduly circumscribes the wide discretion normally accorded the trial court in managing discovery); see also Rescuing Expedited Discovery from Courts and Returning it to FRCP 26(1): Using a Doctrine's Forgotten History to Achieve Legitimacy, 64 Ark. L. Rev. 651 (2011) (the "probability of success on the merits" standard articulated in Notaro inappropriately applies the temporary injunction standard to a discovery motion, shackles the trial court's discretion, ignores a case's facts and participants' needs, gives undue weight to defendants, and cannot be reconciled with the plain language of the discovery rules).

Rather than applying the disfavored Notaro standard, trial courts within the Eighth Circuit routinely apply the "good cause" standard, which is meaningfully different than the standard advanced by the Big Ten. While the Big Ten is critical of the Plaintiffs for proposing a "balancing test," this is precisely how the "good cause" standard operates. Under this standard, good cause for expedited discovery exists where the need for expedited discovery, in consideration of administration of justice, outweighs prejudice to the responding party. Oglala Sioux Tribe v. Hunnik, 298 F.R.D. 453, 455 (D.S.D. 2014). "In general, the 'good cause' standard should be applied to requests for expedited discovery, balancing the need for expedited discovery, in the administration of justice, against the prejudice to the responding party, and considering the entirety of the record to date and the reasonableness of the request in light of all of the surrounding circumstances." Wachovia Sec., L.L.C. v. Stanton, 571 F. Supp. 2d 1014, 1050 (N.D. Iowa 2008) (finding good cause where expedited discovery would "clarify matters . . . outside of [Plaintiff's] knowledge and may ultimately lead to the prompt and efficient disposition of this litigation and the parties' underlying dispute," the discovery was narrowly tailored, and there would not be undue prejudice to Defendant).

"District courts within the Circuit…have generally applied this 'good cause' standard." Strike 3 Holdings, LLC v. Doe, No. 18-cv-779, 2018 U.S. Dist. LEXIS 87770, at *5-6 (D.Minn. May 25, 2018) (citing Planned Parenthood Ark. & E. Oklahoma v. Gillespie, No. 4:15-cv-566-KGB, 2018 U.S. Dist. LEXIS 86745, 2018 WL 1904845, at *1 (E.D. Ark. Mar. 20, 2018); Nilfisk, Inc. v. Liss, No. 17-cv-1902, 2017 U.S. Dist. LEXIS 220970, 2017 WL 7370059, at *7 (D. Minn. June 15, 2017); Loeffler v. City of Anoka, No. 13-cv-2060, 2015 U.S. Dist. LEXIS 190598, 2015 WL 12977338, at *1 (D. Minn. Dec. 16, 2015); Oglala Sioux Tribe v. Van Hunnik, 298 F.R.D. 453, 455 (D.S.D. 2014); Wachovia Sec., L.L.C. v. Stanton, 571 F. Supp. 2d 1014, 1050 (N.D. Iowa 2008); Monsanto Co. v. Woods, 250 F.R.D. 411, 413 (E.D. Mo. 2008)); see Progressive Cas. Ins. Co. v. F.D.I.C., 283 F.R.D. 556, 557 (N.D. Iowa 2012) ("[A] majority of courts use the good cause standard.").

Indeed, as recently as last Thursday, Judge Cheryl Zwart applied the "good cause" standard in granting a party's motion for expedited discovery. In granting the request, Judge Zwart stated that "motions for expedited discovery are **typically granted** if the requests are narrowly tailored." Empirical Foods v. Primus Builders, No. 8:19cv457, 2020 U.S. Dist. LEXIS 155570, at *44-45 (D. Neb. Aug. 27, 2020) (emphasis added) (citing Express Scripts, Inc., 2012 WL 1320147, at *1 (expedited discovery granted when requested discovery was not overly burdensome).

Accordingly, the Big Ten's entire Brief is premised on an incorrect legal argument because (1) the Nebraska Rules do not require any finding as required by federal case-law, and the Plaintiffs' Motion is governed only by the Court's exercise of discretion; and (2) even if the Court applies federal case-law, the Court need only find "good cause" as articulated below and as is evident from the record.

IV. Plaintiffs propose a more narrow version of Request for Production No. 4 for purposes of their request for expedited relief (as discussed at the hearing).

At the hearing, the Court noted a concern as to the breadth of Request for Production No. 4. The current version of Request No. 4 states as follows:

> REQUEST NO. 4: All assessments, memoranda, studies, scientific data, and any medical information and advice in possession of the Big Ten at any time during the period from March 15, 2020 to the present regarding any decision to modify, cancel or postpone the 2020 fall football season.

(See Plaintiffs' Limited Discovery Requests, attached to Plaintiffs' Motion for Limited Expedited Discovery). In response to the Court's concern, the Plaintiffs suggest the following revised and limited Request:

> All assessments, memoranda, studies, scientific data, and any medical information and advice discussed, reviewed, and/or considered by the Big Ten between July 1, 2020 and August 12, 2020, relating in any way to its decision to cancel or postpone the 2020 fall football season.

This modified version of Request for Production No. 4 substantially limits the time frame at issue in this Request and calls only for production of those documents actually reviewed, discussed or considered in the weeks leading up to the announcement that fall sports were canceled. Such a request is narrowly tailored to fit the needs of the parties at this time and should be allowed.

V. The Big Ten incorrectly argues the Plaintiffs are unable to state a claim upon which relief may be granted.

As an initial matter, this is not a Motion to Dismiss. Because the Big Ten has not yet moved to dismiss Plaintiffs' Complaint, Plaintiffs do not have a Motion to Dismiss Brief to review or respond to, and it would be unfair to expect the Plaintiffs to respond to the Big Ten's

arguments on the merits in less than 24 hours. At this stage of the case, the Court is required to accept as true the factual allegations in Plaintiffs' Complaint. While the Big Ten relies on evidence outside the pleadings which it claims creates a factual dispute such that it should win, such an argument ignores the fundamental rule that the Plaintiffs' well-pleaded allegations must be accepted as true at this stage of the case.

But even if the Court were inclined to evaluate, in connection with this discovery motion, whether the Plaintiffs have stated viable claims that will survive a motion to dismiss, the Court can easily conclude the Complaint states a claim upon which relief may be granted, and discovery is clearly warranted.

A. Breach of Contract / Third Party Beneficiary / Good Faith and Fair Dealing

1. Plaintiffs have alleged three valid breach of contract claims.

Plaintiffs' claim for breach of contract is based on three separate theories: (1) Plaintiffs' status as third-party beneficiaries; (2) a direct contract between the Plaintiffs and the Big Ten; and (3) the Big Ten's breach of the covenant of good faith and fair dealing.[2] The allegations in Plaintiffs' Complaint must all be taken as true for purposes of evaluating any Motion to Dismiss. And those allegations are more than sufficient to survive an attack at the pleading stage.

a. Third Party Beneficiary Status

1. Courts have routinely found student athletes to be third party beneficiaries under conference and NCAA Bylaws.

First, while citing only one case, the Big Ten erroneously argues it is "settled law" that a student athlete lacks standing to bring claims to enforce conference bylaws as third-party beneficiaries. (See Defendant's Brief, p. 16). To the contrary, numerous courts have held that

[2] The Plaintiffs' Complaint refers extensively to the Big Ten's "Governing Documents," which include the Big Ten "Handbook." The Big Ten's brief does not even attempt to respond to the Plaintiffs' allegations relating to the Handbook.

similarly situated student athletes are third-party beneficiaries under conference and NCAA bylaws and have standing to maintain contract claims under third-party beneficiary theories. For example, in Bloom v. NCAA, the NCAA restricted Bloom's ability to obtain endorsements and participate in entertainment activities. Bloom 93 P.3d 621, 622-623 (Colo. Ct. App. May 6, 2004). As relevant here, Bloom alleged, as a third-party beneficiary of the contract between the NCAA and its members, he was entitled to enforce NCAA bylaws permitting him to engage in and receive remuneration from a professional sport different from his amateur sport. Id. The trial court determined Bloom was a third-party beneficiary under the NCAA Bylaws. Id. On appeal, the Colorado Court of Appeals agreed "that the NCAA's Constitution, Bylaws, and Regulations evidence a clear intent to benefit student-athletes" and that Bloom had standing as a third party beneficiary. Bloom, 93 P.3d at 623-24 (emphasis added). The Bloom decision is consistent with decisions reached by other courts finding student athletes to be third party beneficiaries under NCAA and conference Bylaws. See, e.g., Langston v. Mid-America Intercollegiate Ath. Ass'n, No. MDL No. 2492, 2020 U.S. Dist. LEXIS 51408, at *66-67 (N.D. Ill. Mar. 25, 2020) (“Langston has alleged that the NCAA and PSU entered into a contract obliging the NCAA and PSU to conduct athletic programs in a manner designed to protect the health of PSU's student-athletes. Taking these allegations to be true and making all reasonable inferences in Langston's favor (as the Court must do at this stage), the complaint sufficiently alleges that these obligations were intended solely for the benefit of student-athletes, like Langston. Accordingly, Defendants' motion to dismiss Plaintiff's third-party beneficiary claim is denied.”); Richardson v. Southeastern Conference, No. MDL No. 2492, 2020 U.S. Dist. LEXIS 55340, at *66-68 (N.D. Ill. Mar. 30, 2020) (because it was the intent of the NCAA and the university to oversee football operations in a way that would directly benefit the university's football players, the players were third party beneficiaries under the agreement between the

university and NCAA); Weston v. Big Sky Conference, No. 2492, 2020 U.S. Dist. LEXIS 103080, at *30 (N.D. Ill. June 12, 2020) (concluding that Weston alleged the NCAA and WSU entered into a written agreement by which the NCAA agreed to promulgate rules and regulations, including those set forth in the NCAA's Division Manuals, Constitution, and Bylaws, to protect the safety and physical well-being of each student-athlete, and therefore denying motion to dismiss the breach of contract claim as a third-party beneficiary); Miss. High Sch. Activities Ass'n v. R.T., 163 So. 3d 274, 278 (Miss. 2015) (finding that high-school student athletes are intended beneficiaries of the bylaws and contract between the Mississippi High School Activities Association and member schools); Oliver v. NCAA, 920 N.E.2d 203, 210-12 (Ohio Ct. Com. Pl. 2009) (determining that "[i]t is unquestionable that the defendant and [Oklahoma Statute University]'s contractual agreement is created to confer a benefit on the student-athletes" and allowing a third-party beneficiary claim).

2. Nebraska law is consistent with these cases which have found student athletes to be third party beneficiaries.

In Nebraska, "[b]eneficiaries of a contract may recover thereon, though not named as parties, if it appears by express stipulation or by reasonable intendment that the rights and interests of the unnamed parties were contemplated and provision was being made for them." Spring Valley IV Joint Venture v. Neb. State Bank of Omaha, 269 Neb. 82, 86, 690 N.W.2d 778, 782 (2005) (citation omitted); see also Podraza v. New Century Physicians of Neb., LLC, 280 Neb. 678, 686, 789 N.W.2d 260, 267 (2010). The parties' intent is an issue of fact. See Podraza v. New Century Physicians of Neb., LLC, 280 Neb. 678, 683, 691, 789 N.W.2d 260, 265, 270 (2010).

Similar to Bloom and its related progeny, Plaintiffs have alleged sufficient facts establishing them as the intended third-party beneficiaries of the contract between the Big Ten

and one of its member institutions, the University of Nebraska. The reciprocal promises between the Big Ten and the University are intended to benefit the student athletes. It is disingenuous for the Big Ten to argue that the Bylaws and other Governing Documents do not evidence an intent to benefit the Plaintiffs and other student athletes, yet refuse to produce those Governing Documents and/or disclose only the one or two sections it believes may support its position.

As a result, Plaintiffs can maintain a breach of contract claim against the Big Ten as third-party beneficiaries.

b. Direct Contract with the Big Ten

Second, the Plaintiffs have alleged a direct contract between them and the Big Ten. See, e.g., Complaint, ¶¶ 47-48. The Big Ten cannot avoid these allegations by simply arguing in a brief that it disagrees. In Nebraska, "to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty." Phipps v. Skyview Farms, Inc., 259 Neb. 492, 498, 610 N.W.2d 723, 730 (2000) (citation omitted). "A 'breach' is a nonperformance of a duty." Phipps v. Skyview Farms, Inc., 259 Neb. 492, 499, 610 N.W.2d 723, 730 (2000). "The determination whether a material breach has occurred is generally a question of fact." Siouxland Ethanol, LLC v. Sebade Bros., LLC, 859 N.W.2d 586, 592 (Neb. 2015) (quoting 23 Williston, supra note 6, § 63:3 at 440-41).

Here, the Plaintiffs explicitly allege an agreement between them and the Big Ten. See, e.g., Complaint, ¶ 47. Indeed, the Court accepted into evidence without objection Exhibit No. 2, the Big Ten Agreement Letter of Plaintiff Garrett Snodgrass (the Defendant submitted the same document with its Brief). In that Agreement, which we understand all Big Ten scholarship athletes must sign, Plaintiff's scholarship is subject to his "full compliance with this institution's policies and the rules, regulations, bylaws and other legislation of the Big Ten Conference…"

(Exhibit No. 2). Yet the Big Ten won't even provide the Plaintiffs with copies of those documents. Nonetheless, the allegations in the Complaint allege a contract between the Plaintiffs and the Big Ten, and this is sufficient to allege an independent contract theory of recovery which will presumably be the subject of further discovery as this case progresses.

c. Good Faith and Fair Dealing

Third, the Plaintiffs also assert a claim for breach of the covenant of good faith and fair dealing. (Complaint, ¶¶ 47-48). These allegations, like the claim for breach of a direct contract, are not susceptible to dismissal at the pleading stage.

2. All Parties Agree the Big Ten Bylaws Are Relevant Evidence, and the Big Ten's Attempt to Offer Only Part of Its Bylaws and Hide the Other 95% of Its Bylaws Support Plaintiffs' Motion.

a. The Big Ten's repeated assertion that it is "as transparent as possible" couldn't be farther from the truth.

The Big Ten goes to great lengths in its Brief to argue it is being **transparent**. Take, for example, the following arguments advanced by the Big Ten in its Brief:

- "[T]he Big Ten has been as transparent as possible…" (Defendant's Brief, p. 8).
- "While Plaintiffs contend that the Big Ten has not been transparent as to its reasoning, nothing could be further from the truth." (Defendant's Brief, p. 5).
- "[C]onsistent with the transparent approach [the Big Ten] has taken to date…" (Defendant's Brief, p. 9).
- "The announcement was followed by an 'open letter' from Big Ten Commissioner Kevin Warren…" (Defendant's Brief, p. 5).

However, the Big Ten continues to hide the specifics of the vote, evidence supporting its contention that a vote occurred, and any specifics regarding the medical basis for its decision. One notable example of the Big Ten's continued lack of transparency is its partial disclosure of

its own Bylaws. Consistent with its overall lack of transparency, the Big Ten has now submitted two small excerpts from its Bylaws and then redacted the other 95% of the Bylaws that it did not want the Plaintiffs or the Court to see. **Even though the Plaintiffs are forced to agree to be bound by these Bylaws and can be punished if they do not comply, the Big Ten refuses to produce those Bylaws and is preventing the Plaintiffs from seeing the very document the Big Ten forces the Plaintiffs to agree to. That is neither transparent nor fair. The Big Ten has relied on its own Bylaws to support the arguments made in its Brief; its selective disclosure of those Bylaws cannot stand, and Plaintiffs' Motion for Limited Expedited Discovery should be sustained.**

These issues can be further briefed in connection with any motions to dismiss or motions for summary judgment that may be filed in the future, but the breach of contract allegations are well-pleaded, must be accepted as true for purposes of a motion to dismiss, and state a claim upon which relief may be granted. The Big Ten's arguments to the contrary are without merit.

B. Tortious Interference

1. Elements Under Nebraska Law

Under Nebraska law, a plaintiff pleads a viable claim for tortious interference if it pleads the following elements: (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted. Thompson v. Johnson, 299 Neb. 819, 828 (2018) (citation omitted). Tortious interference with a business expectancy has been defined as "an intentional, damaging intrusion on another's potential business relationship, such as the opportunity of obtaining customers or employment." Black's Law Dictionary 1627 (9th ed. 2009).

2. Plaintiffs' factual allegations clearly satisfy the pleading standard for establishing a "reasonable expectation" of a business expectancy.

The Big Ten largely ignores all of the Plaintiffs' factual allegations supporting their tortious interference claim and addresses them only in a footnote on page 16 of the Big Ten's Brief, where the Big Ten argues the Nebraska Fair Pay to Play Act was only recently enacted and will not inure to the Plaintiffs' benefit until such time as the University of Nebraska authorizes its implementation. Plaintiffs agree. Plaintiffs have rights to their own name/image/likeness right now, and whether the University of Nebraska intends to take action tomorrow, next week or next month is a question for discovery so that it can be determined whether Plaintiffs have a "reasonable expectation" of financial benefit as required to state a claim. This is what distinguishes a claim for tortious interference with an [existing] business *relationship* from a claim for interference with a business *expectancy*.

Fact discovery will reveal the Plaintiffs' expectation is indeed reasonable. The University of Nebraska has already partnered with Opendorse (a market leader in helping athletes prepare and execute programs to increase the value of their Name, Image, and Likeness) to launch the Ready Now Program, which is tailored to every student athlete.[3] And a recent study shows that the Name/Image/Likeness rights possessed by student athletes at the University of Nebraska are likely worth somewhere between a few hundred dollars to over $150,000 per athlete.[4] Indeed, a study conducted by Opendorse evaluated the annual earnings potential of student athletes at the University of Nebraska and released the following chart showing the earning potential of the top student athlete in every sport:

[3] See https://huskers.com/news/2020/3/10/athletics-huskers-launch-first-ncaa-program-to-maximize-value-of-individual-brands.aspx; and https://fivethirtyeight.com/features/student-athletes-will-soon-be-social-media-influencers-and-one-college-program-is-helping-them-do-it/.

[4] See https://fivethirtyeight.com/features/student-athletes-will-soon-be-social-media-influencers-and-one-college-program-is-helping-them-do-it/

The top University of Nebraska student-athlete per sport by estimated potential annual earnings through social media branding

		TWITTER/INSTAGRAM		
ATHLETE	SPORT	TOTAL FOLLOWERS	EARNINGS PER POST	ANNUAL EARNINGS
Adrian Martinez	Football	79,531	$1,501	$153,147
Lexi Sun	Volleyball	70,857	1,160	39,438
Trey McGowens	Basketball (M)	24,217	364	8,014
Taylor Kissinger	Basketball (W)	7,156	188	4,317
Logan Foster	Baseball	7,079	169	3,880
Allie Binder	Track and field	9,393	136	3,671
Alex Thomsen	Wrestling	14,808	207	1,859
Emma Worley	Tennis (W)	1,992	56	1,124
Brynn Lambrecht	Bowling	4,018	50	844
Hannah Davis	Soccer (W)	5,325	47	837
Khalil Jackson	Gymnastics (M)	5,089	60	726
William Gleason	Tennis (M)	1,483	39	504
Maggie Berning	Swimming/diving	2,071	28	495
Lexey Kneib	Softball	7,680	127	381
Will Marshall	Golf (M)	1,722	33	333
Sierra Hassel	Gymnastics (W)	8,061	104	313
Jessica Haraden	Golf (W)	3,331	13	203
Trinity Gomez	Rifle	1,169	15	168

SOURCE: OPENDORSE

Given that the Plaintiffs in this case are seeking **nominal damages** and have **disclaimed damages in excess of $75,000**, it is clear that the Plaintiffs have pleaded and will sustain some level of damages -- even if only nominal -- as a result of their inability to showcase their talent and build their brand during the 2020 fall football season. Since a "reasonable expectation of financial benefit" is sufficient to satisfy this element -- and Plaintiffs have adequately pleaded that element in their Complaint (and obviously have an abundance of additional facts upon which discovery can be conducted on this issue) -- the Plaintiffs have adequately pleaded their claim for tortious interference and it will survive any attack at the pleading stage of the case.

CONCLUSION

The Plaintiffs have propounded limited discovery: two Interrogatories and four Requests for Production of Documents. The requests can be answered in a few days and involve key

information that goes to the heart of Plaintiffs' claims and their requested relief. The Big Ten does not argue that responding to the requests would be burdensome; it argues only that it should not have to produce the information/documents because it already selectively chose which facts it wishes to disclose. That is not how discovery works in civil litigation.

Plaintiffs respectfully request the Court enter an Order requiring the Big Ten to produce all responsive information and documents by no later than 12:00 p.m. Central on Friday, September 4, 2020. The Plaintiffs are providing a proposed Order contemporaneously herewith.

Dated this 1st day of September, 2020.

Respectfully submitted,

GARRETT SNODGRASS, GARRETT NELSON, ETHAN PIPER, NOA POLA-GATES, ALANTE BROWN, BRANT BANKS, BRIG BANKS, and JACKSON HANNAH, Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on this 1st day of September, 2020, upon the Defendant Big Ten Conference, Inc. through its attorneys via email and regular U.S. mail, postage prepaid as follows:

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