

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD
OF GOVERNORS, on behalf of WEST VIRGINIA
UNIVERSITY,

Plaintiff,

v.

Civil Action No. 11C-695

THE BIG EAST CONFERENCE,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT, BREACH OF CONTRACT, AND
PERMANENT INJUNCTIVE RELIEF

The Plaintiffs, by and through its undersigned attorneys, complains of the Defendants as follows:

PARTIES

1. The Plaintiff, West Virginia University Board of Governors ("WVU"), was created by the legislature of the State of West Virginia through the Code of West Virginia §18B-2A as a governing body with the mission of general supervision and control over the academic and business affairs of West Virginia University.

2. The Defendant, The Big East Conference, is a nonprofit corporation organized under the laws of the District of Columbia.

JURISDICTION & VENUE

3. This action is brought in part pursuant to the W. Va. Code § 55-13-1 *et seq.*, seeking a declaration of the parties' rights and obligations under the Big East Conference Amended and Restated Bylaws As of March 12, 2008 ("Bylaws"). Further, this is an action for breach of contract and permanent injunctive relief.

FILED

OCT 31 2011

JEAN FRIEND
CIRCUIT CLERK

4. The substantive law of the District of Columbia governs this civil action in accordance with the Big East Conference Amended and Restated Bylaws As of March 12, 2008.

5. The Circuit Court of Monongalia County, West Virginia has general and specific personal jurisdiction over the parties to this civil action as the parties have systematic and continuous contacts in this jurisdiction and a substantial part of the acts and omissions giving rise to the cause of action arose in this jurisdiction. Federal removal jurisdiction does not lie as WVU is a public body created by statute, an “alter ego” of the State of West Virginia for jurisdictional analysis. As such, WVU is not a citizen of West Virginia for purposes of federal removal jurisdiction.

6. Pursuant to West Virginia Code § 56-1-1 venue is proper in the Circuit Court of Monongalia County, West Virginia because a substantial part of the events and omissions giving rise to the claim occurred in Monongalia County, West Virginia.

FACTUAL ALLEGATIONS

History of the Big East

7. The Big East was formed in 1979 when Providence College (“Providence”), St. John’s University (“St. John’s”), Georgetown University (“Georgetown”), Syracuse University (“Syracuse”), Seton Hall University (“Seton Hall”), University of Connecticut (“UConn”), and Boston College agreed to form a sports conference focusing primarily on basketball. Villanova University (“Villanova”) joined in 1980, and University of Pittsburgh (“Pittsburgh”) joined in 1982.

8. About a decade after its inception, the Big East decided to become a major football conference. The Big East invited five schools, including Rutgers University (“Rutgers”), University of Miami (“Miami”), Temple University (“Temple”), Virginia Polytechnic Institute

and State University (“Virginia Tech”), and West Virginia University (“WVU”) to compete in football only. The inaugural Big East football season launched in 1991.

9. WVU and Rutgers joined the Big East as full members in all sports in 1995, and Virginia Tech joined as a full member in all sports in 2000.

10. In 1995, University of Notre Dame (“Notre Dame”) became a member of the Big East in all sports except football.

11. Accordingly, by 2000, Big East members Providence, St. John’s, Georgetown, Seton Hall, UConn, and Villanova did not compete in NCAA Division I football. Notre Dame competed in NCAA Division I football, but not as a member of the Big East. WVU, Rutgers, Miami, Virginia Tech, Syracuse, and Boston College competed in all sports, including NCAA Division I football, as members of the Big East. Temple was a member of the Big East only for NCAA Division I football.

12. This unusual arrangement, one in which some member schools competed in NCAA Division I football (“football schools”) and some did not (“non-football schools”), led to instability in the conference. In 2003, Miami, Virginia Tech, and Boston College withdrew from the Big East in order to join as members of the Atlantic Coast Conference (“ACC”).

13. In the wake of Miami, Virginia Tech, and Boston College leaving the Big East to join the ACC, the Big East invited University of Louisville (“Louisville”), University of Cincinnati (“Cincinnati”), University of South Florida (“South Florida”), DePaul University (“DePaul”), and Marquette University (“Marquette”) as members. Louisville, Cincinnati, and South Florida were football schools as they competed in NCAA Division I football. DePaul and Marquette joined as non-football schools as they did not compete in NCAA Division I football. Additionally, UConn became a football school as it began competing in NCAA Division I

football. Finally, the Big East voted out Temple. Thus, following this restructuring in the wake of the 2003 defections, the Big East consisted of 16 member institutions: 8 football schools and 8 non-football schools.

14. The Big East retained its status as an Automatic Qualifying (“AQ”) football conference following its restructuring. This meant that the member institution which won the Big East football conference automatically qualified to play in one of the five Bowl Championship Series (BCS) bowl games.

Big East Bylaws

15. On or about March 12, 2008, the Big East member institutions agreed to amend the conference’s bylaws, agreeing to The Big East Conference Amended and Restated Bylaws As of March 12, 2008 (“Bylaws”) (a copy of the Bylaws is attached hereto as Exhibit A).

16. The Bylaws make clear that a critical purpose of the Big East is to “[e]nhance the opportunities for participation in, and the level of competition of, men’s and women’s intercollegiate athletics on an equitable basis[.]”

17. The Bylaws acknowledge the distinction between its member institutions that compete in NCAA Division I-A football and those that do not. The Bylaws define “Football Action” as “any matter which relates specifically to any participation in NCAA Division I-A football by Division I-A Schools”

18. Despite the fact that half of the member institutions are non-football schools, the Bylaws allow those non-football schools to vote on football matters, stating: “Notwithstanding any provision in these Bylaws to the contrary, any vote on a matter constituting a Football Action shall be passed by a majority vote of all Division I-A School Directors only, or where applicable, by majority vote of all Division I-A School Athlete Directors only, and no

amendment to this definition of 'Football Action' shall be passed without the vote of a majority of all the Division I-A School Directors”

19. The Bylaws create a Commissioner of the Big East to serve as its chief executive officer and President of the Conference. The current Commissioner of the Big East is John Marinatto.

20. Under the Bylaws, the Commissioner is obligated to perform certain duties for the Big East member institutions including, but not limited to, promoting the prestige and success of the conference.

21. The Bylaws specifically contemplate withdrawal from the Big East. Pursuant to the Bylaws, a member may withdraw from the Big East by providing written notice to the conference. The withdrawing member is further required to (a) specify an effective date of withdrawal which must be at least twenty-seven months after the date that the withdrawal notice is received by the commissioner; and (b) pay a withdrawal fee to the Big East in the amount of five million dollars (\$5,000,000.00).

Denigration Of the Big East Football Conference

22. In 2010, Texas Christian University (“TCU”) accepted an invitation to join the Big East as an all sports member beginning in the 2012-2013 academic year. TCU would be a football school. The Big East invited TCU in an attempt to raise its profile as a major football conference and help ensure it remained an AQ conference.

23. On September 17, 2011, Syracuse and Pittsburgh announced they were withdrawing from the Big East and that they had accepted invitations to join the ACC.

24. On September 18, 2011, UConn President Susan Herbst issued a statement saying that although UConn was a “proud charter member of the Big East” the school was staying

“actively involved in discussions with our counterparts from around the country to ensure the successful long-term future of our university's athletic program.”

25. On September 26, 2011, the Governor of Connecticut confirmed that UConn was aggressively seeking an invitation to join the ACC due to the uncertainty that the Big East would remain a viable football conference in the near future

26. On October 10, 2011, TCU announced that it was withdrawing from the Big East to become a member of the Big XII Conference. The Big East did not require TCU to honor the twenty-seven month withdrawal period set forth in its bylaws.

27. Upon information and belief, representatives of Louisville, Rutgers, and Cincinnati have been engaged in discussions with other sports conferences, including the ACC, the Big XII, the SEC, and the Big 10 for the purpose of trying to obtain invitations to join these conferences and withdraw from the Big East.

28. On October 27, 2011, WVU received an invitation to join the Big XII for all sports, including football. WVU accepted the Big XII's offer the same day. As the Big East, in less than two months, had denigrated into a non-major football conference whose continued existence is in serious jeopardy, WVU had no choice but to accept the Big XII's offer.

Commissioner's Breach of Fiduciary Duties to Football Schools

29. The denigration of the Big East football conference is a direct and proximate result of ineffective leadership and breach of fiduciary duties to the football schools by the Big East Conference and its Commissioner.

30. The Big East and its Commissioner failed to take proactive measures to maintain, let alone enhance, the level of competition for the Big East football schools.

31. Upon information and belief, this breach of fiduciary duty presumably forced member institutions Pittsburgh and Syracuse to withdraw from the Big East and accept an invitation to join the ACC. Upon information and belief, this breach presumably forced member TCU to withdraw from the Big East and join the Big XII.

32. The departure of members Pittsburgh, UConn, and TCU created an imbalance and disparity between the football and non-football playing schools that was neither contemplated nor addressed in the Bylaws. The departure of these schools left six football schools and eight non-football playing schools. The sudden withdrawal of thirty-three percent of the football schools resulted in the football schools being subjected to increased governance by the non-football schools. This disparity was not considered in the Bylaws, and the departure of the above-mentioned schools has rendered WVU's performance in the Big East commercially impracticable.

33. During the weeks that followed the departure of Pittsburgh, Syracuse, and TCU, and the public acknowledgement by UConn that it was exploring other conference affiliations, the Big East and its Commissioner further breached their fiduciary duties to the Big East football schools. The Big East football schools advocated measures to be taken by the Big East and its Commissioner to maintain the level of competition of the Big East football conference. The non-football schools repeatedly exerted their newfound level of increased governance at the expense and to the detriment of the football schools. The Commissioner did nothing to protect the football playing schools and in fact took measures to further protect and advance the interests of the non-football playing schools.

34. This lack of leadership, breach of fiduciary duties by the Big East and its Commissioner, and voting disparity between the football and non-football schools resulted in the

Big East football conference no longer being a viable and competitive football conference. Additionally, upon information and belief, is expected by WVU and others that the Big East will lose its position as an AQ conference. Accordingly, the Big East Conference and its Commissioner, through their actions, breached their contract to WVU and nullified and voided the Bylaws.

COUNT I: DECLARATORY JUDGMENT

35. WVU incorporates the foregoing allegations herein by reference.

36. The agreement between WVU and the Big East, as well as the bylaws, impose on the Commissioner certain fiduciary obligations towards WVU and the other member universities.

37. These fiduciary obligations include, but are not limited to, acting to maintain a ratio of football-to-non-football universities of eight-to-eight and maintaining and enhancing the level of competition in the Big East football conference.

38. Over the past several months, the Commissioner has failed to fulfill his fiduciary obligations towards WVU by failing to act to maintain the eight-to-eight ratio between football and non-football universities within the membership of the Big East, failing to properly protect the interests of WVU as a member of the Big East, and by allowing the level of competition in the Big East football conference to substantially decrease.

39. Upon information and belief, the aforementioned actions and inactions of the Commissioner in failing to carry out his fiduciary obligations towards WVU were performed without the prior or subsequent approval of WVU.

40. In addition, WVU recently submitted an offer to the Commissioner proposing that WVU be permitted to immediately withdraw from the Big East in exchange for a payment of certain monies with this offer.

41. Following receipt of the aforementioned offer or proposal, the Commissioner accepted WVU's tendered enclosed payment, thus accepting WVU's offer or proposal to immediately withdraw from the Big East on the terms WVU submitted.

42. Upon further information and belief, the Commissioner has previously allowed TCU to withdraw from the Agreement without requiring TCU to provide the Agreement-mandated 27 (twenty-seven) months' prior notice.

43. Due to the aforementioned actions and inactions of the Commissioner, by which the Commissioner has failed to carry out his fiduciary obligations towards WVU as the Agreement requires, the Big East has materially breached the Agreement and bylaws, and the Agreement is therefore void and of no effect.

44. An actual controversy exists between the parties concerning the enforceability of the Agreement in light of the Big East's material breach of the agreement via the Commissioner's failure to carry out his required fiduciary obligations towards WVU.

45. The interests of the parties concerning the enforceability of the Agreement are real and adverse, and the issue is ripe for adjudication, due to the fact that the rights and obligations of the parties under the Agreement are at issue in this action.

46. The Agreement is void due to the actions and inactions of the Commissioner in failing to carry out his required fiduciary obligations towards WVU. WVU expects that the Big East will maintain that the Agreement is enforceable.

47. The Commissioner's acceptance of WVU's submitted monetary payment constitutes acceptance of WVU's proposal or offer to immediately withdraw from the Big East.

48. Moreover, the Commissioner's excusal of TCU's noncompliance with the 27-month notice provision of the Agreement constitutes a waiver of this same provision with respect to WVU.

49. The Court should accordingly enter an order declaring the Agreement and bylaws to be void and of no effect as between the parties, or in the alternative, declaring that the Big East has accepted WVU's proposal or offer to immediately withdraw from the Big East, or in the further alternative, declaring that the Big East has waived WVU's obligation to abide by the Agreement's 27-month notice provision.

COUNT II: MATERIAL BREACH OF CONTRACT

50. WVU incorporates the foregoing allegations herein by reference.

51. The Big East has failed to satisfy a number of its fiduciary, and other, obligations owed to WVU under the Agreement.

52. Upon information and belief, the Big East has, for example, failed to comply with the fiduciary obligations towards WVU that the Commissioner act to maintain the eight-to-eight ratio between football and non-football universities within the membership of the Big East.

53. Furthermore, upon information and belief, the Big East has also failed to maintain and enhance the level of competition of the Big East football conference, in violation of the Agreement.

54. The actions and inactions of the Big East and its Commissioner, as described above, constitute material breaches of the Agreement, thus relieving WVU of its own obligations under the Agreement and excusing WVU from any further performance of said obligations.

55. As a proximate result of these and other material breaches of the Agreement, WVU has suffered damages.

COUNT III: IMPOSSIBILITY OR IMPRACTIBILITY OF PERFORMANCE

56. WVU incorporates the foregoing allegations herein by reference.

57. Due to circumstances and events beyond WVU's control, which are substantially and materially different from what WVU reasonably anticipated, WVU's performance under the Agreement has become impossible or unreasonably burdensome.

58. These materially different circumstances include, but are not limited to, repeated actions and inactions of the Commissioner in failing to carry out its fiduciary obligations towards WVU as required by the Agreement, as discussed in the aforementioned allegations.

59. The Agreement does not contemplate a scenario in which the Big East football conference is no longer a viable and competitive football conference.

60. Due to these unanticipated circumstances, whereby the Big East is no longer a viable and competitive football conference, the benefits to be achieved by WVU through the Agreement are not justified by the unanticipated burden on WVU.

61. In light of this unreasonable burden, WVU's performance of the Agreement is excused and the Court should accordingly enter an order declaring the Agreement and bylaws, including the twenty-seven month notice period, to be void and of no effect as between the parties.

COUNT IV: FRUSTRATION OF PURPOSE/FAILURE OF CONSIDERATION

62. WVU incorporates the foregoing allegations herein by reference.

63. Due to circumstances and events beyond WVU's control, which are substantially and materially different from what WVU reasonably anticipated, a principal purpose of WVU in entering into the Agreement has been substantially frustrated.

64. These materially different circumstances include, but are not limited to, repeated actions and inactions of the Commissioner in failing to carry out its fiduciary obligations towards WVU as required by the Agreement, as discussed in the aforementioned allegations.

65. This frustration was not within the risks assumed by WVU under the Agreement, and the non-occurrence of these frustrating events was a basic assumption upon which the Agreement was made.

66. Due to these unanticipated circumstances, WVU has suffered a failure of consideration, as the benefits to be achieved by WVU through the Agreement are not justified by the unanticipated burden on WVU.

67. In light of this substantial frustration, failure of consideration, and unreasonable burden, WVU's performance of the Agreement is excused and the Court should accordingly enter an order declaring the Agreement and bylaws, including the twenty-seven month notice period, to be void and of no effect as between the parties.

COUNT V: UNREASONABLE RESTRAINT ON TRADE

68. WVU incorporates the foregoing allegations herein by reference.

69. The provision of the Agreement requiring WVU to provide twenty-seven months' notice before withdrawing from the Agreement constitutes an unreasonable restraint on trade.

70. This restraint is larger and/or more extensive than was required for the necessary protection of the Big East's business interest.

71. Further, holding WVU to the twenty-seven month notice provision of the Agreement will contravene public policy.

72. The Court should therefore declare the twenty-seven month notice provision of the Agreement void and of no effect with respect to WVU.

COUNT VI: PERMANENT INJUNCTIVE RELIEF

73. WVU incorporates the foregoing allegations herein by reference.

74. Upon information and belief, and based upon the prior experience of WVU, the Big East will hold WVU to the Agreement provision requiring WVU to provide 27 (twenty-seven) months of prior notice before WVU may withdraw from the Big East.

75. For the aforementioned reasons, the Big East has breached its fiduciary obligations to WVU, has materially breached the Agreement, and has fostered a state of affairs in which it is impossible and/or impracticable for WVU to remain in the Big East and has frustrated a principal purpose of WVU's decision to enter into the Agreement.

76. Enforcing the 27-month notice provision against WVU will unreasonably force WVU to remain in the Big East for at least 27 more months.

77. Absent a Court order permanently enjoining the Big East from enforcing the 27-month notice provision against WVU, WVU has no adequate remedy at law to protect its interests and will suffer continuing and irreparable damages and injury.

WHEREFORE, for the foregoing reasons, WVU respectfully requests that the Court:

a. Enter an order declaring that the Agreement is void and of no effect, or in the alternative, declaring that the Big East has accepted WVU's proposal or offer to immediately withdraw from the Big East, or in the further alternative, declaring that the Big East has waived WVU's obligation to abide by the Agreement's 27-month notice provision;

b. Award WVU all damages incurred as a result of the material breaches of contract and breaches of fiduciary duty committed by the Commissioner and the Big East;

c. Enter an Order permanently enjoining the Commissioner and the Big East from enforcing the 27-month notice provision of the Agreement against WVU;

d. Awarding WVU such other and further relief as it deems appropriate under the circumstances.

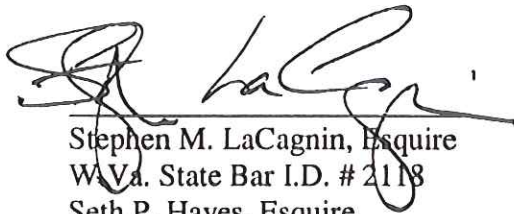
JURY TRIAL DEMANDED

WVU hereby demands a trial by jury.

Respectfully submitted,

**WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS, on behalf of WEST VIRGINIA
UNIVERSITY,**

By Counsel.



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