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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

Superior Court
Civil Action No. 23CV2900

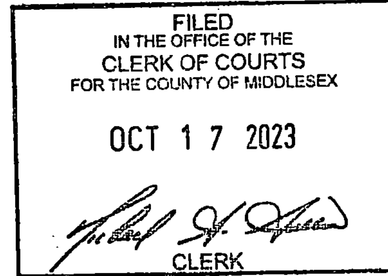
JANE AND JOHN DOES 1-37,

Plaintiffs,

v.

TRUSTEES OF BOSTON COLLEGE, BLAKE JAMES, in his official and individual capacity, and REGGIE TERRY, in his official and individual capacity,

Defendants.



PLAINTIFFS' JANE AND JOHN DOES 1-37 MEMORANDUM OF LAW IN SUPPORT OF THEIR EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs Jane and John Does 1-37 (collectively, "Plaintiffs" or "Does") are students currently enrolled at Boston College ("BC" or the "College") and are all members of the BC Swimming and Diving Team. The 37 Plaintiffs include 18 females, 19 males, and represent every class year, with 6 freshmen, 10 sophomores, 12 juniors, and 9 seniors. Plaintiffs seek a temporary restraining order and preliminary injunction, enjoining the College from enforcing the indefinite suspension imposed on the entire Swimming and Diving Team on September 20, 2023. The College's Athletic Department imposed this unwarranted, and unprecedented suspension, on the entire program — immediately halting all practices, training, and competition — without affording the students a fair process and in violation of the College's conduct policies. The College's decision to suspend the entire Team, and the public statement issued along with the suspension, has caused significant harm to these elite athletes, a number of whom hope to participate in the conference championships and 2024 Olympic trials. BC's imposition of a full program suspension, prior to any investigation being conducted and before any determinations had been reached, was an egregious miscarriage of justice and will cause irreparable harm to the Plaintiffs should they not be permitted to resume their practice, training, and competition schedule immediately. For the reasons described herein, Plaintiffs meet the requirements for a temporary restraining order and a preliminary injunction.

STATEMENT OF FACTS[1]

The Boston College Swimming and Diving program is a National College Athletic Association ("NCAA") Division One ("D1") co-ed team in the Atlantic Coast Conference ("ACC"), led by head coach Joe Brinkman ("Coach Brinkman"), along with diving coach Jack

[1] For a full recitation of the facts, please see Plaintiffs' Complaint. (Dkt. 1).

Lewis, and assistant coaches. Compl., ¶¶ 23-25. BC recruited Plaintiffs to become members of the Swimming and Diving Team, with many of the students declining offers and opportunities from other prestigious institutions, choosing instead to attend BC. *Id.* at ¶¶ 36-37.

Jane and John Does 1-37 began their practices on August 30, 2023, and expected to begin the 2023-2024 season with a meet on September 23, 2023. *Id.* at ¶ 38. However, just as the season was about to begin, the Boston College Athletics Department took it upon themselves to put an end to it. *Id.* at ¶ 39. On or about September 11, 2023, Senior Associate Athletics Director Reggie Terry ("AAD Terry" or "Defendant Terry") called a meeting with the 7 junior boys on the swim team who live in an off-campus residence known as "Kirk[2]", when he notified them that they would be suspended from the swim team due to a statement someone made related to alleged alcohol consumption that occurred at their house. *Id.* at ¶¶ 41-50. This suspension came without any hearing or other opportunity for the junior swim boys to defend themselves. *Id.* at ¶ 48.

When the residents of Kirk asked AAD Terry who made the alleged statement, and on what date the event at issue occurred, he responded that he did not have this information but that the boys would be hearing from the Dean of Students office. Compl., ¶ 43. Oddly, during this meeting, Defendant Terry likened the alleged actions of those in the Kirk to an alleged rape that occurred on campus. *Id.* at ¶ 44. This anecdote lacked any relevance to the current matter, causing confusion amongst the swimmers who understood that they were being compared to rapists. *Id.*

On September 19, 2023, Coach Brinkman notified the Team that they were required to attend a meeting the following morning at 8:00 a.m. with Director of Athletics Blake James ("AD James" or "Defendant James") and AAD Terry. *Id.* at ¶ 51. Also on September 19, 2023, the entire Swimming and Diving Team received a notice from Associate Dean Melissa Woolsey ("Dean

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[2] "Kirk," also called the "Swim House" refers to 44-46 Kirkwood Road, an off-campus multi-family home where seven (7) junior swim boys and six (6) junior swim girls reside.

Woolsey") in the Office of the Dean of Students indicating that the office had received reports about alleged violations of the Student Code of Conduct (the "Code") (Ex. 45) committed by members of the Swimming and Diving Team, in connection with events during the weekend of September 1-4, 2023, in locations on and off campus. Compl., ¶ 52.

The notice mentioned events occurring on September 2, September 3, and September 4, 2023, allegedly involving underage drinking and hazing activities. *Id.* at ¶ 53. Dean Woolsey stated that after reviewing the report, she had identified potential violations of the Student Code of Conduct (the "Code"), including: (1) 9.3 Hazing, (2) 8.1 Alcohol Policy; (3) 11.2 Disorderly Conduct; (4) 11.1 Community Disturbance; and (5) Complicity. *Id.* at ¶ 54; Ex. 45.

The following day, the Swimming and Diving Team met with AD James for approximately seven minutes, during which AD James informed the Team that they were all indefinitely suspended from swimming and diving. Compl., ¶ 56. AD James admitted that the school did not yet have all of the relevant information and acknowledged that not everyone was involved, yet nonetheless called the students "disgusting" while berating and humiliating them. Compl., ¶ 57. The same day, prior to the Office of the Dean of Students having initiated any formal investigation let alone before reaching any findings on the allegations, the BC Athletics Department published the following false and defamatory statement (the "Statement") to the BC Athletics website:

> The Boston College Men's and Women's Swimming and Diving program has been placed on indefinite suspension, after University administrators ***determined that hazing had occurred*** within the program.

(emphasis supplied). *Id.* at ¶ 58; Ex. 38. Indisputably, as of September 20, 2023, University administrators ***had not*** determined that any hazing had occurred, and the affected students only first received notification of such allegations the day prior. Compl., ¶ 60.

In an attempt to save face, also on September 20, 2023, the Athletics Department revised its statement to include one additional sentence, noting: "Consistent with University policy, the matter will be investigated by the Office of the Dean of Students and adjudicated fairly and impartially through the student conduct process." *Id.* at ¶ 63; Ex. 38. The Athletics Department revised the statement for a third time on September 21, 2023, to now read: "Boston College Athletics has suspended the activities of the Men's and Women's Swimming and Diving teams following credible reports of hazing. Based on the information known at this time, Athletics has determined a program suspension is warranted, pending a full investigation by the University." Compl., ¶ 64.; Ex. 40. However, these revisions were rendered obsolete as the reputational damage had already been done. *Id.* at ¶ 65.

Within hours of the Athletics Department publishing its statement regarding the indefinite suspension of the Swimming and Diving Team, the story had been picked up by nearly every major local and national media outlet. *Id.* at ¶ 66; *See e.g.,* Ex. 42, 43, and 44. The local and national print and television reports relied upon and cited to the statement first issued by the Athletics Department, inaccurately reporting that the BC Swimming and Diving Team had been indefinitely suspended "after university administrators ***determined that hazing had occurred.***" Compl., ¶ 67.

Again, the Statement was demonstrably false as an investigation had not yet been completed, and no findings had been made, let alone any findings that every single member of the Swimming and Diving Team was responsible for the alleged violations, as implied by the overarching language of the Statement. *Id.* at ¶ 68. This Statement, and the ensuing media coverage generated significant attention on the student athletes, both from their peers within the Boston College community, as well as the media, causing reputational, social, mental, and emotional harm to the members of the Team and creating a hostile environment on campus. *Id.* at ¶ 69.

On September 28, 2023, the Office of the Dean of Students issued an updated Notice of Investigation which adjusted the address and location of one of the events under investigation. Compl., ¶ 71. That same office further requested that each student sign up by Saturday, September 30, 2023, for an investigation interview to take place during the week of October 2 through October 6. *Id.* at ¶ 72. The College retained an external law firm to conduct the investigative interviews, which took place in part during the students' fall break. *Id.* at ¶ 73. Though the investigation had only just begun, on October 6, 2023, the College took further steps to double down, publicly canceling all remaining meets for the year on the program's online schedule. *Id.* at ¶ 74; Ex. 46. Peculiarly, the College removed some of the noted "cancellations" on the Team's online schedule later that same day. Nonetheless, the full program suspension remains in effect. *Id.* at ¶ 75.

ARGUMENT

I. The Requested Temporary Restraining Order and Preliminary Injunction is Proper Under the Law.

Plaintiffs' motion for a temporary restraining order and preliminary injunction should be granted because Plaintiffs satisfy the requisite elements for such relief: "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.'" *T.T.K., Inc. v. Columbia Speedway Plaza Member, LLC*, No. 20092093, 2009 WL 3644707, at *2 (Mass. Super. Oct. 9, 2009) (quoting *Tri–Nel Mgt., Inc. v. Board of Health of Barnstable,* 433 Mass. 217, 219, 741 N.E.2d 37 (2001) (internal citations omitted)). "Out of these factors, the likelihood of success on the merits normally weighs heaviest in the decisional scales." *Viken Detection Corp. v. Videray Techs. Inc.,* No. 2019 WL 2491618, at *6 (D. Mass. June 14, 2019) (internal citations omitted).

A preliminary injunction, while considered an extraordinary remedy, should be issued when necessary to preserve the status quo pending final outcome of a case. *Reuters Ltd v. United Press International, Inc.*, 903 F.2d 904, 909 (2d Cir. 1990) ("[F]or purposes of a preliminary injunction, the status quo is 'the situation that existed between the parties immediately prior to the events that precipitated the dispute.'"). The "'status quo' does not mean the situation existing at the moment the lawsuit is filed, but the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (additional citations omitted). *See also LaRouche v. Kezer*, 20 F.3d 68, 74 n.7 (2d Cir. 1994) (same); *Phillip v. Fairfield University*, 118 F.3d 131, 133-134 (2d Cir. 1997). The temporary restraining order and preliminary injunction that Plaintiffs seek here preserves the status quo of their being able to engage in practice, training, and competitive swimming and diving.

The courts of the Commonwealth of Massachusetts have previously granted injunctive relief to students, to restrain colleges from imposing a sanction. *See, e.g., Ackermann v. President of Coll. of Holy Cross,* No. 030577B, 2003 WL 1962482, at *1 (Mass. Super. Apr. 1, 2003); *Byrne v. Curry Coll.,* No. NOCV201801596, 2019 WL 2150225, at *1 (Mass. Super. Jan. 28, 2019). In addition, courts within the First Circuit have also previously granted such relief. *See, e.g., Doe v. Brown Univ.,* No. 1:16-cv-00017 (D.R.I. Aug. 23, 2016), ECF 57; *Paradise v. Brown Univ.,* No. 1:21-cv-00057 (D.R.I. Feb. 5, 2021), ECF 8. Moreover, courts across the Country have restrained colleges from taking action against a student when an unfair process was utilized, and irreparable harm is likely. *See, e.g., Roe v. Adams-Gaston*, 2018 WL 5306768, at 14 (S.D. Ohio Apr. 17, 2018); *Doe v. Texas A&M Univ.-Kingsville*, No. 2:21-cv-00257 (S.D. Tex. Nov. 5, 2021); *Doe v. Rector & Visitors of Univ. of Va.,* 2019 WL 2718496, at 6 (W.D. Va. June 28, 2019); *Doe v. Univ. of Mich.,* 325 F. Supp. 3d 821, 829 (E.D. Mich. 2018).

II. <u>Plaintiffs Are Likely to Succeed on the Merits of Their Claims</u>.

A. Breach of Contract

First, Plaintiffs satisfy the first prong of the analysis as they are likely to succeed on the merits of their breach of contact claim. To establish a breach of contract claim under Massachusetts law, the plaintiffs must demonstrate that: (i) "there was an agreement between the parties"; (ii) "the agreement was supported by consideration"; (iii) "the plaintiff was ready, willing, and able to perform his or her part of the contract"; (iv) "the defendant committed a breach of the contract"; and (v) "the plaintiff suffered harm as a result." *Viken Detection Corp. v. Videray Techs. Inc.,* No. CV 19-10614-NMG, 2019 WL 2491618, at *6 (D. Mass. June 14, 2019), *quoting Bulwer v. Mount Auburn Hosp.,* 473 Mass. 672, 46 N.E.3d 24, 39 (2016). Moreover, it is well established in Massachusetts that the relationship between a student and a school is contractual in nature. *See Massachusetts Inst. of Tech. v. Guzman,* 90 Mass. App. Ct. 1102, 56 N.E.3d 894 (2016); *Mangla v. Brown Univ.,* 135 F.3d 80, 83 (1st Cir.1998); *Dinu v. President & Fellows of Harvard College,* 56 F.Supp.2d 129, 130 (D.Mass.1999).

The terms of the contract between a university and a student can include written policies such as the university's policies related to conduct and disciplinary proceedings. *Id.* In determining whether a university breached any provision of its educational contract, the court is to examine whether the college's actions met the reasonable expectations of the student. *Cloud v. Trustees of Boston Univ.,* 720 F.2d 721, 724 (1st Cir.1983). *See also Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34 (1st Cir. 2007) (whether the "process [was] carried out in line with [the Plaintiff] student's reasonable expectations"); *Travelers Casualty & Surety Co. of America v. The Netherlands Ins. Co.*, 312 Conn. 714, 740 (2014) (any ambiguity in contract is construed in accordance with reasonable expectations of non-drafting party).

Here, the governing contract between BC and the Plaintiffs was the College's Student Code of Conduct. Ex. 45. BC recruited each of the Plaintiffs, Jane and John Does 1-37, to join BC's Swimming and Diving Team. Plaintiffs subsequently committed and chose to enroll at BC, join its Swimming and Diving Team, and paid all associated fees and expenses. The Plaintiffs did so in reliance on, and with the understanding and reasonable expectation that BC would implement and enforce the provisions and policies set forth in its official publications, including its Code and related policies. Accordingly, an express contract or, alternatively, a contract implied in law or in fact was formed between each of the Plaintiffs and BC. The contract contained an implied covenant of good faith and fair dealing. It implicitly guaranteed that any proceedings would be conducted with basic fairness. *See Doe v. Trustees of Bos. Coll.,* 892 F.3d 67, 87 (1st Cir. 2018).

Nonetheless, and based on the aforementioned facts and circumstances, Defendant BC breached express and/or implied agreement(s) with Plaintiffs, and the covenant of good faith and fair dealing contained therein, as follows:

1. The College Deprived the Students of their Fundamental Rights to Defend Themselves and be Heard, Before Imposing a Disciplinary Suspension.

Section 1.3 of the Code assures that in the case of conduct procedures, students have the right to "be informed of any charges of misconduct, an opportunity to respond to the charges, hear evidence in support of the charges, present evidence against the charges, and be informed of the outcome of a conduct proceeding." *Code, § 1.3*; Ex. 45. The Code describes that the purpose of conduct proceedings is to investigate the facts of the matter and to determine responsibility for alleged violations, under a preponderance of the evidence standard. *Code, § 1.5*; Ex. 45.

Here, the College suspended an entire team one day after notifying the students that they were being investigated and prior to affording them a fair opportunity to defend themselves and be heard. The imposition of a season-ending suspension on the entire Team, when the investigative

process had only just begun, was an egregious overstepping of the College's Athletics Department. The impropriety of this interim action is further exemplified by the fact that numerous members of the Swimming and Diving Team may ultimately be deemed not responsible for any policy violations. Notwithstanding, by the time the conduct process concludes, they will have potentially lost out on an entire swim season, severely and permanently jeopardizing their future opportunities.

2. BC Violated its Policies When it Imposed an Unjustified, and Unprecedented, Suspension of an Entire Sports Program.

Section 2.3 of the Code details the circumstances in which interim administrative action may be taken: "when a student is deemed to threaten the health, safety, or well-being of the University community, threaten or impair the effective functioning of the University, or when a student has been charged with a serious criminal offense." *Code, § 2.3*; Ex. 45. The Code provides examples of when an interim suspension may be imposed, which includes instances of: "physical violence, sexual misconduct, disruption of the educational or civil living environment of the University, significant damage to property, and possession and distribution of controlled substances." *Code, § 2.3*; Ex. 45.

It is without question that the members of the Swimming and Diving Team could not be considered threats to the health, safety, or well-being of the University community (the allegations concerned events occurring during Labor Day weekend, rather than any ongoing conduct of concern), there was no threat to the effective functioning of the University, and none of the student athletes have been charged with a serious criminal offense. Yet, there is no indication that the Dean of Students has made any such assessment as to whether the criteria for an interim suspension have been met. In fact, had the circumstances warranting interim administrative action been present, the Dean of Students could have chosen to impose an interim suspension. Tellingly, it did not do so.

Moreover, the Code does not explicitly authorize the Athletics Department to impose interim administrative action (such as a full program suspension), during the pendency of a conduct investigation as the Athletics Department did here. Nor could the Athletics Department be considered a "designee" of the Dean of Students office, as confirmed by the Dean of Students' September 20, 2023, letter which declared that the Statement issued by the Athletics Department "[did] not reflect the status of the Student Conduct Process." To the contrary, Section 5.1.1 provides that status related sanctions, such as the suspension of a student group, "are issued at the Discretion of the Office of the Dean of Students..." *Code, § 5.1.1*; Ex. 45.

Evidently, the suspension was not imposed at the discretion of the Dean of Students, but instead was unilaterally and arbitrarily issued by the Athletics Department, against the College's policies. Accordingly, the imposition of interim administrative action in the form of a full sports program suspension was not only improper, but was also a violation of the College's policies.

3. Additional Policy Violations.

The College further violated its Code when it failed to notify the Plaintiffs' parents about the decision to suspend the entire program. Section 2.2 provides that the Office of the Dean of Students or designee, at the Dean's discretion, may notify parents or guardians of conduct matters, including those involving a finding of responsibility and related sanctions. *Code, § 2.2.* Here, despite its decision to suspend the entire Swimming and Diving program, the College chose to announce the indefinite suspension to the public by posting a Statement on the Athletics Department's website, rather than notifying the swimmers' parents beforehand. This failure of common decency also amounted to a violation of the College's policies.

Additionally, the College violated its obligations surrounding confidentiality when it published the Statement online. Section 3.5 states that "disclosure of information or evidence,

whether written or oral, learned through an investigation or conduct process should not be disclosed, and any such disclosures by participants to persons not involved in the hearing process… may be dealt with as a subsequent charge…" *Code, § 3.6*; Ex. 45. The disclosure of information concerning the allegations to the public, and the misrepresentation that hazing had been substantiated, was a direct violation of the College's policies concerning privacy.

Finally, Section 3.7 states that a responding student in a conduct matter will be sent written notification of any decisions and/or sanctions reached as a result of a hearing within ten (10) business days after a hearing. *Code, § 3.7*; Ex. 45. The Code assures students that matters will be investigated and heard before a finding is made, and the outcome conveyed in writing to the student. Accordingly, the issuance of the Statement to the public, falsely affirming that university administrators had already concluded hazing allegations were substantiated again constituted a further violation of the College's own policy.

The foregoing violations deprived Plaintiffs of a fair and impartial process, presumed every member of the Swimming and Diving Team to be guilty, disregarded Plaintiffs' right to privacy and confidentiality, and have resulted in substantial ongoing and irreparable harm.

B. Denial of Basic Fairness

Defendant BC denied Plaintiffs basic fairness, in violation of the implied covenant of good faith and fair dealing. A private university may not act "arbitrarily or capriciously" in disciplining a student. *Doe v. Brandeis Univ.,* 177 F. Supp. 3d 561, 600 (D. Mass. 2016). Instead, such proceedings must be "conducted with basic fairness." *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 725 (1st Cir. 1983) (citing *Coveney v. President & Trs. of Holy Cross Coll.*, 445 N.E.2d 136, 139 (Mass. 1983)); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 380 (Mass. 2000).

Here, Defendant BC, through the actions of Defendants James and Terry, breached their common law duty of good faith and basic fairness, as well as their own stated policies, when they suspended all team activities, including practices and competition, less than one day after issuing a notice of investigation — well before any meaningful investigation could occur — and, well before any findings as a result of that investigation had been dispensed.

First, Defendant BC unfairly suspended the Plaintiffs prior to adjudicating the matter in a fair and sufficient manner. By doing so, BC failed to afford them a fair opportunity — or any opportunity at all — to defend themselves prior to the issuance of the full team suspension. BC only notified the Plaintiffs one day prior that an investigation would occur and did not provide any opportunity whatsoever for the Plaintiffs to provide evidence in support of their defense prior to the issuance of the full program suspension.

Second, AD James, as agent of the College, imposed the drastic, unfair, and unprecedented sanction upon the entire team. The students did not pose a threat to the safety and well-being the College community, or the effective functioning of the College. Thus, it cannot be construed that BC acted in a rational manner when imposing the sanction prior to any meaningful investigation. Even further, the students did not have any indication that Defendant James could enact such a measure, as Section 5.1.1 of the Code provides that status related sanctions, such as the suspension of a student group, "are issued at the Discretion of the Office of the Dean of Students…", not the Director of Athletics. *Code, § 5.1.1.* (Ex. 45 at 18). The foregoing resulted in the deprivation of a fair process for Plaintiffs.

C. Estoppel

In Massachusetts, in order to successful claim equitable estoppel, a plaintiff must demonstrate: (i) a representation, or conduct amounting to a representation, intended to induce a

course of conduct on the part of the person to whom the representation was made, (ii) an act or omission resulting from the representation by the person to whom the representation was made, and (iii) detriment to the person as a consequence of the act. *Boutilier v. John Alden Life Ins. Co.*, 2000 WL 1752623, at *9 (D. Mass. Sept. 29, 2000). BC's Code constitutes representations and promises that BC should have reasonably expected the Plaintiffs to rely upon when they accepted the College's offers of admission, chose to join the Swimming and Diving Team, and paid the required tuition and fees associated with matriculation at the College. The Plaintiffs relied upon the representations made to them by the College when they participated in the recruitment process for the Swimming and Diving Team, with many declining offers and opportunities from other prestigious colleges, because of their desire to attend BC.

D. Defamation

Plaintiffs are likely to succeed on their defamation claim. To prevail on such a claim in Massachusetts, a plaintiff must show that: (1) "[t]he defendant made a statement, concerning the plaintiff, to a third party"; (2) "[t]he statement could damage the plaintiff's reputation in the community"; (3) "[t]he defendant was at fault in making the statement"; and (4) "[t]he statement either caused the plaintiff economic loss (traditionally referred to as 'special damages' or 'special harm'), or is actionable without proof of economic loss." *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629–30, 782 N.E.2d 508 (2003) (internal footnotes and citations omitted). There are four types of actionable statements without proof of economic loss, including "statements that constitute libel." *Alharbi v. Theblaze, Inc.*, 199 F. Supp. 3d 334, 351 (D. Mass. 2016) (citing *Ravnikar,* 782 N.E.2d at 511). Statements that are provable as false are actionable. *Alharbi,* 199 F. Supp. 3d at 353, citing *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 108 (1st Cir. 2000), quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 – 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

Defendants defamed Plaintiffs when they published the false Statement about the Plaintiffs to countless third parties on September 20, 2023, that specifically stated: "The [BC] Men's and Women's Swimming and Diving program has been placed on indefinite suspension, after University administrators ***determined that hazing had occurred*** within the program." (emphasis added). Ex. 38. As of September 20, 2023, BC had undeniably not determined that any hazing had occurred. By publishing the Statement, Defendants failed to act reasonably, as they knew or should have known the falsity of such a claim. The Statement has caused Plaintiffs substantial harm, as they have been the subject of harmful social media posts, outcast by their peers, stalked by news media, and subjected to public humiliation and embarrassment.

E. Intentional Infliction of Emotional Distress

Plaintiffs will likely succeed on their claim for intentional infliction of emotional distress, where in Massachusetts, a plaintiffs must demonstrate: (i) that defendants, knew, or should have known that their conduct would cause emotional distress; (ii) that the conduct was extreme and outrageous; (iii) that the conduct caused emotional distress; and (iv) that the emotional distress was severe. *See Howell v. Enterprise Publ. Co.,* 455 Mass. 641, 672, 920 N.E.2d 1 (2010); *Sena v. Commonwealth,* 417 Mass. 250, 263–264, 629 N.E.2d 986 (1994). The Defendants knew or should have known that abruptly suspending the entirety of the Swimming and Diving Team, prior to any investigation or findings being reached, just as they approached the new competitive season — in an Olympic year — would cause emotional distress. Imposing an indefinite suspension on an entire athletic program, without having gathered all the necessary information and without having made any determinations regarding the veracity of the allegations was extreme and outrageous conduct and has resulted in severe emotional distress. Plaintiffs have devoted much of their lives to training and competition to achieve athletic feats; to rip it all away from them so

abruptly indeed caused severe emotional distress. Moreover, the Defendants knew or should have known that publishing false information within the Statement would cause emotional distress.

F. Title IX

Plaintiffs will likely succeed on their claim for Title IX selective enforcement. Title IX bars imposing university discipline where gender is a motivating factor. *Yusuf v. Vassar Coll.,* 35 F.3d 709, 715 (2d Cir. 1994). It applies to private schools that receive federal funding, which BC indeed receives. Under a "selective enforcement" theory, the claim asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or decision to initiate the proceeding was affected by the student's gender.

The BC Swimming and Diving Team is similarly situated to other male dominated sports teams at BC as they are all a part of the NCAA D1 Athletics Department. Upon information and belief, other teams made up of solely male student athletes at BC have engaged in behavior that could amount to an alleged violation of the College's Code. However, upon information and belief, prior to the imposition of a disciplinary sanction upon members of the male teams for similar allegations, those student athletes received an investigation process that amounted to more than what the Plaintiffs in the instant matter received.

Upon information and belief, the act of suspending an entire team without an investigation process is unprecedented in BC's history. Defendants' decision to impose the suspension was likely motivated by the fact that the Swimming and Diving Team is a co-ed program, thus making Plaintiffs likely to succeed on their Title IX claim.

III. <u>Plaintiffs Will Suffer Irreparable Harm if the Requested Relief is Not Granted.</u>

Plaintiffs also satisfy the second prong for a preliminary injunction, as they will suffer considerable and irreparable harm if the requested relief is not granted, and they are not permitted

to immediately resume their practices, training, and competition. Irreparable harm is defined as "a substantial injury that is not accurately measurable or adequately compensable by money damages." *Marlowe v. Keene State Coll.*, 189 F. Supp. 3d 326, 333 (D. Mass. 2016) (quoting *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir.1996)). "To demonstrate irreparable harm, the plaintiff must show that without the injunctive relief, there will be no adequate remedy at final judgment." *Byrne v. Curry Coll.*, No. NOCV201801596, 2019 WL 2150225, at *1 (Mass. Super. Jan. 28, 2019), citing generally *American Grain Prod. Processing Inst. v. Dep't of Pub. Health,* 392 Mass. 309, 326 (1984); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.,* 102 F.3d 12, 19 (1st Cir. 2004).

Here, Plaintiffs will suffer irreparable harm in a variety of ways if the suspension is not lifted, for which monetary damages would not provide sufficient remedy. As described in the Declarations of Jane and John Does 1-37 (Ex. 1-37), the harm that will result absent injunctive relief is not compensable by monetary damages. Plaintiffs are suffering irreparable harm by losing out on critical practice and training opportunities. *See, e.g.* Ex. 8 ¶ 19; Ex. 10 ¶ 15; Ex. 15 ¶ 14-15, 21; Ex. 37 ¶ 16. The swimmers spend 20+ hours per week training and practicing. *See, e.g.* Ex. 1 ¶ 12; Ex. 6 ¶ 12-16; Ex. 8 ¶ ; Ex. 31 ¶ 13. Without the ability to train and practice on a schedule with their coaches, they will not physically be at the necessary level in order to stay competitive. *See, e.g.* Ex. 7 ¶ 10-13, 17, 26; Ex. 17 ¶ 5; Ex. 18 ¶10; Ex. 27 ¶ 4, 6-8, 12; Ex. 37 ¶ 8, 16. Many swimmers barely take any prolonged period of time away from swimming, as coaches and famous swimmers have reflected that one day out of the water is similar to missing two days of training in any other sport. Ex. 17 ¶ 13; Ex. 28 ¶ 12; Ex. 30 ¶ 17. This will place their hopes and competitive goals in jeopardy, not only for this season, but for their entire swimming careers. In particular, distance swimmers work and train to build their endurance so that they can swim for prolonged

periods of time. *See, e.g.* Ex ¶ 14-16. Without training, they will be unable to achieve the endurance needed for competitive swimming.

Additionally, Plaintiffs will lose out on immense competitive opportunities where they can achieve their goals, such as recording personal best times, breaking school and collegiate records, and participation in meets such as the ACC Championships, the US Open, the NCAA championships, and Olympic Trials. *See, e.g.* Ex. 6 ¶ 12-16; Ex. 7 ¶ 26; Ex. 17 ¶ 14.; Ex. 20 ¶ 14; Ex. 26 ¶ 11-15; Ex. 28 ¶ 11-12; Ex. 29 ¶ 16-21; Ex. 33 ¶ 15; Ex. 30 ¶ 15-16. Plaintiffs have already missed their two scheduled collegiate meets and will continue to miss more opportunities the longer the suspension remains in place, which will unquestionably impact their athletic goals. Each day that passes, these goals slip further away. Ex. 29 ¶ 16-21. The collegiate competitive swim meets help Plaintiffs obtain qualifying times and scores for the conference and national championships, as well as the US Open. The Olympic Trials is an event that happens only once every four years; for many of the Plaintiffs, this is their one and only chance to compete at this event. *See, e.g.* Ex. 28 ¶ 11-12; Ex. 30 ¶ 15-16. Plaintiffs can obtain qualifying times and scores through their collegiate meets. Without training, practice, and coaching, Plaintiffs will not be able to compete in a meaningful manner, to qualify for the Olympic Trials. Ex. 14 ¶ 18-21; Ex. 23 ¶ 11-14; Ex. 27 ¶ 4, 7-8; Ex. 29 ¶ 16-21. Should the suspension not be lifted, they will forever be irreparably harmed by losing these opportunities, for which monetary damages cannot compensate.

Various courts have recognized the significance of collegiate athletes losing even one year of competition, during the fleeting college years, the mental, emotional, physical, and social impacts that students suffer when prohibited from participating in their sport, and the effects on their competitiveness and skill. *See, e.g. Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 292 (D. Conn. 2009) (finding irreparable harm based on "the loss that even a year of competition would

have on the skills and competitiveness of elite Division I athletes"); *Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983, 998 (E.D. Mich. 2018) (holding elimination of a college team caused irreparable harm to plaintiffs due to the "unique circumstances college athletes face" and the "brief time-span in which they are permitted to compete"); *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000, at *6 (N.D. Ill. Nov. 21, 1996) (recognizing that "[a]n elite level swimmer only has a competitive life span of a few years. . . [i]n addition, the evidence suggests that the loss of a year of competition is likely to inhibit his development as a swimmer during a critical point in his career. It is difficult to imagine how a court could quantify these losses in financial terms."); *Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578, 583 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993) ("The opportunity to compete in undergraduate interscholastic athletics vanishes quickly, but the benefits do not. We believe that the harm emanating from lost opportunities...are likely to be irreparable."); *Lazor v. Univ. of Connecticut*, 560 F. Supp. 3d 674,684 (D. Conn. 2021) (highlighting that Plaintiffs will suffer irreparable harm if their D1 athletic team training and competitions are interrupted); *Cohen v. Brown Univ.*, 991 F.2d 888,904-905 (1st Cir. 1993) ("absent judicial intervention, the plaintiffs would suffer irremediable injury in at least three respects: competitive posture, recruitment, and loss of coaching."); *Brooks v. State Coll. Area Sch. Dist.*, 643 F. Supp. 3d 499, 510–11 (M.D. Pa. 2022) (highlighting the court's "longstanding finding that lost opportunity in the context of student athletics can be considered irreparable harm."); *Richmond v. Youngstown State Univ.*, 2017 WL 6502833, at 1 (N.D. Ohio Sept. 14, 2017) (observing irreparable harm to be "patent . . . due, in part, to the public nature of being banned from playing football" and that "forfeiture of eligibility is a harm that, while not dispositive, bodes in favor of granting the temporary restraining order").

Plaintiffs, due to the suspension, are also deprived of the enjoyment that comes with being part of an elite D1 College team: an unmatched, once-in-a-lifetime experience, where athletes push themselves to the limits to achieve their goals and form lifelong bonds. *See, e.g.* Ex. 2 ¶ 9-10; Ex. 7 ¶ 9. As many of the Plaintiffs are seniors, whose college experience was marred by the pandemic, this is their last chance to experience this to the fullest. *See, e.g.* Ex. 18 ¶ 23-24. The loss of community, and the mental and physical health benefits are immense. *See, e.g.* Ex. 1 ¶ 13; Ex. 7 ¶ 3, 13, 17, 26; Ex. 2 ¶ 14; Ex. 3 ¶ 8-15; Ex. 13 ¶ 13-14; Ex. 17 ¶ 12; Ex. 26 ¶ 7-8; Ex. 37 ¶ 8. *See Lazor v. Univ. of Connecticut*, 560 F. Supp. 3d 674,684 (D. Conn. 2021) ("Rowing at UConn, moreover, has been a central part of Plaintiffs' lives, and has brought about immeasurable mental and physical health benefits. There is a sense of community on the team, with the coaches serving as vital mentors. [Money] could not repair the harm Plaintiffs would suffer if those intangible benefits are lost."). Accordingly, Plaintiff meets the second element necessary for injunctive relief.

Furthermore, Plaintiffs will be irreparably harmed should the suspension not be lifted, as this will impact their ability to gain acceptance to graduate programs and employment. See, e.g. Ex. 18 ¶ 21; Ex. 32 ¶ 19-23. A simple Google search of the team will return results that may irreparably harm the Plaintiffs' futures; however, a reinstatement of the team will likely receive media coverage and will demonstrate that the team in fact continued with their competitive programming, as scheduled.

IV. In Light of the Plaintiffs' Likelihood of Success on the Merits, The Risk of Irreparable Harm Outweighs the Potential Harm to the Defendants.

The risk of irreparable harm to the Plaintiffs unquestionably outweighs the potential harm to the Defendants. Massachusetts courts have found that the harm to a plaintiff student far outweighs the potential harm to a college and/or university:

> The harm to the plaintiff should she be denied an opportunity to reenroll in the course, far outweighs the injury which would be inflicted on [the] College by granting injunctive relief. The argument by [the] College that it stands to suffer significant harm if it is hindered by judicial intervention into its own policies is unpersuasive. While academic institutions are afforded some discretion in administering their policies, an institution bears an obligation to follow established procedures that its own employees and agents represent to students.

Byrne v. Curry Coll., 2019 WL 2150225, at *2. As articulated above, the Plaintiffs face irreparable harm should the Swimming and Diving Team remain suspended. Thus, "in the absence of a preliminary injunction [Plaintiff] will continue to suffer real, unavoidable consequences even if he wins this suit." *King v. DePauw Univ.,* No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *14.

By comparison, granting an injunction to reinstate the Swimming and Diving Team places no real hardship on BC. Prior to the suspension, the team had a full practice and competition schedule. The College, upon information and belief, still employs the full BC Swimming and Diving Coaching staff. Where granting an injunction would have little impact to the non-moving party, but denying relief sought would cause great harm to the moving party, this factor weighs in favor of granting the injunction. See *NovaQuest Cap. Mgmt., L.L.C. v. Bullard*, 498 F. Supp. 3d 820, 838 (E.D.N.C. 2020). Conversely, as discussed above, the burden on the Plaintiffs if the injunctive relief is denied is significant and will negatively harm them both currently and in the future. Thus, this factor supports the issuance of a preliminary injunction.

CONCLUSION

For the reasons described above, this Court should grant a temporary restraining order and preliminary injunction, enjoining Defendants from enforcing the suspension of the Swimming and Diving Team, pending the adjudication of the merits of Plaintiffs' Complaint.

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Respectfully submitted,

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