

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 22ND JUDICIAL CIRCUIT
WASHTENAW COUNTY

THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN; JAMES J.
HARBAUGH,

Plaintiffs,

Case No. 23-_____-CB

v.

THE BIG TEN CONFERENCE, INC.; TONY
PETITTI,

Hon.

Defendants.

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**PLAINTIFFS' BRIEF IN SUPPORT
OF ITS EMERGENCY *EX PARTE*
MOTION FOR TEMPORARY
RESTRAINING ORDER, ORDER
TO SHOW CAUSE, AND
PRELIMINARY INJUNCTION**

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**PLAINTIFFS' BRIEF IN SUPPORT OF ITS EMERGENCY *EX PARTE* MOTION FOR
TEMPORARY RESTRAINING ORDER, ORDER TO SHOW CAUSE, AND
PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

	Pages
INDEX OF AUTHORITIES.....	iv
INTRODUCTION	1
STATEMENT OF FACTS	3
ARGUMENT	6
I. Plaintiffs Are Likely To Succeed on the Merits	7
II. Premature Punishment Would Cause Irreparable Injury.	13
III. The Balance of Equities Warrants Injunctive Relief.	16
IV. The Public Interest Would Be Served by an Injunction	18
CONCLUSION.....	19

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>ACT, Inc v Worldwide Interactive Network, Inc,</i> 46 F4th 489 (6th Cir 2022)	13
<i>Ardt v Titan Ins Co,</i> 233 Mich App 685 (1999).....	11
<i>Att’y Gen v Thomas Solvent Co,</i> 146 Mich App 55 (1985).....	6, 17
<i>Bank of America, NA v First Am Title Ins Co,</i> 499 Mich 74, 100 (2016)	7–8
<i>Barrett v W Chester Univ of Penn of the State Sys of Higher Educ,</i> No 03-cv-4978, 2003 WL 22803477 (ED Pa Nov 12, 2003)	13
<i>Bonelli v Volkswagen of Am., Inc,</i> 166 Mich App 483, 496 (1988)	12
<i>Brown Dairy Equip, Inc v Lesoski,</i> No 291372, 2010 WL 4485919 (Mich Ct App Nov 9, 2010).....	12–13
<i>Certified Restoration Dry Cleaning Network, LLC v Tenke Corp,</i> 511 F 3d 535 (6th Cir 2007)	17
<i>Cohen v Brown Univ,</i> 809 F Supp. 978 (DRI 1992) 991 F2d 888 (1st Cir 1993).....	15
<i>DM by Bao Xiong v Minn State High Sch League,</i> 917 F3d 994 (8th Cir 2019)	14
<i>Johnson v Mich Minority Purchasing Council,</i> 341 Mich App 1 (2022).....	7, 12
<i>Kircher v Boyne USA, Inc,</i> --Mich App--, 2023 WL 7238820 (Nov 2, 2023)	10
<i>Martin v Progressive Mich Ins Co,</i> No 361659, 2023 WL 6784371 (Mich App Oct 12, 2023).....	12
<i>Mayerova v E Mich Univ,</i> 346 F Supp 3d 983, 997 (ED Mich 2018).....	13
<i>Mich State AFL-CIO v Sec’y of State,</i>	

230 Mich App 1 (1998).....	7
----------------------------	---

Pages

Secondary Sources—cont.

<i>Portz v St Cloud State Univ,</i> 196 F Supp 3d 963 (D Minn 2016).....	13
<i>Slis v State,</i> 332 Mich App 312 (2020).....	12, 15
<i>Stark v Kent Prods, Inc,</i> 62 Mich App 546, 548 (1975).....	8
<i>State Bank of Standish v Curry,</i> 442 Mich 76 (1993)	11
<i>Woodington v Shokoohi,</i> 288 Mich App 352 (Mich Ct App 2010)	8–9
<i>Van Buren Pub Sch Dist v Wayne Cnty Cir Judge,</i> 61 Mich App 6 (1975).....	6

Rule

MCR 3.310(B)(1).....	7
----------------------	---

Secondary Sources

Bill Shea, <i>Georgia’s blowout win vs. TCU draws lowest viewership of CFP championship since BCS era began</i> , The Athletic (Jan. 10, 2023)	17
Chris Low, <i>How the creation of the BCS set the stage for the current playoff format</i> , ESPN (Oct. 31, 2023)	17
David Hale, <i>Sign-stealing and the quest to crack the opponent’s code</i> , ESPN (Nov. 9, 2023)	16
Joshua D. Winneker & Ian Silfies, <i>The Ethics of Sign Stealing in College Football</i> , 32 Marq. Sports L. Rev. 425, 427 (2022).....	16
Pat Forde, <i>Follow the Signs: How Clemson Football Mastered the (Totally Legal) Art of Signal Stealing</i> , Sports Illustrated (Nov. 6, 2020)	15
UChicago News, <i>How Much Do Coaches Impact Success in Sports?</i> (Mar. 6, 2019).....	14

INTRODUCTION

Sportsmanship is founded upon principles of integrity, respect, and fair play. So it is a poignant irony that The Big Ten Conference, Inc. (“Conference”) invoked its *Sportsmanship* Policy even as it breached a contract, succumbed to pressure, and threw procedure out the window in pursuit of summary punishment. But when rivals join together to create an athletic conference, each relies upon procedures to ensure fair treatment. Because the Conference has ignored those procedures and breached its contract, the University of Michigan (“University”) and Coach James Harbaugh come to this Court requesting the fair treatment the Conference has denied.

In recent weeks, the University of Michigan’s football program has come under scrutiny for the alleged actions of one of its junior staff members. The University is taking seriously the allegations that the staff member—whom it immediately suspended and who has since resigned—repeatedly violated a prohibition on in-person scouting to record opponents’ signals. The University is cooperating fully with the NCAA’s investigation; and when that investigation concludes, the University will accept its share of responsibility under the rules.

But what the University cannot accept is the Conference’s breach of its obligations to the University, its students, and its staff. Amid the clamoring for punishment by the University’s rivals, the Conference repeatedly threw out the procedures:

First the Conference threw out the procedure that required it to wait until the NCAA’s investigation finished before determining punishment, a rule intended to avoid duplication and prevent inconsistent results.

Then the Conference threw out the procedure requiring an investigation, due process, findings from a multi-member body, and a right to appeal before the Conference imposes punishment for rules violations. The Conference has not interviewed a single witness and has

access to at most the NCAA's incomplete investigation. But the Conference ignored the procedures that would have allowed the University to defend itself.

Then the Conference misguidedly invoked the "Sportsmanship Policy," which it claims permits the Commissioner unilateral and unreviewable authority to find "sportsmanship" violations and impose any punishment he chooses—with essentially no process. But the Conference's own notice of inquiry confirms that the supposed "sportsmanship" violations *are the alleged rules violations*. So it appears, in the Conference's world, member universities' contractual rights to address allegations of rules violations apply only at the whim of the Commissioner.

Confoundingly, the rush to judgment is unexplained and unnecessary. The staff member who allegedly broke the rules is gone, and the Conference cites no evidence that the University continues to rely upon (or indeed ever relied upon) his scouting reports. The Conference instead has suspended the head coach, Jim Harbaugh, despite citing no evidence whatsoever that Coach Harbaugh knew about, directed, or tolerated the alleged wrongdoing (and even though this form of penalty accordingly is not even authorized under the rules).

There was therefore no justification for the Conference to act now, before the facts are found and the University is afforded the due process to which it is entitled. There is no evidence of an ongoing threat to the integrity of the competition, or any explanation why removing the head coach would address such a threat. Instead, the Conference's punitive action *threatens* the integrity of competition by improperly depriving a nationally-ranked football program of its leader on the eve of critical games, just as the season approaches the playoffs. The Sportsmanship Policy's focus on the integrity of competition is intended to *prevent* such imbalances—not create them.

In its misguided attempt to satisfy the University’s critics, the Conference has betrayed its promises to the University, its students, and its staff, imposed quintessentially irreparable harm, and set a dangerous precedent for future process deprivations against the University and other member schools. Sportsmanship is at issue in this case, but not in the way the Conference thinks.

This Court should grant the motion and preserve the status quo.

STATEMENT OF FACTS

The University of Michigan is a member of the Big Ten Conference, a collegiate athletic conference within the NCAA. Compl. ¶¶ 8. University members’ participation in the Conference is governed by Big Ten Handbook (“Handbook”), which is incorporated into the organization’s bylaws. *Id.* ¶ 15. The Handbook establishes the agreement among members as to the organization of the Conference, regulations of conduct, and procedures for conducting investigations and imposing sanctions. *Id.* ¶¶ 15-16.

A crucial part of the Handbook is the set of detailed procedural protections for institutions and constituents accused of violating NCAA or Conference rules. These protections, bargained for and agreed upon between the members of the Big Ten, were key to inducing the University and other members to join and remain in the Conference. *Id.* ¶¶ 16-18.

On October 18, 2023, the NCAA informed both the University and the Conference that the NCAA was investigating the University for an alleged violation of NCAA Bylaw 11.6.1, governing off-campus, in-person scouting of future opponents, based on the alleged conduct of a former junior analyst, Connor Stalions. *Id.* ¶ 30. Two days later, the University suspended Mr. Stalions, who has since resigned. *Id.* ¶¶ 32, 34.

Despite the ongoing investigation by the NCAA (due to be completed this fall), the Conference announced on November 4 its separate “belief” that Mr. Stalion’s alleged conduct

constituted a violation of Agreement 10 of the Handbook, captioned “Sportsmanship Policy.” *Id.* ¶ 36. The Conference stated that the Sportsmanship Policy violation was premised on violations of (1) NCAA Bylaw 11.6.1, (2) NCAA Football Rule 1-4-11-h, and (3) the Conference’s Football Game Management Manual Section 14.A. *Id.* ¶ 40. Bylaw 11.6.1 prohibits “off campus, in-person scouting of future opponents,” the very subject matter of the ongoing NCAA investigation. *Id.* ¶ 41. This was a concerning announcement, because the Conference had not followed any of the procedures for investigation and enforcement of rule violations as required by the Handbook. *Id.* ¶ 42.

One “guiding principle throughout the enforcement process,” delineated in the Handbook, is that “a case, whether major or secondary, shall be administered primarily by either the Big Ten or NCAA,” because it is the “policy of [the Conference’s enforcement] program to avoid duplication [and] increase consistency.” Rule 6.03.C. Indeed, in complex cases like this one, the NCAA is often “the preferred organization to determine the facts and penalty” “because of its superior resources and experience.” *Id.* The usual process when, as here, there is a pending NCAA investigation is for the Conference to “cooperate” with the NCAA investigation while “the case [is] processed through normal NCAA channels.” Rule 32.2.2.C.1. Indeed, by joining the NCAA the Conference agreed to “comply completely and promptly” with the NCAA’s enforcement process. NCAA Constitution art. 2.

To be sure, the Handbook does not leave the Conference without recourse of its own: under Rule 32, the Conference’s enforcement provisions, the Conference is permitted to “impose additional penalties, if warranted, *subsequent* to the NCAA action.” Rule 32.2.2.C.1.2 (emphasis added). More fundamentally, in cases where the Conference seeks to impose penalties for violations of NCAA or Conference rules, the Conference must follow Handbook Rule 32, which

provides procedural protections for institutions and their constituents that are accused of violating such rules. *Id.* ¶ 19. This process, which differs depending on the severity of the alleged infraction, provides in all cases for an investigation and an opportunity for the member university to object to proposed penalties and initiate an appeal, which may stay the effect of punishment. Rule 32.10. The Handbook then provides an appeal process involving a notice of appeal, responses from affected institutions, documentary submissions, and a hearing at which parties have the right to make oral presentations to the Joint Group Appeals Committee (JGAC). *See* Rules 32.10.7, 32.10.10.

Despite the plain language of the Handbook, on November 10, without conducting a Conference Rule 32 investigation or awaiting the results of the NCAA investigation, the Conference imposed a sanction on Coach Harbaugh: suspension of its head coach, Jim Harbaugh, for the next three games. *Id.* ¶ 50.

Under the guise of “Sportsmanship,” the Big Ten Commissioner completely abrogated the procedural protections designed to ensure a fair process for addressing alleged rule violations. The Conference suggested instead that the Commissioner, pursuant to the Sportsmanship Policy, could simply sidestep Rule 32 and unilaterally determine whether disciplinary action should be imposed for the alleged rules violations. *Id.* ¶¶ 38-50. But even the Sportsmanship Policy requires some investigation. Sportsmanship Policy Agreement 10.3.1. No meaningful Conference investigation has occurred, however. Indeed, as far as the University is aware, the Conference has not interviewed a single witness from the University, and has relied in substantial part on evidence that was merely described to the Conference. *Id.* ¶ 41.

Moreover, the Commissioner imposed a penalty that exceeded his authority, even if he were properly proceeding under the Sportsmanship Policy. The Sportsmanship Policy authorizes

the Commissioner to impose disciplinary action on only two, specifically delineated categories of respondents: First, the Commissioner may “h[o]ld individually accountable” a person associated with an institution “if [that person is] found to have committed an offensive action.” Agreement 10.1.1. Second, the Commissioner may “h[o]ld accountable” an “institution” that is “responsible for” the person who committed an offensive action. *Id.* Coach Harbaugh is neither. And the Conference has not referenced anything implicating Coach Harbaugh, despite Agreement 10.1.1’s limitation on individual sanctions to those who have “committed an offensive action.” *Id.* ¶¶ 38-50.

ARGUMENT

The object of immediate injunctive relief is to “preserve the status quo.” *Att’y Gen v Thomas Solvent Co*, 146 Mich App 55, 61 (1985). That is precisely the relief that the University seeks here. An injunction staying the Conference’s punishment allows the University’s student athletes to continue their season without undue harm or irreparable consequences, while posing no risk to the Conference or others. If a punishment is ultimately found to be appropriate, it can be levied at the conclusion of the process the parties contracted for. Put simply, there is an overwhelming need to preserve the status quo in light of the University’s robust claims against the Conference and the damage it would irreparably suffer absent injunctive relief.

A temporary restraining order and preliminary injunctive relief are the only appropriate remedy where, as here, “the party requesting it...will otherwise suffer irreparable injury, and that he does not have an adequate remedy at law.” *Van Buren Pub Sch Dist v Wayne Cnty Cir Judge*, 61 Mich App 6, 16 (1975) (internal quotations omitted). Under Michigan law, a temporary restraining order may issue upon a showing that “immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice.” MCR 3.310(B)(1).

That inquiry is distinct from the four-part inquiry as to whether the court shall issue a preliminary injunction.

In evaluating the request for a preliminary injunction, the four factors Michigan state courts consider are “(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.” *Johnson v Mich Minority Purchasing Council*, 341 Mich App 1, 9 (2022); *Michigan State AFL-CIO v Sec’y of State*, 230 Mich App 1, 14; (1998). These four factors are a “guide” for the court, but are not “rigid and unbending requirements.” *Id.* at 25 (affirming a preliminary injunction where the court concluded that plaintiffs were unlikely to succeed on the merits) (citation omitted).

All four factors weigh heavily in favor of granting the immediate relief.

I. Plaintiffs Are Likely To Succeed on the Merits

The University and Coach Harbaugh can easily demonstrate that they will prevail on each of their claims.¹

First, the University is highly likely to succeed on its breach of contract claim. The Conference has patently ignored the procedural requirements set forth in the Handbook, which serves as the governing contract between the parties, by failing to follow the adjudicatory processes in Rule 32, and by imposing an unauthorized penalty.²

¹ The law of the state of Illinois provides causes of action near identical to those in Michigan—hence the choice of law will not affect the vindication of the University’s contractual rights.

² For these same reasons, Plaintiff Harbaugh is likely to succeed on his breach of contract claim as a third-party beneficiary to the Handbook.

To establish a breach, a party must establish “by a preponderance of the evidence that (1) there was a contract, (2) the other party breached the contract, and (3) there were damages incurred by the party claiming breach.” *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100 (2016). Under Michigan law, an enforceable contract is created where there is “a meeting of the minds on all the material facts *Stark v Kent Products, Inc*, 62 Mich App 546, 548 (1975). ”A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *Bank of America, Na*, 499 Mich at 101. By this definition, the Bylaws and the Handbook of the Conference constitute a contract between the Conference and its members. The Handbook unambiguously requires process for alleged [major] rule violations in the form of notice (sometimes authorized by a committee), thorough investigation, deliberation and decision by a multi-member panel, and opportunities for appeal. Compl. ¶¶ 19-21. The Commissioner made no attempt to abide by these due process protections, instead deliberately flouting that Rule in favor of unilaterally imposing sanctions under the inapposite Sportsmanship Policy.

The cited Sportsmanship Policy is not an all-inclusive loophole through which the Commissioner can rewrite the parties’ contract. Rule 32 provides the mandatory process for the Conference’s consideration of violations of “NCAA or Conference rules.” Rule 32.2.2.C-D. When the NCAA has initiated an investigation into alleged violations of specific rules, the Conference waits for the NCAA’s investigation to conclude, reviews the results, and imposes any additional sanctions warranted; and for Conference investigations of rule-breaking, Rule 32 provides the procedure. Rule 32.2.2.C.

The Sportsmanship Policy, on the other hand, applies to actions that do not easily fit within an enumerated rule infraction, but offend “integrity of the competition, civility toward all,

and respect.” Agreement 10.01. The Handbook’s text and structure refute the suggestion that all of the protections of Rule 32 for alleged rule breaking fall away if the Commissioner simply announces that the rule breaking *itself* constitutes unsportsmanlike conduct. *See Woodington v Shokoohi*, 288 Mich App 352, 374 (2010) (Michigan courts “must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory”) (citation and internal quotations omitted). This would all but read Rule 32 out of the contract.

This is plain language of the contract is confirmed by Conference precedent: For the three years of investigations for which records are readily available, all recorded applications of the Sportsmanship Policy punished infractions such as disparaging officials, postgame insults, taunting, aggressive actions toward opponents, referees inappropriately addressing players, using a racial slur, scuffles between players, disrespectful social media posts, and obscene gestures. Compl. ¶ 26. Unlike violations of clearly defined rules (as alleged here), those are the sort of infractions for which a discretionary adjudicatory system for largely undefined conduct (as the Sportsmanship Policy) makes sense. *Id.*

Even if the Commissioner were permitted to sanction the University under the Sportsmanship Policy based on violations of NCAA or Conference rules—which it cannot—the Commissioner is still required to conduct a reasonable, good-faith investigation and to allow the University a reasonable opportunity to respond. Compl. ¶ 23. No such investigation took place here. As far as the University is aware, the Conference has not interviewed Coach Harbaugh, Mr. Stalions, or anyone else from the University, nor have Coach Harbaugh or Mr. Stalions been interviewed by the NCAA. In short, the Conference has breached its contractual obligation, even under the Sportsmanship Policy, to give the University a meaningful chance to be heard.

The Conference has also breached the contract by targeting Coach Harbaugh, an action that exceeds the Conference's authority even under the Sportsmanship Policy. The Sportsmanship Policy applies only to individuals who "committed an offensive action," or responsible institutions. Agreement 10.1.1. Coach Harbaugh is neither. He is not an "institution" as that term is used in the Handbook, and there is no allegation, much less evidence, that Coach Harbaugh himself "committed an offensive action." The Commissioner's decision to pursue Coach Harbaugh thus contradicts the plain language of the Sportsmanship Policy he purports to apply. As a result, the University of Michigan and Coach Harbaugh have not received the benefits under the contract: due process and a fair chance to respond to the allegations.

Second, the Conference has violated the implied covenant of good faith and fair dealing. Michigan law recognizes an implied, common-law duty of good faith and fair dealing in every contract. *Kircher v Boyne USA, Inc*, -- Mich App --, unpublished opinion of the Court of Appeals, decided November 2, 2023 at *2 n.5 (Docket No 360821) (will be published). Here, the Conference, by intentionally bypassing Rule 32, grossly breached its duty and acted in bad faith. Moreover, even if the Sportsmanship Policy applied, which it does not, the implied covenant still required the Commissioner to act fairly and in good faith. Engaging in no genuine investigation, failing to provide the University even the minimal information necessary to respond, and imposing an extra-contractual sanction that threatens irreparable harm smacks of bad faith.

A party acts in bad faith if it frustrates the other party's reasonable expectations about contractual performance, depriving that party of the benefit of the bargain. *Kircher*, Docket No 360821 at *3. It was reasonable for the University to expect that any alleged violation would

proceed under Rule 32, given that the Sportsmanship Agreement had never before been applied to alleged rule violations such as those implicated here. By failing to follow even the minimal safeguards, or to conduct any sort of independent investigation, and by announcing an unauthorized sanction, the Conference violated the implied covenant of good faith.

Third, the University is likely to succeed on its alternative claim of promissory estoppel, even if there were no contract between the parties. To prevail, the University must show: (1) the defendant made a clear and definite promise, (2) the defendant should reasonably have expected the promise to induce action of a definite and substantial character by the plaintiff, (3) the defendant's promise either caused the plaintiff's reliance or forbearance, and (4) court enforcement is needed to avoid injustice. *Ardt v Titan Ins Co*, 233 Mich App 685, 692 (1999). A court's ability to enforce such promises enables "individuals to trust promises in circumstances where trust is essential." *State Bank of Standish v Curry*, 442 Mich 76, 83 (1993). The aforementioned protections to be afforded constituent members in the event of an alleged infraction are a clear promise to follow those procedures in practice. And there can be no serious question that the University relied on those promises. The University relied on the Conference's promise to abide by these standards when it agreed to enter the Conference, chose to remain a member of the Conference, and allowed its student-athletes to participate in Conference events. Like football itself, an athletics conference cannot function without rules that both sides agree to. What makes the venture possible is the parties' commitment to those rules, particularly when there is a dispute. The University would not have agreed to join, nor remain a member of, the Conference if it did not believe the Conference would protect the institution, its student athletes, and its coaches by adhering to the Handbook. Compl. ¶ 17. Furthermore, in reliance on the protections provided by these procedures, the University of Michigan created compliance and

response programs to mitigate and resolve conflicts in accordance with procedure. *Id.* The Conference's wholesale departure from the principles and procedures contained within the governing documents has resulted in damages to the University.

Fourth, Commissioner Pettiti owes a fiduciary duty to the University as the chief executive officer of the Big Ten Conference. The existence of a fiduciary duty is "a question of law for the court to decide." *Harts v Farmers Ins Exch*, 461 Mich 1, 6 (1999). The duty "arises from the reposing of faith, confidence, trust, and the reliance of one on the judgement and advice of another," and that trust must be "reasonable." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 43-44 (2005). There is no doubt that the duties imposed on the Commissioner by the Conference Handbook makes him a fiduciary of the conference's members. The wide discretion afforded the Commissioner under Agreement Ten confirms that no member would voluntarily enter into the Conference agreement absent "trust" and "confidence" that the Commissioner use that power in a fundamentally fair manner. Commissioner Pettiti "has a duty to act for the benefit of the principal regarding matters within the scope of the relationship." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581. In taking this unprecedented and untimely action against the University under the guise of a Sportsmanship Agreement meant to cover an entirely different class of infractions, Commissioner Pettiti has breached the fiduciary duty owed the University.

Fifth, Coach Harbaugh is likely to succeed on his claim of intentional interference with his employment contract. The basic elements to establish tortious interference are (i) a valid business relationship; (ii) knowledge of this relationship; (iii) an intentional inference causing a breach or termination of the relationship; and (iv) damage. *Bonelli v Volkswagen of Am., Inc*, 166 Mich App 483, 496 (1988). Pursuant to his employment agreement, of which the

Conference was undoubtedly aware, Coach Harbaugh expected to coach the remainder of the Michigan Wolverine football team's games this season. Compl. Ex. A. The Conference's unjust punishment has unduly interfered with that contractual expectation. *Id.* It has also plainly tarnished Coach Harbaugh's reputation, and painted him a false light in the public eye. *Puetz v. Spectrum Health Hosps.*, 324 Mich. App. 51, 69, 919 N.W.2d 439, 448–49 (2018) (including “publicity that places the plaintiff in a false light in the public eye” as one type of invasion of privacy sufficient to support a claim). Indeed, the Conference imposed its suspension without “any information indicating that Head Football Coach Harbaugh was aware of the impermissible nature of the sign-stealing scheme,” but has nonetheless cast dispersions regarding his fitness to continue to serve as the team's head coach this season. Compl. Ex. D.

II. Premature Punishment Would Cause Irreparable Injury.

The University of Michigan and its constituents will suffer significant and irreparable harm if the Conference is permitted to impose the announced sanction without complying with its contractual obligations. Whether an injury is irreparable is “evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief.” *Martin v Progressive Mich Ins, Co*, unpublished opinion of the Court of Appeals, decided October 12, 2023 (Docket No 361659) at *2. Irreparable harm does not include “the mere apprehension of future injury or damage.” *Johnson*, 341 Mich App at 9.

It is impossible to quantify the entirety of the significant harm that will befall the University absent injunctive relief, but there can be no doubt that the University, its students, and the community will suffer greatly. The University itself, and particularly its athletics program, will endure significant and lasting reputational injury if the Conference is permitted to impose a sanction in advance of a full and fair investigation. The University prides itself on fairness and integrity. It is dedicated to following all of the NCAA and Big Ten Conference rules, and

supports the NCAA's investigation. Any sanction would unjustifiably undermine this image, reflecting poorly on the University's compliance before any determination of wrongdoing has been made.

As the Court is aware, this case has received significant media attention, which has already painted the University in a negative light. Courts routinely recognize that reputational harm constitutes an irreparable injury. *See, e.g., Slis v State*, 332 Mich App 312, 362-63 (2020) (holding that loss of goodwill can constitute irreparable harm because it is too difficult to measure and affirming a preliminary injunction); *Brown Dairy Equip, Inc v. Lesoski*, unpublished opinion of the Court of Appeals, decided November 9, 2010 (Docket No 291372) (recognizing that there was "no adequate remedy at law for the loss of goodwill and the potential harm to [plaintiff's] competitive position" and affirming a preliminary injunction); *ACT, Inc v Worldwide Interactive Network, Inc*, 46 F4th 489, 503-04 (6th Cir 2022) (holding that reputational harm is "precisely the sort of injur[y]" that is "difficult to quantify monetarily, and thus constitute[s] irreparable harm" and affirming a preliminary injunction). The University prides itself on fairness and integrity. It is dedicated to following all of the NCAA and Big Ten Conference rules, stands firmly behind the Conference's Sportsmanship Policy, and supports the NCAA's investigation. Any sanction would unjustifiably damage the University's reputation for compliance before any determination of wrongdoing has been made.

The Conference's sanction, absent injunctive relief, would cause a reputational hit on the University that undoubtedly would have an effect on future athletic recruitment, including both the University's ability to attract top high-school talent and to retain the players already on its team. Compl. ¶ 32. This type of damage is consistently found to favor injunctive relief. *Mayerova v E Mich Univ*, 346 F Supp 3d 983, 997 (ED Mich 2018) (holding that interruptions to

sports teams can result in irreparable harm in the form of “inability to attract quality players and coaches”); *Portz v St Cloud State Univ*, 196 F Supp 3d 963, 972 (D Minn 2016) (noting the harm to plaintiff team’s “recruiting efforts for future ... seasons”); *Barrett v W Chester Univ of Penn of the State Sys of Higher Educ*, 2003 WL 22803477, at *14 (ED Pa Nov 12, 2003) (same).

This is to say nothing of the irreparable harm suspension will cause Coach Harbaugh personally. No more dramatic blow could be given to his character and reputation than the permanent lifetime label of “missing in action” because of a purported—but still unsubstantiated—cheating scandal.

More fundamentally, the harm to the University’s student athletes would be irreversible. Now 9-0 on the season, it is undisputed that the team is in contention for the National Championship. Standing between the student athletes and a chance at this extraordinary opportunity are three Big Ten Conference games against Penn State, the University of Maryland, and Ohio State University. For the seniors on the University of Michigan team, this will be their last contest against these rival conference schools and their last chance to compete for a Conference and National Championship. These are once-in-a-lifetime events: the games cannot be replayed.

Suspension of Coach Harbaugh deep into the team’s season would irreparably harm the University’s chances of success. This is not merely conjecture. A study out of the University of Chicago’s Harris School of Public Policy found that “coaches account for 20 percent to 30 percent of the variation in team outcomes.” See UChicago News, *How Much Do Coaches Impact Success in Sports?* (Mar. 6, 2019). This is particularly pronounced in college football, where coaches “significantly affect points scored, points allowed, point differential and victories.” *Id.*

The purpose of the “Sportsmanship Policy” under which the Conference has purported to act is to promote “the integrity of . . . competition.” Agreement 10.01. Far from promoting fair competition, the removal of Coach Harbaugh would manufacture an unfair competitive disadvantage. While Penn State, Maryland, and Ohio State will finish out the season under the leadership of their head coaches, the University will be forced to change course on the eve of critical games. Altering the University’s chances of success in these critical games is damage that cannot be undone. Indeed, “[t]hese sorts of injuries, i.e., deprivations of temporarily isolated opportunities, are exactly what preliminary injunctions are intended to relieve.” *DM by Bao Xiong v Minn State High Sch League*, 917 F3d 994, 1003 (8th Cir 2019).

The student-athletes who have trained under Coach Harbaugh for the entire season (and in previous years) would be deprived of their best chances of success at this once-in-a-lifetime opportunity, if their leader is improperly removed. As legendary Notre Dame football coach Ara Parseghian aptly said, “a good coach will make his players see what they can be rather than what they are.” This type of relationship is not built overnight. The loss that would result from the loss of a head coach is a clear and irreparable harm. *See Cohen v Brown Univ*, 809 F Supp. 978, 998 (DRI 1992) (finding a team’s inability to “maintain the same level of intercollegiate competition” an irreparable harm favoring an injunction), *aff’d*, 991 F2d 888 (1st Cir 1993).

III. The Balance of Equities Warrants Injunctive Relief.

The proposed injunction—staying any penalty that does not comply with the Conference’s procedural requirements—poses no harm to the Big Ten Conference or anyone. Where, as here, harm to the plaintiff far outweighs the risk of harm to the defendant, preliminary injunctive relief should be granted. *See Slis*, 332 Mich App 312, 364-65.

Here, a TRO poses is *zero* risk of harm to the Conference, its members, or anyone else. No additional misconduct of the type that the Conference has alleged is ongoing. The University

suspended Mr. Stalions within two days of learning of the alleged misconduct, and the Conference has not claimed that any other member of the University’s coaching staff has been involved in improper in-person scouting. There is thus no colorable claim that the University poses any harm to its competitors, or to the integrity of the Conference. Moreover, even if the football team retained information about other teams’ prior signals—a possibility the Conference has not alleged and for which there is no evidence—it would not benefit the University anyway because “most teams will switch up their signals from week to week.” Pat Forde, *Follow the Signs: How Clemson Football Mastered the (Totally Legal) Art of Signal Stealing*, Sports Illustrated (Nov. 6, 2020). Finally, it is noteworthy that the crux of the rule violation here was the alleged in-person scouting and videotaping of opponents’ signals – not the decoding of those signals.

“Sign stealing”—the practice of decoding opponents’ play signals—is legal under NCAA and Conference rules. Teams regularly review publicly available game footage, as an NCAA committee implicitly recognized when considering removing the in-person scouting restriction altogether. Joshua D. Winneker & Ian Silfies, *The Ethics of Sign Stealing in College Football*, 32 Marq. Sports L. Rev. 425, 427 (2022) (describing software coaches use to review already existing game tape to analyze signs); NCAA Division I Council (Legislative Committee), *Division I Proposal 2021-32*. Such publicly available footage “allows coaching staffs to ... spot play calling patterns and increase the odds that sign stealing could be used effectively.” Joshua D. Winneker & Ian Silfies, *The Ethics of Sign Stealing in College Football*, 32 Marq. Sports L. Rev. 425, 427 (2022). The issue here, which was resolved with the suspension and subsequent resignation of Mr. Stalions, was the “in-person” nature of the signal recording.

Third, there is *no* harm to the Conference in delaying its imposition of a sanction. If the NCAA investigation determines that the University violated Rule 11.6.1 or any other rule, the Conference will have a full and fair opportunity to follow the procedures set forth in Handbook Rule 32 and levy an appropriate additional punishment. Whether that punishment issues this week, later in the season, or next season should be of no import to the Conference. There remain significant factual questions, as well as disputes about the application of the rules. Those outstanding issues are material to whether a violation occurred, the nature and gravity of any such violation, and the proper scope of any punishment. It can only benefit the Conference to conduct a thorough investigation, to ensure that any punishment is warranted, particularly in light of recent news accounts suggesting that the alleged conduct is more widespread than previously realized. *See* David Hale, *Sign-stealing and the quest to crack the opponent's code*, ESPN (Nov. 9, 2023).

The object of immediate injunctive relief is to “preserve the status quo”—the “last actual, peaceable, noncontested status which preceded the pending controversy.” *Att’y Gen v Thomas Solvent Co*, 146 Mich App 55, 61(1985). Given this lack of a risk of harm from an injunction, and the significant harm that the University will face if prematurely sanctioned, the equities weigh heavily in favor of maintaining the status quo and delaying any sanction pending appropriate due process.

IV. The Public Interest Would Be Served by an Injunction

It is a basic principle of contract law that “enforcing a contract by its plain terms is in the public interest.” *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F 3d 535, 551 (6th Cir 2007) (finding that holding a defendant “to the terms of the bargain they entered into” through a contract was beneficial to the public interest and issuing a preliminary

injunction). The public, and fellow member institutions of the Big Ten Conference alike, have an interest in the fair application of the contractual procedures outlined in the Big Ten Handbook

Even more fundamentally, the public has an interest in college football, and the fairness of college football; and the College Football National Championship is meant to crown the best college football team in the nation. In 2013, the viewership for the championship game between the University of Georgia and TCU, despite having comparative low ratings, still averaged 17.2 million viewers. *See* Bill Shea, *Georgia's blowout win vs. TCU draws lowest viewership of CFP championship since BCS era began*, *The Athletic* (Jan. 10, 2023). Fans have a vested interest in seeing the most deserving team win the title. This has historically been the goal of college playoffs. Indeed, Commissioner Petitti, then ABC Sports' vice president for programming, helped to create the BCS—the precursor to the National Championship—nearly 30 years ago, in recognition of the importance of broadcasting “1 vs. 2.” *See* Chris Low, *How the creation of the BCS set the stage for the current playoff format*, *ESPN* (Oct. 31, 2023). The NCAA has taken concerted steps over the past few years to ensure that the top two teams make it to the final game. *Id.* The University of Michigan is indisputably a contender for one of those spots this year, and the public has an interest in seeing it have a fair opportunity to compete at the highest level under the leadership of its head coach.

CONCLUSION

For the foregoing reasons, the University of Michigan respectfully requests that the Court grant Plaintiff's request for a temporary restraining order, order Defendant to Show Cause, and issue a preliminary injunction.

Respectfully submitted,

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Dated: November 10, 2023

Certificate of Service

I hereby certify that on the 10th day of November, 2023, I electronically filed the foregoing with the Clerk of Court and that I have served a true and correct copy of the foregoing document on counsel listed below via email:

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