IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

GARRETT SNODGRASS, GARRETT NELSON, ETHAN PIPER, NOA POLAGATES, ALANTE BROWN, BRANT BANKS, BRIG BANKS, and JACKSON HANNAH, Plaintiffs, v. THE BIG TEN CONFERENCE, INC., Defendant.	)	Case No. CI20-3086 **BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LIMITED EXPEDITED DISCOVERY**

Defendant The Big Ten Conference, Inc. ("Big Ten"), by and through counsel, opposes Plaintiffs' motion for limited expedited discovery. There is no merit to Plaintiffs' Complaint, something the discovery sought cannot remedy. The Complaint is solely premised on three incorrect and unsupportable assertions:

1. the Big Ten's Council of Presidents and Chancellors ("COP/C") did not vote to postpone the 2020–21 fall sports season;
2. if the COP/C did vote, it did not exceed the 60% threshold required by the Big Ten's By-Laws; and
3. even if the vote exceeded 60%, the COP/C solely relied on one faulty study.

All of Plaintiffs' claims hinge on those three assertions, which are without merit because:

1. On August 11, 2020, the governing board of directors of the Big Ten, the COP/C, voted 11-3 to postpone the 2020–21 fall sports season due to ongoing health and safety concerns related to the COVID-19 pandemic, including the health and safety of the thousands of staff, referees and student-athletes who participate in intercollegiate activities and the surrounding communities. *See* Ex. A, Schapiro Aff. ¶¶ 5–7 (Aug. 31, 2020).
2. The vote complied with the Big Ten's By-Laws because it exceeded the 60% threshold necessary when "reduc[ing] the number of sporting events in a member's schedule." Ex. B, Big Ten By-Laws § 5.2.[1]
3. The COP/C's decision was the result of discussion and "medical advice and counsel of the Big Ten Task Force for Emerging Infectious Diseases [("Infectious Diseases Task Force")]," a task force of highly qualified medical professionals from each of The Big Ten's fourteen member schools, including the University of Nebraska, "and the Big Ten Sports Medicine

[1] Indeed, 60% is the highest threshold that could apply to August 11 vote. Section 5.1 bestows the COP/C with "all such authority and powers of the [Big Ten]" and the ability "to do all such lawful acts and things as are not by statute, these By-Laws or the Certificate of Incorporation directed or required to be exercised or done by the members." Section 5.2 states that all such actions "unless otherwise provided by the Certificate of Incorporation or by these By-Laws, **require a majority vote**" (emphasis added). Thus, to the extent a postponement is deemed to be something other than a scheduling change, the number of votes needed for approval decreases dramatically (from nine to seven). The August 11 vote far exceeded this requirement.

Committee," comprised of sports medicine and team physicians from the fourteen member schools, among other factors. *See* Ex. C, Big Ten Press Release (Aug. 11, 2020). There is no basis for Plaintiffs' contention that all of these highly respected professionals relied solely on a single flawed study.

No amount of discovery, whenever obtained, will change these facts. Plaintiffs should dismiss this case voluntarily. If they do not do so, we ask that this Court deny the current motion and set an expedited briefing schedule on a motion to dismiss.

Plaintiffs are eight University of Nebraska student-athletes who disagree with the COP/C's decision and seek to have it overturned. But Plaintiffs' desire for a different outcome does not equate to a cause of action allowing them to overturn a duly-made decision by the governing body of the Big Ten that impacts thousands of people in and around the fourteen member schools. There is no legal authority that allows Plaintiffs to substitute their judgment as to safety and the risks presented by the pandemic for that of the COP/C. Plaintiffs' claims ultimately will be dismissed (or, consistent with their counsel's ethical obligations, Plaintiffs will voluntarily dismiss their unsupportable claims).

Plaintiffs know this. They also know that in the normal course of litigation, that dismissal would end Plaintiffs' fishing expedition. To circumvent this reality, and obtain what is the true objective of their baseless complaint—information about the COP/C deliberative process—Plaintiffs have filed this motion for expedited discovery. To be clear, the Big Ten opposes this motion, not because of a concern as to what its internal

documents will show, but because it is an unwarranted intrusion into the legitimate deliberative process of a non-profit decision-making body that should not be permitted. Again, even if Plaintiffs were entitled to the information they seek (and they are not), that information would not support a claim for relief. The Court should not indulge this meritless probe, and Plaintiffs' motion should be denied.

I. BACKGROUND

On August 11, 2020, five months into a global pandemic that has killed nearly 200,000[2] people in this country (and is projected to kill more than 300,000 by December[3]), the Big Ten announced the postponement of the 2020–21 fall sports season due to ongoing health and safety concerns related to the COVID-19 pandemic. Ex. C, Big Ten Press Release (Aug. 11, 2020).

This decision did not occur in a vacuum. The initial press release indicated that this decision "was based on multiple factors" including "the medical advice and counsel of the Big Ten Task Force for Emerging Infectious Diseases [("Infectious Diseases Task Force")] and the Big Ten Sports Medicine Committee." *Id.* The decision was the result of COP/C members' discussions with members of the Infectious Diseases Task Force and the Big Ten Sports Medicine Committee. *Id.* The Infectious Diseases Task Force, which was created in March 2020, has representation from each of the Big Ten's fourteen member

[2] *Coronavirus in the U.S.: Latest Map and Case Count*, New York Times (last updated Aug. 29, 2020, 9:42 A.M. ET), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html
[3] Nurith Aizenman, *300,000 Deaths By December? 9 Takeaways From The Newest COVID-19 Projections*, NPR (Aug. 6, 2020), https://www.npr.org/sections/health-shots/2020/08/06/900000671/300-000-deaths-by-december-9-takeaways-of-the-newest-covid-19-projections.

schools, including the University of Nebraska. Ex. D, Big Ten Press Release (Apr. 20, 2020). The express purpose of the group is "to provide counsel and sound medical advice to ensure the health, safety and wellness of the Big Ten's students, coaches, administrators and fans." *Id.* Relying on this advice, the COP/C, which itself includes two member-school presidents who are renowned medical professionals,[4] voted to postpone the fall season. Thus, the "status quo," Plfs' Mot. for Ltd. Expedited Discovery ¶ 3, that has been in place since August 11, 2020, is that the 2020–21 fall sports season is postponed.

While Plaintiffs contend that the Big Ten has not been transparent as to its reasoning, nothing could be further from the truth. The announcement was followed by an open letter from Big Ten Commissioner Kevin Warren explaining in detail the reasoning and process behind the decision. Ex. E, Warren Letter (Aug. 19, 2020). The letter stated that the vote by the COP/C "was overwhelmingly in support of postponing fall sports." *Id.* It listed with great specificity the primary medical and risk-related factors that led to the decision and noted that the Big Ten had assembled a Return to Competition Task Force "to plan for the return of fall sports competition as soon as possible." *Id.*

The Big Ten reiterated many of these points in another statement issued on August 27, 2020, again stating that there was a vote by the COP/C, that the vote was "overwhelmingly" in favor of postponing the season and that the decision was due to

[4] Dr. Mark S. Schlissel is the president of the University of Michigan. *Office of the President: Biography*, University of Michigan, https://president.umich.edu/about/biography/. Samuel L. Stanley Jr., M.D., is the president of Michigan State University. *Office of the President: Biography*, Michigan State University, https://president.msu.edu/meet-the-president/biography.html.

ongoing health and safety concerns, among other factors. Ex. F, Big Ten Press Release (Aug. 27, 2020).

Earlier that same day, Plaintiffs filed a Complaint setting forth three causes of action against the Big Ten related to the COP/C's vote to postpone the 2020–21 fall sports season. Plaintiffs' claim that the Big Ten tortiously interfered with their expectation to "play professional football" and "to market themselves and develop their brand." Compl. ¶¶ 32–41. Plaintiffs also allege that the Big Ten breached its governing documents, which caused damage to Plaintiffs as third-party beneficiaries to those governing documents, and has breached a claimed duty of good faith and fair dealing. *Id.* ¶¶ 42–51. Finally, Plaintiffs seek a declaratory judgment allowing them to reverse the Big Ten's decision because, they allege, the COP/C did not vote to postpone the fall season. *Id.* ¶¶ 52–57. Under this claim, Plaintiffs seek an order reinstating the football season for all fourteen schools, an order that would affect thousands of student-athletes, administrators, staff and others around the country. *See id.*

Within an hour of the Complaint appearing on the court's docket and without the requisite three days' notice to the Big Ten, NEB. CT. R. P. § 6-1106(e), Plaintiffs filed the instant Motion for Limited Expedited Discovery, which requested a response to four requests for production of documents and two interrogatories within five days. According to Plaintiffs, expedited discovery—before the court has evaluated whether they have even stated a valid claim for relief—is necessary because, without it, "they will not be able to seek temporary injunctive relief to prevent the Big Ten from implementing its invalid and

legally unenforceable decision." Plfs' Mot. for Limited Expedited Discovery ¶ 3. Thus, Plaintiffs argue, they seek evidence of "whether a vote was taken, and if so, the result of any such vote(s), as well as the information reviewed allegedly supporting the vote, *so that they may evaluate whether the decision violated any of their rights*." *Id.* ¶ 2 (emphasis added). A hearing on the motion was held just three hours later.

Although Plaintiffs' claims are invalid on their face, the Big Ten is providing with this brief in opposition answers to Plaintiffs' central allegation as to the validity of the Big Ten's decision. As stated numerous times in public, and provided under oath here, the COP/C did vote on the decision to postpone the season, and the vote was 11-3 in favor of the decision. This, once and for all, should put to rest Plaintiffs' baseless assertion that the Big Ten decision was somehow invalid.

In addition, we are providing this Court with the Big Ten's statements as to how it reached its decision—based on consultation and advice with members of two committees of medical experts—to dispel any notion that the COP/C somehow relied on one flawed study. Plaintiffs do not identify the source of their "information and belief" as to this allegation, and it is untenable on its face.

II. ARGUMENT

A. The Big Ten's Responses to Requests for Production Nos. 1 and 3—Attached Here—Remove Any Doubt as to the Baseless Nature of Plaintiffs' Claims.

Plaintiffs' Complaint is almost entirely predicated on their allegations that the Big Ten postponed the 2020–21 fall sports season without a vote of at least 60% of the COP/C,

in violation of its own By-Laws. Plaintiffs are wrong, which is clear from the numerous statements made by the Big Ten that are already in the public domain. This includes multiple, detailed press releases outlining: (1) that a vote to postpone occurred and was overwhelmingly in favor of postponing the 2020–21 fall sports season; (2) the categories of information relied on; and (3) the entire slate of esteemed medical professionals comprising the Infectious Diseases Task Force and the Sports Medicine Committee.[5]

Thus, contrary to Plaintiffs' assertion, Plfs' Mot. for Ltd. Expedited Discovery ¶ 2, the Big Ten has been as transparent as possible, while still protecting the integrity of the deliberative process for the COP/C, as well as the numerous medical professionals advising it.

Yet, because they disagree with the COP/C's decision, Plaintiffs demand more information, going so far as demanding "*[a]ll* 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." Plfs' Ltd. Discovery Requests, Request No. 4 (emphases added). Despite no allegation of wrongdoing or improper motive by the COP/C, Plaintiffs seek any and all information relied on by any of the professionals who advised the Big Ten in order to then substitute their own medical judgment.

[5] Ex. E, Warren Letter (Aug. 19, 2020); Ex. C, Big Ten Press Release (Aug. 11, 2020); Ex. D, Big Ten Press Release (Apr. 20, 2020).

This turns the legal process on its head. Courts decide motions to dismiss on the basis of "the face of the complaint" along with any "materials that are necessarily embraced by the pleadings." *Gray v. Nebraska Dep't of Corr. Servs.*, 26 Neb. App. 660, 667 (2018). Thus, district courts should stay any discovery pending the outcome of a motion to dismiss. *See id.* Plaintiffs' approach is particularly inappropriate where, as here, their claims are clearly invalid on their face (*see infra,* Section II(B)(1)).

However, consistent with the transparent approach it has taken to date and to dispel the fictitious account perpetuated by Plaintiffs of how the postponement decision was made, the Big Ten is producing with this brief two exhibits to put to rest any doubt that the COP/C acted within its powers and according to its governing rules.

First, attached as Exhibit B is a portion of the Big Ten's By-Laws.[6] As Plaintiffs allege, and the By-Laws confirm,

> All actions relating to the following matters of [the Big Ten] are reserved to and may take effect only upon the vote of not less than sixty percent (60%) of the entire Board of Directors: . . . (d) enforcing any of the [Big Ten]'s Rules, Regulations, Agreements, Appendices or these By-Laws which would . . . (i) reduce the amount of revenue to be received by a member; . . . (iii) **reduce the number of sporting events in a member's schedule;** or (iv) deprive participation of a member's team in either a post-season sporting event or in a telecast of a sporting event . . . .

Ex. B, Big Ten By-Laws § 5.2 (emphasis added); *see also* Compl. ¶ 20.

The Big Ten's By-Laws require a vote of 60% of its board to postpone the 2020–21 fall sports season.[7] And that is exactly what occurred here.

[6] The By-Laws are produced in response to Request for Production No. 3.
[7] As noted in footnote 1, 60% is the highest threshold possibly required for this vote.

Attached as Exhibit A is an affidavit from Morton Schapiro, the Chair of the COP/C and the president of Northwestern University.[8] Under penalty of perjury, Dr. Schapiro testifies that: (1) the decision to postpone the 2020–21 fall sports season was the result of a vote by the COP/C (Ex. A, Schapiro Aff. ¶ 5 (Aug. 31, 2020)); and (2) the vote was 11-3 in favor of the decision (*id.* ¶ 7), far exceeding the 60% required by the By-Laws. This is consistent with what the Big Ten has stated publicly prior to this lawsuit.

These documents, which are responsive to Requests for Production 1 and 3 and Interrogatory 1, make clear that Plaintiffs have no basis to challenge the decision of the COP/C to postpone the 2020–21 fall sports season. These documents answer the questions "whether a vote was taken"—Yes—"and if so, the result of any such vote(s)"—11-3 for approval of postponement. *See* Plfs' Mot. for Ltd. Expedited Discovery ¶ 2. Given that Plaintiffs' argument to invalidate the decision hinges on whether the COP/C followed its By-Laws, it is clear that Plaintiffs' claims are baseless, will not survive a motion to dismiss and should be voluntarily dismissed.

Accordingly, all that is left of Plaintiffs' expedited discovery request is the exceedingly broad demand for all "information reviewed allegedly supporting the vote," the purported purpose of which is to allow Plaintiffs to "evaluate whether the decision violated any of their rights." *Id.* As detailed below, there is no legal or factual basis to provide that discovery now (or ever) and doing so would be exceedingly harmful to the Big Ten.

[8] The affidavit is produced in response to Request for Production No. 1 and Interrogatory 1.

B. Plaintiffs Have Failed to Meet the Standard to Obtain Discovery Now.

Even if Exhibits A and B do not dispense with this case, Plaintiffs are not entitled to the discovery they seek at this time. Nebraska Court Rule of Discovery 34 provides a defendant with "forty-five days after service of the summons upon that defendant" to respond to discovery requests. Although the Court may grant "a shorter or longer" response time, *id.*, there is no clear standard under Nebraska law for when a court should grant "a shorter" time to respond to a discovery request. However, the Comment to Rule 34 provides guidance. It states, "This rule follows the federal rule." *Id.* cmt.; *see also Biloff v. Gregory Allen Biloff*, No. A-99-033, 2000 WL 781377, at *6 (Neb. Ct. App. June 20, 2000) (unpublished) ("[W]e find federal authority highly persuasive based on the fact that Nebraska's rule 34 is modeled after rule 34 of the Federal Rules of Civil Procedure.").

Federal courts have not reached consensus regarding the standard that should govern requests for expedited discovery. *See* Jesse N. Panoff, *Rescuing Expedited Discovery from Courts and Returning It to FRCP 26(d)(1): Using a Doctrine's Forgotten History to Achieve Legitimacy*, 64 Ark. L. Rev. 651, 661–71 (2011). The three most common tests are: (1) the test outlined in *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982); (2) the reasonableness test; and (3) the good cause standard. *Id*. Plaintiffs, without any legal support, assert a fourth standard should apply—a balancing test. Plfs' Mot. for Ltd. Expedited Discovery ¶ 7. But under any standard, discovery now is improper.

1. Plaintiffs Cannot Show Probability of Success on the Merits.

Under the *Notaro* test, a plaintiff must show: "(1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted." *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982). Critically, Plaintiffs have failed to demonstrate that they have any probability of success on the merits.[9]

Plaintiffs' claim that limited expedited discovery is warranted here "because the Student Athlete Plaintiffs will be able to obtain important discovery information sufficiently early to protect their rights under the law." Plfs' Mot. for Ltd. Expedited Discovery ¶ 6. But that claim suffers from a key, fatal flaw—Plaintiffs' claims are predicated on the assertion of a purported legal right to challenge the Big Ten's decision to postpone the 2020–21 fall sports season, a right which they unquestionably do not have.

The Big Ten has shown that Plaintiffs' central contention—that the COP/C did not vote, or that any vote did not comply with the By-Laws—is wrong. The only assertion left to support this entire case is Plaintiffs' fanciful claim that the COP/C decision "was based on flawed data." Compl. ¶¶ 37, 48. They obliquely reference one study, and suggest that

[9] Plaintiffs' motion also fails the other three elements of the *Notaro* test. They cannot show irreparable harm because they allege their claims are compensable. In addition, there is no connection between the discovery requests and avoidance of injury because their claims are invalid. Finally, the Big Ten will be injured by these requests as they will open the door to future unwarranted discovery on facially dubious claims, as explained in more detail in Section B(2), *infra*.

was the only data the COP/C considered. But Plaintiffs offer *no support* for this remarkable contention, which simply flies in the face of common sense and the public record. It is uncontested that five months ago the Big Ten convened a task force of public health and related experts from each school to provide advice and counsel as to the issues presented by the pandemic. Plaintiffs apparently claim that the deliberations by these medical professionals, along with the deliberations of the COP/C were dominated by consideration of "one flawed study." There is no support for this imaginative claim; all information is to the contrary.

In addition, Plaintiffs do not state what alternative medical evidence they believe the COP/C should have relied on. Under well-settled pleading standards in Nebraska, Plaintiffs' unsupported (and unsupportable) claim that all COP/C members and all of the medical professionals advising them relied on one allegedly flawed study is implausible on its face and is insufficient to support their claims. *See Vasquez v. Chi Props., LLC*, 302 Neb. 742, 750 (2019) ("[A] plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.").

Even if Plaintiffs had provided some alternative medical approach to the analysis performed by the COP/C, their claim would fail in any event. Plaintiffs' unsupported assertion that the COP/C relied on "flawed data" is nothing more than a clear attempt to exchange their judgment—or the Court's—for the COP/C's. This they cannot do.

To the contrary, the well-settled business judgment rule, protecting the good faith decisions of non-profit governing boards, serves as a bar to recovery. That "rule is 'a

presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" *Sadler v. Jorad, Inc.*, 268 Neb. 60, 66 (2004) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). Under the rule, "courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Id.* at 66. Although the business judgment rule is often applied in shareholder derivative lawsuits, it applies equally to decisions of non-profit boards. Accordingly, the relief that Plaintiffs seek, invalidating a vote of an organization's board of directors, is barred by the business judgment rule.

Plaintiffs have alleged no facts that suggest that any members of the COP/C were acting in bad faith when they voted to postpone the 2020–21 fall sports season, nor could they. The statements of the Big Ten, as well as the affidavit of Morton Schapiro, make clear that the COP/C voted based on sound feedback, guidance and advice from medical experts, including "a diverse set of disciplines across campus healthcare systems and schools of public health," that represent a "collection of world-class research institutions with the resources and talented medical experts on campus." Ex. D, Big Ten Press Release (Apr. 20, 2020). As stated in multiple press releases, the COP/C relied on information from this counsel, as it had for months, to make the difficult decision to postpone the 2020–21 fall sports season. This decision, and the specific information underpinning it, is exactly what the business judgment rule was designed to protect.

Failing to apply the business judgment rule here has very real, and harmful, consequences. As discussed further *infra*, setting a precedent for the public disclosure of the Big Ten's private deliberations and decision-making processes constitutes harm that goes far beyond eight student-athletes, given the chilling effect it is likely to have on COP/C internal discussions.

Looking at the elements Plaintiffs must prove to substantiate their claims fairs no better for Plaintiffs. To prevail under their tortious interference theory, Plaintiffs are required to prove, among other things, "an unjustified intentional act of interference on the part of the interferer." *Thompson v. Johnson*, 299 Neb. 819, 829 (2018). In deciding whether a defendant's action was "unjustified," Nebraska courts consider a number of factors:

> (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.

Id. The By-Laws give the Big Ten, through the COP/C, broad authority to manage the "business and affairs of the" Big Ten, including making decisions such as "reduc[ing] the number of sporting events in a member's schedule." Ex. B, Big Ten By-Laws §§ 5.1, 5.2. Plaintiffs have not alleged, and would have no conceivable basis to allege, that the COP/C decided to postpone the 2020–21 fall sports season in bad faith for the purpose of reducing Plaintiffs' future earnings. *See, e.g.*, Ex. E, Warren Letter (Aug. 19, 2020); Ex. C, Big Ten

Press Release (Aug. 11, 2020). That decision, which the COP/C was entitled to make, cannot constitute tortious interference with any business expectancy of the Plaintiffs.[10]

Plaintiffs' breach of contract claim fairs no better. It is settled law that student-athletes do not have standing to bring claims to enforce conference by-laws as third-party beneficiaries. In a case bearing a striking resemblance to this one, the Ninth Circuit rejected student-athletes' claims that they were third-party beneficiaries to the contracts between the Pacific-10 Conference ("Pac-10") and its member schools. *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315, 1319 (9th Cir. 1996). There, the plaintiffs relied on statements in the Pac-10's governing documents that its goals were "'[a]cademic and athletic achievement of student-athletes,' 'increased educational opportunities for young people,' 'quality competitive opportunities for student-athletes,' and 'amateurism in intercollegiate athletics.'" *Id.* The Ninth Circuit agreed with the district court's conclusion that "this language largely consisted of 'vague, hortatory pronouncements in the contract' and that '[b]y themselves, these pronouncements are not sufficient to support the players' claims that the Pac–10 intended to assume a direct contractual obligation to every football player

[10] Nor does the newly adopted Fair Right to Play Act (Compl. ¶ 34) help Plaintiffs. That statute does not apply to anyone (including Plaintiffs) until the University of Nebraska determines when it should take effect. 2020 Neb. Laws 962. That has not occurred and may be delayed until as late as July 1, 2023. *See id.* Plaintiffs therefore do not have any immediate ability to generate income under the Act. Moreover, although the statute will permit student-athletes to develop their brands, it neither guarantees them the right to play in any particular game nor abridges the Big Ten's right to make decisions regarding scheduling of games. Accordingly, the idea that any individual student-athlete might earn less money in the future, once the Act goes into effect, based on the Big Ten's decision to postpone games now is too hypothetical and attenuated to support a tortious interference claim.

on a Pac–10 team.'" *Id.* (quoting *Hairston v. Pac.-10 Conf.*, 893 F. Supp. 1485, 1494 (W.D. Wash. 1994)).

Plaintiffs' arguments here are nearly identical to those in *Hairston*. Plaintiffs argue that "[a] principal reason the Big Ten exists is to provide opportunities to its student athletes and to benefit its student athletes." Compl. ¶ 43. They then rely on public statements the Big Ten has made stating "that its 'primary responsibility is to make the best possible decisions in the interest of [its] students, faculty, and staff.'" *Id.* ¶ 45. These are the same "vague, hortatory pronouncements" that were insufficient to support a claim that "the Pac–10 intended to assume a direct contractual obligation to every football player on a Pac–10 team." *Hairston*, 101 F.3d at 1319 (quoting *Hairston*, 893 F. Supp. 1485, 1494).

The Northern District of Illinois's recent decision in *Richardson v. Southeastern Conference* further undermines Plaintiffs' position. No. 16 C 8787, 2020 WL 1515730 (N.D. Ill. Mar. 30, 2020). There, the court concluded that a former Southeastern Conference student-athlete was a third-party beneficiary of the NCAA's contract with his former school because, unlike *Hairston* (and here), the NCAA had entered into "specific commitments . . . to safeguard the mental and physical well-being of its football players," including "to enact and implement rules and regulations to protect the safety and well-being of each student-athlete." *Id.* at *1, 12.

Plaintiffs' claims here are opposite to those in *Richardson* in every material respect. Here, like in *Hairston*, Plaintiffs only rely on "vague, hortatory pronouncements," *Hairston*, 11 F.3d at 1319, by the Big Ten to place student-athletes "at the center of every

decision." Compl. ¶ 45. In addition, in *Richardson* the athletic conference allegedly did not protect the student-athletes whereas here, Plaintiffs contest the Big Ten's decision to protect them. *Richardson* supports dismissal of Plaintiffs' contract claim.[11]

Moreover, even if Plaintiffs had standing to enforce the Big Ten's By-Laws in a breach-of-contract action, their claim would fail because *no breach occurred*. As previously discussed, the COP/C's decision was made in accordance with the Big Ten's By-Laws and with a goal of promoting the health and safety of student-athletes.

Plaintiffs' final cause of action—which seeks a declaratory judgment that the COP/C did not vote on the decision to postpone the 2020–21 fall sports season—is equally flawed. *See id.* ¶¶ 52–57. As the Big Ten has established, the COP/C did vote on the decision and the vote was 11-3 in support of postponing fall sports. Ex. A, Schapiro Aff. ¶¶ 5–7 (Aug. 31, 2020). Plaintiffs therefore are not entitled to a declaratory judgment and should voluntarily dismiss this claim because its sole factual basis has been proven false.

This is a discovery motion in search of a case. Nebraska courts do not allow "fishing expedition[s]" that are undertaken to support "fanciful allegation[s]." *See I Am. Employers*

[11] Although unclear from the Complaint, Plaintiffs appear also to allege that they have entered into a direct contract with the Big Ten whereby "the Big Ten has agreed to coordinate athletic competitions including football subject to conference rules and requirements." Compl. ¶ 47. This appears to be a reference to the Big Ten Tender of Financial Aid ("Tender") that Plaintiffs (for the first time) raised at the hearing on this motion. Ex. G, Big Ten Tender of Financial Aid. Even assuming Plaintiffs are attempting to base their breach of contract claim on this Tender, the claim still fails. The Tender only requires student-athletes to comply "with the rules, regulations, bylaws and other legislation of the Big Ten" and does not impose any requirements on the Big Ten in exchange, and certainly nothing that would abridge the right of the COP/C to postpone the 2020-21 fall season. *Id.* Acceptance, ¶ 4.

Grp., Inc. v. Lentz, No. A-01-731, 2002 WL 31747268, at *9, *11 (Neb. Ct. App. Dec. 10, 2002) (unpublished) (internal quotation marks omitted). The Court should reject Plaintiffs' "speculative claim" that the requested "discovery will provide the requisite evidence to flesh out deficient claims." *Id.* at *9. Indeed, Plaintiffs' claims are worse than speculative; they have been affirmatively disproved by a sworn affidavit. A discovery request that embarks on "'fishing expedition' to determine whether the statements in the affidavit are true" does not qualify as "permissible discovery." *Ex parte Vulcan Materials Co.*, 992 So. 2d 1252, 1266 (Ala. 2008). The motion should be denied.

2. Plaintiffs Also Cannot Satisfy Any Other Expedited Discovery Test.

Even if the Court chooses not to apply the *Notaro* standard, Plaintiffs' motion fails under any other legal standard governing expedited discovery requests. The federal courts have sometimes applied two other tests in determining whether to grant expedited discovery—the reasonableness test and the good cause standard—both of which look to whether the need for the discovery sought outweighs the harm or prejudice to the disclosing party. *See, e.g.*, *Share Corp. v. Momar, Inc.*, No. 10-cv-109, 2010 WL 724321, at *2 (E.D. Wis. Feb. 26, 2010) (reasonableness test); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) (good cause standard). Without legal authority, Plaintiffs suggest a separate "balancing of interests" test that, without invoking reasonableness or good cause by name, appears to look to the same factors of those tests in practice.

Regardless of which test or terms the Court applies, Plaintiffs cannot satisfy the standard. Their claims fail on the merits, regardless of whether they obtain expedited

discovery or not. Because there is no need for the discovery, this lack of need cannot outweigh even slight prejudice to the opposing party.

But here, the prejudice to the Big Ten in granting the motion is real and substantial. The Big Ten is a private non-profit corporation, and its deliberations and decision-making processes are not public. The COP/C and Big Ten leaders relied on candid medical opinions, risk assessments and deliberations by highly qualified professionals. The COP/C needed such candid and thoughtful advice and counsel in order to receive the best information available. Similar advice will be required in the future, as the COP/C deliberates on when and how to return to competition. The potential chilling effect that will result from the public disclosure of these deliberations and counsel is incalculable. Professionals advising the COP/C members, and the COP/C itself, will have to consider what they say and how they say it while considering the difficult issues of addressing the pandemic and the public health and safety issues that result. Indeed, if the Court permits Plaintiffs to circumvent the usual procedural protections of the motion to dismiss and use meritless legal claims to obtain the Big Ten's confidential documents, the precedent of allowing student-athletes to review the internal deliberations of the COP/C will most assuredly be used by others in the future, in similarly meritless lawsuits against the Big Ten.

Finally, as this Court noted at the August 27, 2020 hearing, the request for all medical evidence, advice, assessments and scientific data provided to the Big Ten over a five month period is daunting. Moreover, the request itself is inconsistent with the

Plaintiffs' contention that the COP/C relied on one flawed study. The Big Ten should not have to be put through the task of assembling all medical and scientific data and evidence provided by its legion of professionals in order to dispel the unsupported suggestion that it only relied on one study. The request is overly burdensome and simply makes no sense in the context of this case.

C. The Big Ten Requests an Expedited Motion to Dismiss Briefing Schedule.

Although Plaintiffs' claims have no merit and therefore deserve no urgency, the Big Ten requests an expedited Motion to Dismiss briefing schedule in order to dispose of this lawsuit as efficiently as possible, further undercutting the basis for Plaintiffs' motion. To alleviate Plaintiffs' concerns and dispense with the need for "emergency" discovery, the Big Ten will agree to file its motion to dismiss on or before September 8, 2020. However, given that Plaintiffs' claims so significantly hinge on their allegations that there was no COP/C vote or that it violated the Big Ten's By-Laws, and there is no support in the Complaint for their "one flawed study" assertion, they should voluntarily dismiss this case.

III. CONCLUSION

For all of the aforementioned reasons, the Court should deny Plaintiffs' Motion for Limited Expedited Discovery.

DATED this 31st day of August, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Defendant's Brief in Opposition to Plaintiffs' Motion for Expedited Discovery has been served upon the following on the 31st of August, 2020 as follows:

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