

SUPERIOR COURT OF THE STATE OF RHODE ISLAND  
PROVIDENCE COUNTY

JD

THE BIG EAST CONFERENCE,

Plaintiff,

-against-

WEST VIRGINIA UNIVERSITY,

Defendant.

Case No. PB 11-6391

MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

SUPERIOR COURT  
FILED  
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## INTRODUCTION

The parties need to know in what conference West Virginia University (“WVU”) teams will play while this matter is pending. To preserve the status quo, the BIG EAST moves for a preliminary injunction requiring WVU to adhere to its obligations under the BIG EAST Bylaws by competing within the Conference in each varsity sport for which it has a Division I team.

The relevant factors demonstrate that an injunction should issue. Given the unambiguous withdrawal provisions in the Bylaws—which WVU (a) helped draft and (b) reaffirmed as recently as October 17, 2011—the BIG EAST has a strong likelihood of success on the merits. The Bylaws require WVU to participate in BIG EAST athletics through the 2013–14 seasons; WVU has breached the Bylaws by announcing its intent to play in the Big 12 Conference for the 2012–13 season.

Absent a preliminary injunction, the BIG EAST would suffer irreparable harm. Monetary damages could not fully compensate the Conference for the injuries it would suffer. Indeed, WVU claims immunity from damages. Conversely, any harm to WVU is solely a result of its own actions and in any event is exceedingly limited because WVU teams will compete in the BIG EAST, a premier conference. An injunction supports the public interest in enforcement of contractual obligations and preserves the status quo by requiring WVU to adhere to the commitment it made in the Bylaws.

## STATEMENT OF FACTS

### The Big East Conference

The BIG EAST Conference provides a jointly-governed body for sponsoring, supervising and regulating intercollegiate athletics, assists its Members in funding and promoting their intercollegiate athletics programs, and enhances the opportunities for participation in, and the level of competition of, men's and women's intercollegiate athletics on an equitable basis. (Affidavit of John Marinatto ("Marinatto Aff.") at ¶2.)

The current Members of the BIG EAST Conference are Providence College, Georgetown University, St. John's University, Villanova University, Seton Hall University, The University of Connecticut, Rutgers, the State University of New Jersey, Marquette University, The University of Notre Dame, The University of Louisville, The University of Cincinnati, DePaul University, The University of South Florida, West Virginia University, Syracuse University, and The University of Pittsburgh (the "Member Schools"). (*Id.* at ¶3.) Certain Members do not participate in all of the Conference's sports. (*Id.*)

To accomplish the Conference's goals, the participating Member schools have worked together on a number of collective activities, including, among other activities, creating annual Conference schedules in which Conference teams play each other every season in 24 sports, negotiating and participating in joint agreements with respect to the sale of broadcast and other media

rights, ongoing joint marketing efforts, and an ongoing effort to maximize the athletic and financial interests of the BIG EAST Conference and its Member Schools. (*Id.* at ¶4.)

WVU has been a Member of the BIG EAST since 1991. (*Id.* at ¶5.) WVU and all Member Schools are parties to the BIG EAST Bylaws and related agreements and thus have an existing contractual relationship with the BIG EAST and its Member Schools. (*Id.*)

On November 29, 2010, Texas Christian University (“TCU”) accepted an invitation to join the BIG EAST as a member effective July 1, 2012 (during the period between November 29, 2010 and July 1, 2012, TCU would remain a member of the Mountain West Conference). (*Id.* at ¶18.) The acceptance agreement provided that TCU would be bound by the Bylaws (including the withdrawal provision) upon the effective date of its admission to the BIG EAST, but that if TCU did not actually join the Conference and so become a Conference member on the effective date, it would owe the Conference a specified amount. (*Id.*) On October 6, 2011, TCU announced that it had instead decided to join the Big 12 Conference. (*Id.* at ¶20.) TCU never became an actual member of the BIG EAST, and as a result was never subject to the Bylaws’ withdrawal provisions. (*Id.*)

In September 2011, Pittsburgh and Syracuse tendered notices of withdrawal, announcing an intent to leave the Conference effective July 1, 2014. (*Id.* at ¶19.) Both Pitt and Syracuse have stated publicly that they intend to honor their obligations under the BIG EAST Bylaws. (*Id.*)

On December 7, 2011, Boise State University, San Diego State University, the University of Houston, Southern Methodist University, and the University of Central Florida accepted invitations to join the BIG EAST Conference effective July 1, 2013 (that is, for the 2013–14 season). (*Id.* at ¶21.)

### **The BIG EAST Bylaws Withdrawal Provisions**

The current provisions of the BIG EAST Bylaws, and the withdrawal provisions in particular, reflect the past experiences of the Conference's Member Schools. (*See id.* at ¶¶6–17.)

The University of Miami, Virginia Polytechnic Institute, and Boston College announced plans to leave the BIG EAST for the Atlantic Coast Conference in 2003. (*Id.* at ¶6.) At the time, the provisions governing withdrawal from the Conference permitted Members to leave on short notice. (*Id.*) As a result, the three schools were able to leave the BIG EAST in relatively short order. (*Id.* at ¶6.) Their departures caused a great deal of instability because the Conference lacked adequate time between the announcement of their departure and their departure date to complete informed, strategic planning for the Conference's future. (*Id.* at ¶7.) Moreover, their departure caused a great

deal of uncertainty with respect to existing contracts between the BIG EAST and various service providers. (*Id.* at ¶8.)

Then-WVU President David C. Hardesty Jr. said at the time that changes in the withdrawal requirements were necessary to “strike a balance that puts our swords on the roundtable for a period of time that is reasonable and hooks us together contractually so that we have time to build up what we want to build up.” (*Id.* at ¶9 & Ex. A.)

As a result, in 2004, the Conference established a committee to draft new bylaws. The committee included Thomas Dorer, the general counsel of WVU, among its six members. (*Id.* at ¶10.) One of the key considerations guiding that committee’s work was to create withdrawal requirements that would provide the stability and certainty that the Conference lacked when the three former member schools announced their departure in 2003. (*Id.*)

In March 2005, the BIG EAST directors, including the President of WVU, voted unanimously to change the withdrawal requirements to enhance stability and provide an opportunity for strategic expansion should realignment reoccur. (*Id.* at ¶11.) At that March 2005 meeting, the Conference adopted Bylaws that provided that a Member may withdraw from the Conference only by: (i) tendering written notice to the Commissioner, copying each of the other members, with an effective date of withdrawal at least 27 months after the date of receipt (and which withdrawal date must be July 1 of the applicable

year in which the withdrawal is to be effective); (ii) payment of a Withdrawal Fee of \$5 million, with \$2.5 million due upon the first delivery of the withdrawal notice; and (iii) playing all athletic competitions included in the Conference schedules until the effective date of withdrawal. (*Id.* at ¶¶11–12.)

The Bylaws expressly state the agreement of each member, including WVU, that any attempted withdrawal without full compliance with these requirements would cause irreparable harm to the Conference and to the non-withdrawing Member Schools for which there is no adequate remedy at law. (*See id.* at ¶15 & Ex. B, at Art. 11.02(b).)

The Bylaws specifically provide that the Conference shall be entitled to seek and obtain injunctive relief, including but not limited to an injunction, requiring the Withdrawing Member to comply with the withdrawal procedures and obligations set forth in the Bylaws. (*Id.* at ¶16 & Ex. B, Art. 11.02(b).) The Withdrawing Member is also required to pay the Conference's costs, including reasonable attorneys' fees, associated with any proceeding seeking such equitable relief. (*Id.*)

On October 17, 2011, the Conference adopted an amendment to the Bylaws that reaffirmed the 27-month notice provision, the admission of irreparable harm in the event of an improper withdrawal, the ability of the Conference to seek and obtain injunctive relief to prevent an improper withdrawal, and the exit fee requirement, and further provided that the exit fee amount

would increase in certain circumstances to \$10 million for football-playing members. (*Id.* at ¶13.) This vote, too, was unanimous, including that of WVU President James Clements. (*Id.*)

### **WVU's Breach of the Bylaws**

Despite these express provisions—which WVU in many respects spearheaded and authored, and which it subsequently confirmed in the October 17, 2011 amendments to the Bylaws—WVU announced publicly on October 28, 2011 that it had applied to and been accepted to the Big 12 Conference, and that WVU would begin participating in Big 12 Conference athletic events in July 2012 (i.e., two years before the earliest effective date upon which WVU could withdraw from the BIG EAST). (*Id.* at ¶23.)

On October 28, 2011, WVU sent a purported notice of withdrawal to Commissioner Marinatto stating that WVU planned to withdraw from the BIG EAST on June 30, 2012. (*Id.* & Ex. C.) (Commissioner Marinatto immediately responded, advising WVU that the notice was not proper under the Bylaws. (*See id.* ¶24 & Ex. D.)

Amplifying WVU's intention to breach the Bylaws, WVU's President James P. Clements stated in published news releases that, "[WVU's] intent is clearly July 1 we'll be a member of the Big 12." (*Id.* at ¶25.)



## **The Injuries Suffered by the BIG EAST**

WVU's departure from the BIG EAST without honoring its withdrawal notice obligation adversely implicates numerous interests of the BIG EAST, both immediately and concretely. At the very least, WVU's departure implicates the BIG EAST's goodwill, competitive positioning, abilities to recruit, contractual interests, and expansion plans in an immediate and irreparable manner. (*See id.* at ¶¶29–60.)

*First*, WVU's early departure would adversely affect the Conference's reputation and goodwill. (*See id.* at ¶¶49–53.) The strength of the Conference's membership is directly linked to the outlook of alumni and fans of the Member Schools toward the Conference. (*Id.* at ¶49.) The stability of any conference's membership implicates the morale of alumni and fans of the Member Schools and is directly related to donations, ticket sales, and the purchase of merchandise by those fans and alumni. (*Id.* at ¶50.)

The untimely and improper departure of WVU would reduce the number of Conference games in most, if not all sports. (*Id.* at ¶51.) No award of damages could fully compensate the Conference or its Members for these lost or rescheduled games. (*Id.*)

The untimely and improper departure of WVU would also reduce the Conference's visibility and ability to promote its name and brand. (*Id.* at ¶52.) No award of damages could fully make up for those lost opportunities. (*Id.*)

The untimely and improper departure of WVU could also result in the Conference not being able to fill all of its bowl slots. (*Id.* at ¶53; *see also* pages 13–14, *infra*.) The untimely and improper departure of WVU would also result in the Conference having fewer games in its postseason tournaments, including the Conference basketball tournament at Madison Square Garden. (Marinatto Aff. at ¶53.) This would result in reduced exposure for the Conference and its brand, as well as the loss of goodwill. (*Id.*) No damages award could fully compensate the Conference for these harms. (*Id.*)

*Second*, and relatedly, WVU's untimely departure would also have a detrimental impact on the Conference's athletic programs. (*Id.* at ¶¶54–60.) It would be difficult if not impossible for the Conference to find and schedule replacement games for all of the contests to which WVU would have been committed to compete for the 2012–13 and 2013–14 seasons. (*Id.* at ¶55.)

As an example, football schedules generally are established two to three years in advance. (*Id.* at ¶56.) If WVU were to withdraw early, each remaining Member would suddenly have an open game date that it would need to fill. (*Id.*) That date would be during the period when most schools are committed to conference games. (*Id.*)

It would be difficult, if not impossible, for each Member school to fill these holes, let alone to fill them with a quality opponent that would not detrimentally affect the Member's BCS standing or bowl eligibility. (*Id.* at ¶57.) For

example, if a Member could only find a Football Championship Series school to play the date when WVU was committed to play, that game may not count for purposes of determining bowl eligibility. (*Id.*)

More generally, even if a Member school could schedule a different opponent for a game or contest (in any sport), it would not be a *Conference* contest. (*Id.* at ¶58.) Conference contests attract more fan interest and excitement because they count toward Conference championships and other Conference recognition. (*Id.*) It would be impossible to fully compensate the Conference for the loss of these opportunities. (*Id.*) Similarly, the improper early departure of WVU would reduce the number of Conference games and the number of Conference teams eligible for postseason tournaments and championships, thereby limiting the Conference's media exposure and decreasing popularity and fan interest. (*Id.* at ¶59.) It would be impossible to fully compensate the Conference for the loss of these opportunities. (*Id.*)

Moreover, WVU's untimely departure would impact how the Conference and its Members are perceived by potential recruits, thus affecting the long-term competitive strength of the Conference. (*Id.* at ¶60.) The uncertainty of whether other Member schools will have a full slate of Conference contests could lead recruits to choose to attend non-BIG EAST schools instead. (*Id.*)

No award of monetary damages could fully make the Conference or its members whole for this injury. (*Id.*)

*Third*, WVU's untimely departure would undermine the BIG EAST's existing and future contracts with its television and bowl partners. (*See id.* at ¶¶32–42.)

In September 2006, the BIG EAST entered into a contract with ESPN for the broadcast of its football games, running through the 2013–14 season, that is worth tens of millions of dollars of revenue for the BIG EAST and its Member Schools over its duration. (*Id.* at ¶33.) Also in September 2006, the BIG EAST entered into a six-year contract with ESPN, running through the 2013–14 season, to broadcast its men's and women's basketball games, a contract worth tens of millions of dollars of revenue for the BIG EAST and its Member Schools over its duration. (*Id.* at ¶35.) WVU voted to authorize the BIG EAST to enter both contracts. (*Id.* at ¶¶33, 35.)

The ESPN contracts are set to expire after the 2013 season, but include exclusive negotiating periods for extensions, and the parties have discussed an extension of the contracts. Both contracts further provide that if a Member School of the BIG EAST leaves during the term, the parties shall negotiate in good faith with respect to a reduction of the rights fee and renegotiation of other provisions, and that failing agreement, that the parties submit the matter to arbitration. (*Id.* at ¶¶33–36.) The contracts contain a composition clause, under which ESPN could argue that a reduction of rights fees and re-

negotiation of other terms is required even if other schools join the Conference. (*Id.* at ¶¶34, 36–37.)

In 1994, the BIG EAST entered into a contract with CBS, which by subsequent amendment runs through the 2013 season, to broadcast its men's and women's basketball games, a contract worth tens of millions of dollars of revenue for the BIG EAST and its Member Schools over its duration. (*Id.* at ¶37.) WVU also voted to authorize the BIG EAST to enter into this contract. (*Id.*) The agreement between the BIG EAST and CBS also permits CBS to negotiate a reduction in the rights fees it owes to the BIG EAST in the event that a Member School leaves the Conference for any reason. (*Id.*) The contracts contain a composition clause, under which CBS could argue that a reduction of rights fees and renegotiation of other terms is required even if other schools join the Conference. (*Id.* at ¶¶34, 36–37.)

The BIG EAST also has contractual relationships with six non-BCS bowls, the Champs Sports Bowl, the Belk Bowl, the Pinstripe/New Era Bowl, the BBA Compass or Liberty Bowl (one of the two takes a BIG EAST team), and the Beef O'Brady Bowl. (*Id.* at ¶40.) Revenues from the contracts with those bowls—as well as the publicity and exposure attendant with participation in them—benefit the Conference and the Member Schools. (*Id.* at ¶40.)

The contracts with those five non-BCS bowls are in the second year of a four year term (i.e., running through the 2013–14 season). (*Id.* at ¶41.) To ful-

fill these contractual obligations, the Conference must have five bowl-eligible teams. (*Id.* at ¶40.) In addition, certain of these bowls could argue that an early departure by West Virginia triggers the right to terminate the agreement or to reduce the amount of the bowl payment. (*Id.*)

Absent an injunction, the counterparties to these contracts may seek to exercise various remedies, in some cases including potentially attempts to terminate the underlying agreements. The Conference will incur significant expenditures of time and resources in opposing these efforts and/or in having to potentially renegotiate the existing contracts. Having to do so will detract from the Conference's goals and missions, could do lasting and irreparable damage to the Conference's reputation and goodwill, and will also impede the Conference's expansion efforts. (*Id.* at ¶42.) If, conversely, WVU remains in the Conference until the Withdrawal Date under the Bylaws, its departure would not impair or affect the contracts described above.

WVU has also taken the position that it is entitled to sovereign immunity against any claims that the BIG EAST may have against it. (*See, e.g.,* WVU Mot. to Dismiss.) If WVU is immune from damages claims by the BIG EAST, then the Conference would be unable to recover any of the revenue it would lose as a result of WVU's improper early departure. (*See* Marinatto Aff. at ¶43.)

*Finally*, WVU's plans to violate the withdrawal requirements implicate and impair the BIG EAST's expansion plans and future media negotiations. (*See id.* at ¶¶44–48.)

Given the changing landscape in college athletics, the BIG EAST has developed expansion plans to improve its position in the years to come. (*Id.* at ¶44.) Indeed, the BIG EAST Members granted Commissioner Marinatto unanimous authorization to extend invitations to six schools to join the Conference, and five schools have thus far accepted invitations. (*Id.* at ¶¶ 21, 44.)

The Conference's expansion efforts depend in part on WVU honoring the 27-month notice provision because potential BIG EAST invitees have their own remaining obligations to existing conferences and because WVU's flaunting of the Bylaws creates uncertainty about the Conference's stability, self-governance, and existing contractual relations with media and bowl partners. (*Id.* at ¶45.)

The uncertainty regarding WVU's compliance or noncompliance with the Bylaws also would adversely impact negotiations that the Conference will have with ESPN beginning no later than September 2012 for television rights for future basketball and football seasons. (*Id.* at ¶47.) The harm and adverse impact on these issues to the Conference, including the negative effect on the Conference's bargaining strength for these negotiations, is incapable of exact calculation. (*Id.*)

## **The Lack of Harm to WVU**

WVU would not suffer any harm if the Court granted the injunction because WVU will be able to compete in BIG EAST athletic competitions, as it promised to do in the Bylaws. (*Id.* at ¶62.)

Over the years, WVU officials have acknowledged the benefits to WVU of competing in the BIG EAST's high caliber Conference. (*See id.* at ¶¶63–65 & Exs. E–F.)

If WVU competes in the BIG EAST and not the Big 12, that will reduce the travel costs of (and effect of travel on members of) WVU's athletic teams. (*See id.* at ¶66 & Ex. G.)

Notably, the Big 12 Conference has stated publicly that WVU is not required to join the Big 12 for the 2012–13 season. (*See id.* at ¶67 & Ex. H.)

## **LEGAL STANDARD**

“In deciding whether to issue a preliminary injunction, the [court] should determine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.” *Foster Gloucester Reg'l Sch. Bldg. Comm. v. Sette*, 996 A.2d 1120, 1124 (R.I. 2010).



When the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still be entitled to preliminary injunctive relief. *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 743 (1st Cir. 1996).<sup>1</sup>

The purpose of a “preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered.” *Fund for Cmty. Progress v. United Way of Se. New England*, 695 A.2d 517, 521 (R.I. 1997) (quoting *Coolbeth v. Berberian*, 313 A.2d 656, 659 (R.I. 1974)).

Equitable relief is an appropriate remedy for a breach of contract. *See Chavers v. Fleet Bank (RI), N.A.*, 844 A.2d 666, 679 (R.I. 2004). *Accord, e.g., Stanford Hotels Corp. v. Potomac Creek Assocs, L.P.*, 18 A.3d 725, 734–35

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<sup>1</sup> The BIG EAST is a District of Columbia corporation with its principal place of business in Rhode Island. The court need not engage in a choice of law analysis, however, because the substantive result would be the same under the law of either jurisdiction. *See Nat’l Refrigeration, Inc. v. Standen Contracting Co. Inc.*, 942 A.2d 968, 973–74 (R.I. 2008); *Avco Corp. v. Aetna Cas. & Sur. Co.*, 679 A.2d 323, 330 (R.I. 1996). When no conflict exists, the forum law should apply. 16 Am. Jur. 2d *Conflict of Laws* § 4. No conflict exists with respect to the standard for a preliminary injunction. *Compare Foster Gloucester Reg’l Sch. Bldg. Comm. v. Sette*, 996 A.2d 1120, 1124 (R.I. 2010) with *District of Columbia v. E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 14–15 (D.C. 2000) (both applying substantially similar four factor test).

(D.C. 2011) (internal citation omitted) (“Whe[n] the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award judgment of damages for its breach.”). When damages are not adequate, a breach may be enjoined. *Engine Specialties, Inc. v. Bombardier Ltd.*, 454 F.2d 527, 530–31 (1st Cir. 1972).

## ARGUMENT

As described below, an injunction is appropriate to enforce the withdrawal notice provision of the Bylaws because WVU has clearly breached the BIG EAST Bylaws, the BIG EAST would suffer immediate and irreparable harm in numerous ways as a result of that breach, and the balance of equities and the public interest weigh in favor of preserving the status quo.

### **I. The BIG EAST will suffer irreparable harm absent an injunction.**

The BIG EAST has established that it faces an imminent threat of irreparable harm for which no adequate remedy at law exists.

*First*, the Bylaws expressly states the agreement of each Member School, including WVU, that “[a]ny attempted withdrawal of a Member without full compliance with Section 11.02 would cause irreparable harm to the Conference and to the non-withdrawing Members for which there is no adequate

remedy at law.” (Marinatto Aff. Ex. B, at Art. 11.02(b).) Thus, “[t]he irreparable harm element of the injunction standard is established by [the parties’] own contractual stipulation.” *True N. Commc’ns Inc. v. Publicis S.A.*, 711 A.2d 34, 44 (Del. Ch. 1997) (contractual provision stating that breach would cause loss that could not be reasonably or adequate compensation in damages and thus entitled the other party to injunctive relief found sufficient alone to establish irreparable harm).

When a party concedes in the agreement that in the event of its breach of a particular provision of a contract the other party “shall be entitled to injunctive relief, because it would cause irreparable injury ... [this concession] might arguably be viewed as an admission ... that plaintiff will suffer irreparable harm were [the other party] to breach the contract’s ... provision.” *Ti-cor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999). This is particularly true for a “sophisticated business entity [that] signed the [a]greement after consulting with counsel,” such as WVU here. *Nat’l Elevator Cab & Door Corp. v. H & B Inc.*, 282 Fed. Appx. 885, 887 (2d Cir. 2008); (see Marinatto Aff. at ¶¶10–11 (noting that WVU’s general counsel helped draft the Bylaws).)

*Second*, even in the absence of this explicit admission, irreparable harm is presumed when a party seeks to enjoin the violation of a restrictive covenant. See, e.g., *Cullen v. Tarini*, 15 A.3d 968, 980 (R.I. 2011); *Ridgewood Homeowners Ass’n v. Mignacca*, 813 A.2d 965, 975 (R.I. 2003) (“[P]laintiffs seeking

to enforce restrictive covenants need not establish money damages or any other hardship to receive equitable relief.”). The withdrawal provision in the Bylaws (Article 11) is a valid and reasonable restrictive covenant.

*Third*, the evidence detailed above (at pages 7–14) demonstrates that the harm to the BIG EAST by WVU’s untimely and improper departure cannot be fully measured nor compensated in damages. (This is particularly true as WVU claims immunity from damages.)

Among other harms, the reduction in the number of Conference contests that would occur absent an injunction would adversely affect the Conference’s goodwill and reputation. “[G]ood will, reputation, and [the] unique identity” of an entity, combined with a threat to the ability of the entity to conduct its business in its own chosen manner, “is precisely the type of irreparable injury for which an injunction is appropriate since a legal remedy such as monetary damages would be inadequate to compensate the victim for its loss.” *Fund for Cmnty. Progress*, 695 A.2d at 523.

In addition, absent an injunction, the Conference will lose out on opportunities to promote itself and its brand in the Conference athletic contests to which WVU was committed. This may include the inability to field a team for one of the Conference’s bowl affiliations. This, too, is irreparable harm. When an injury would affect future reputation or serve as “a signal to the institutional world” that the moving party is not qualified for some meaningful sta-

tus, “[a] legal remedy alone would be inadequate to compensate them for their loss.” *Reback v. R.I. Bd. of Regents for Elementary & Secondary Educ.*, 560 A.2d 357, 359 (R.I. 1989). The same holds true for the detrimental effects on the Conference Member’s ability to recruit if WVU were to evade its responsibilities under the Bylaws.

The instability and uncertainty regarding the enforceability of the Bylaws also has an immediate, adverse impact on the Conference’s negotiations with other schools who are interested in joining the BIG EAST and with media partners. Absent an injunction, it will be impossible to accurately quantify or make whole the Conference for this adverse effect on these negotiations. *See, e.g., Brady v. NFL*, 640 F.3d 785, 793 (8th Cir. 2011) (citing and quoting *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996); *Dynamic Solutions, Inc. v. Planning & Control, Inc.*, 646 F. Supp. 1329, 1337 (S.D.N.Y. 1986)).

## **II. The BIG EAST has a strong likelihood of success on the merits.**

“[A] party need not prove its claim at the preliminary injunction stage, only that it is likely to be able to prove its claim later.” *Allen v. Creative Servs., Inc.*, 1992 WL 813643, at \*1 (R.I. Super. Ct. Jul. 6, 1992). The BIG EAST has demonstrated that it is likely to be able to prove that WVU has committed an intentional and irrefutable breach of the BIG EAST Bylaws.

“It is a general rule of contract law that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts unless a violation of the law or public policy is clear and certain.” *Gorman v. St. Raphael Acad.*, 853 A.2d 28, 38 (R.I. 2004). An organization such as the BIG EAST may “adopt a constitution, by-laws, rules, and regulations which will control as to all questions of discipline, or internal policy and management, and its right to interpret and administer the same is as sacred as the right to make them. This rule ... reflects an appreciation for the contractual nature of membership in [such organizations].” *Id.* (internal citations and quotations omitted).

The BIG EAST Bylaws constitute a valid and enforceable contract between and among the BIG EAST and its Member Schools, including WVU. As a Member of the BIG EAST, WVU covenanted “to adhere to these Bylaws” (Marinatto Aff. Ex. B, at Art. 4.04), including the requirements that WVU:

- “compete within the Conference in each varsity sport sponsored by the Conference for which [WVU] has a Division I team” (*id.* at Art. 4.01(b));
- “fulfill its obligations to provide for the financial support of the Conference” (*id.* at Art. 4.04(a));
- “participate in all television and broadcast events and arrangements, and in all postseason events, in accordance with the terms of all contracts and agreements, including, without limitation, bowl agreements, as shall be entered into by the Conference” (*id.* at Art. 4.04(c)); and
- “play all athletic competitions included in the Conference schedules until the effective date of the withdrawal” (*id.* at Art. 11.02(a)(iii).)

“It has long been held [by the courts of this State] that ‘parties are bound by the plain terms of their contract.’” *Vincent Co. v. First Nat’l Supermarkets, Inc.*, 683 A.2d 361, 363 (R.I. 1996); *see also Capital Props., Inc. v. State*, 749 A.2d 1069, 1081 (R.I. 1999). WVU should not be heard to complain otherwise, having previously argued to a tribunal that “[b]inding, written contracts are not unenforceable just because a party does not like its [sic] terms in hindsight.” (Pl.’s Mot. for Part. Dismissal of Def.’s Counterclaim at 20–21, *W. Va. Univ. Bd. of Governors v. Rodriguez*, Civ. No. 07-C-851 (W. Va. Monongalia Cnty. Cir. Ct.) (filed Feb. 22, 2008) (attached as Exhibit B to BIG EAST’s Response to WVU’s Motion to Dismiss); *see also id.* at 1 (“Simply put, the defendant ... readily accepted all the benefits of the contract at issue, but cries foul when required to meet his obligations under the same contract.”).)

To demonstrate that Article 11 is an enforceable provision, the BIG EAST need only show that “(1) the provision is ancillary to an otherwise valid transaction or relationship, (2) the provision is supported by adequate consideration, and (3) there exists a legitimate interest that the provision is designed to protect.” *Allen*, 1992 WL 813643 at \*2 (citing *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1053 (R.I. 1989)). *Accord, e.g., Deutsch v. Barsky*, 795 A.2d 669, 674 (D.C. 2002).

The withdrawal provision meets these criteria. It is ancillary to the Bylaws and the purposes for the Conference—to promote and support athletic competitions among the Members. It is supported by adequate consideration—Conference Members share in Conference revenues during the period of membership. And there is a legitimate purpose for the provision—to promote stability and certainty, and to prevent all the attendant consequences of instability and uncertainty, during a period of conference realignment. (*See* Marinatto Aff. at ¶11.) As further proof of the reasonableness and enforceability of the provision, two other Members of the BIG EAST, Pittsburgh and Syracuse, have acknowledged that the Bylaws require 27 months' notice and are completing their obligations to the Conference before departing for the ACC. (*Id.* at ¶19.)

The covenant is also reasonably limited in time and the time restriction is necessary to protect the BIG EAST's legitimate interests. *See Rego Displays, Inc. v. Fournier*, 379 A.2d 1098, 1102 (R.I. 1977) (enforcing restrictive covenant for period of two years because it was the period of time necessary for the moving party to put itself back in a position to compete on an equal basis). Absent enforcement of the 27-month provision, the BIG EAST would lack adequate time to put itself back in a position to compete in terms of its contractual interests, expansion plans, and goodwill.



Rhode Island courts routinely enforce restrictive covenants that promote a legitimate interest and are reasonable in scope. For example, in *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701 (R.I. 1999), a takeout restaurant owner sought a preliminary injunction to enforce a covenant in a lease prohibiting the sale of takeout food on property adjoining the restaurant. Noting that under Rhode Island law, "prospective damage to a business's goodwill and reputation is precisely the type of irreparable injury for which an injunction is appropriate," *id.* at 705 (internal quotation and citation omitted), the court found that an injunction properly issued because the moving takeout restaurant would face irreparable harm through its likely loss of customers. *See id.* at 705–06. The court finally concluded that, because the adjoining restaurant would be able to continue its non-takeout business, the status quo would be preserved. *See id.* at 706.

Consistent with *Iggy's Doughboys*, this Court should grant a preliminary injunction requiring WVU to adhere to its obligations under the Bylaws, pending a final resolution on the merits of this action.

### **III. The balance of the equities favors granting an injunction.**

The BIG EAST has demonstrated that WVU's immediate withdrawal would cause several forms of immediate and irreparable harm.

No similar showing exists for WVU. A preliminary injunction precluding a party “from engaging in conduct that they specifically agreed to avoid when they signed [the] agreement[] does not cause substantial injury. ...” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Wertz*, 298 F. Supp. 2d 27, 34 (D.D.C. 2002). Moreover, any harm to a party “likely to lose on the merits” is necessarily “small.” *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir 1998).

Under a preliminary injunction, WVU would continue to have a home in one of the nation’s premier athletic conferences through 2014. That is hardly a substantial injury. *See* “System of Success,” available at <http://bigeast.org/AbouttheBIGEAST/SystemofSuccess.aspx> (detailing some of the many achievements by the Conference and Conference members).

Indeed, WVU has repeatedly over the years acknowledged the competitive strength of the BIG EAST and its advantageous position based on being a part of that Conference. In 2007, then-President Hardesty told the Charleston Gazette that “[w]e’ve stayed in the BCS [and] we have probably the most competitive basketball conference in the country. ...” (Marinatto Aff. ¶64 & Ex. E.) As recently as August 31, 2011, WVU Athletic Director Oliver Luck stated that WVU is “delighted with the number of national television appearances to showcase our great University and our basketball program. Each year, we continue to rank among the top in strength of schedule, and this

year will be no different. We have set attendance records at home in the last four years under Coach Huggins, and we are getting closer and closer to selling out the Coliseum in season tickets.” (*Id.* at ¶65 & Ex. F.)

WVU has also acknowledged that moving to the Big 12 would increase its hardship in terms of travel schedules and the effect of those travel schedules on classroom responsibilities of student athletes. WVU President James Clements said in a November 2, 2011 interview that “[t]ravel is an issue” and that he knew that WVU Athletic Director Oliver Luck would “be looking at that to try to find ways to minimize travel time to make sure that our student athletes are in the classrooms and doing well in class.” (*Id.* at ¶66 & Ex. G.)

Finally, the Big 12 itself has stated publicly that its offer of admission to WVU was *not* contingent on WVU joining the Big 12 for the 2012–13 season. (Marinatto Aff. at ¶67 & Ex. H.) In such circumstances, any “harm” to WVU in adhering to its commitments in the Bylaws pending resolution of this case pales in comparison to the harm to the BIG EAST and its Members if WVU does not honor those obligations.

The public interest also militates in favor of injunctive relief, as the public policy of this state favors the enforceability of contract rights. *Vincent Co.*, 683 A.2d at 363.

#### IV. A preliminary injunction would preserve the status quo.

A preliminary injunction preserves the status quo if it does nothing more than order the existing relationship between the parties to continue. *See Iggy's Doughboys*, 729 A.2d at 705. As WVU has found the current arrangement satisfactory for "almost twenty years" and the BIG EAST would suffer irreparable harm, a "preliminary injunction [would] impose[] relatively little hardship on defendants [and would] clearly maintain[] the status quo." *Pucino v. Uttley*, 785 A.2d 183, 188 (R.I. 2001).

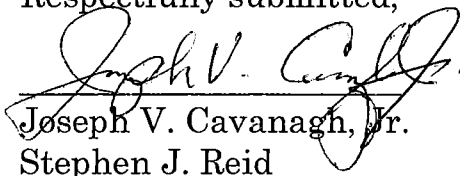
For example, in *Allen v. Creative Services, Inc.*, an investigative and security consulting firm sought a preliminary injunction to enforce a non-compete agreement for two former employees who sought to form a competing private investigation firm. 1992 WL 813643 at \*1. The Court issued a preliminary injunction enforcing the covenant because it would "hold matters approximately in status quo, until the cause may be properly and finally heard and determined on its merits." *Id.* at \*4.

Similarly here, the BIG EAST seeks to enforce a valid Bylaw provision reasonable in scope, and the BIG EAST would suffer irreparable harm absent such relief. Because a preliminary injunction would only order WVU to maintain its obligations to the BIG EAST under Bylaws that WVU agreed to prior to the start of this controversy, the status quo would be preserved.

## CONCLUSION

For the foregoing reasons, the Court should enter a preliminary injunction requiring WVU to participate in all scheduled Conference athletic competitions (and to otherwise honor its obligations under the Bylaws) pending resolution of the merits of this matter.

Respectfully submitted,



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