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**VIA EMAIL**

President Christina Paxson  
Brown University  
Office of the President  
Box 1860  
Providence, RI 02912  
president@brown.edu

**Re: Brown University Athletics**

Dear President Paxson:

This firm represents a coalition of students on the eight Brown University varsity sports teams that were abruptly discontinued, as well as students who committed to enroll at the University in the fall after being recruited to be members of the affected teams (collectively, the “Student-Athletes”).<sup>1</sup> In light of the University’s decision to summarily revoke the varsity status of these teams as part of a deliberately surreptitious process that was concealed from the Student-Athletes and their families, I write to advise you of the significant legal exposure that the University will face unless immediate steps are taken to restore these teams to varsity level.

As you know, the terminated varsity programs have a long history of success at Brown, including a number of recent academic and athletic accomplishments. For example, in 2020, Brown’s Men’s and Women’s Fencing teams finished second in the Northeast Fencing Conference. The Women’s Ski team finished third at the 2020 National Championships and had four team members named All-Americans, including three Scholar All-Americans (the Women’s Ski team is also the most-recent Brown program to win a national title). Women’s Squash finished its latest season as the 12<sup>th</sup> ranked team in the nation, and in 2020, the Men’s Squash team was ranked 14<sup>th</sup> in the nation. Before their 2020 season was cancelled, the Women’s Equestrian team was in second place in their region (after finishing first during the fall 2019 season), while maintaining an average GPA of 3.86. And, members of both Women’s and Men’s Golf have earned numerous individual academic and athletic accolades since 2018, including four members of the Women’s team who were named All-American Scholars.

The University’s response to these great achievements was to make the Student-Athlete members of these eight teams victims of a secret plan to eliminate their varsity status. This plan

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<sup>1</sup> The affected teams are: Women’s Equestrian, Men’s Fencing, Women’s Fencing, Men’s Golf, Women’s Golf, Women’s Skiing, Men’s Squash and Women’s Squash.

was designed to induce the Student-Athletes to rely on Brown's false representations and material omissions that these varsity teams would continue until the very last moment, when they were advised by the University—in the middle of a global pandemic—that they would no longer be permitted to compete or train at the varsity level.

Specifically, on May 28, 2020, over 150 students received an ominous email requesting their attendance on a “Zoom” call that was scheduled to take place less than one hour later. During that call, Brown Athletics Director Jack Hayes unceremoniously explained that the University had decided to eliminate a core aspect of their experience at Brown—their varsity athletics programs—*effective immediately*.<sup>2</sup> The University made clear that its decision was not a result of the COVID-19 pandemic or an effort to meet any revenue shortfall necessary to fund the budget of the Athletics Department.<sup>3</sup> Instead, it was revealed that the termination was the result of a *years-long* covert initiative to reduce the number of varsity teams at Brown.

Indeed, as you finally disclosed at a recent community meeting, the University ordered a confidential external review of its athletics department in 2018. That review was completed during the 2018-19 academic year, but its conclusion was deliberately kept secret from the Student-Athletes, their families, and Brown's coaches. As a result of the secret review, the University convened the ironically named “Committee on Excellence in Athletics” in January 2020 with the *specific charge* of “developing a plan to reduce the number of varsity teams at Brown.”<sup>4</sup> And although the University had clearly determined by that time (and, as we suspect discovery would reveal, much earlier) that it would be eliminating a number of varsity teams, it intentionally withheld that information from the Student-Athletes, knowing full well that it was highly material to their academic, athletic and financial decision-making processes—*i.e.*, whether to remain at Brown or accept admission to another University. When the University finally revealed this devastating news to the Student-Athletes, it knew that it was too late, as a practical matter, for any of them to transfer to comparable schools and resume (or for recruits, begin) their varsity careers. In other words, rather than being transparent and honest with the students it has committed to educate, the University made the purposeful choice to conceal critical information from them. This has caused the Student-Athletes grave harm.

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<sup>2</sup> We understand that on June 9, 2020, the University reinstated its Men's Cross Country and Track and Field teams, decreasing the number of adversely affected student-athletes to approximately 100. This decision, which revived 60 men's varsity roster spots, places Brown's gender equality compliance with Title IX and its consent decree from *Cohen v. Brown University* in serious question. As a result, we understand that the attorneys for the *Cohen* class are considering taking appropriate action.

<sup>3</sup> As the “FAQ” page for the Initiative explains: “[w]hile universities in some areas of the country have announced reductions in athletics programs as budget relief (in the wake of the 2019 novel coronavirus), this initiative at Brown is not a measure to reduce budget or an effort to contend with the financial impact of the COVID-19 pandemic.”

<sup>4</sup> Christina Paxson, *Open Letter Addressing Brown varsity sports decisions* (June 6, 2020), <https://www.brown.edu/about/administration/president/statements/addressing-brown-varsity-sports-decisions>.

For example, the University's Admissions Office actively considered, admitted, and accepted deposits from recruits of the affected teams over the past year without so much as a hint that the team they were recruited to play for may not exist when they arrived on campus. This was a material omission of the grandest proportions since these recruits—relying upon Brown's representation that they would be members of varsity programs—declined other admissions offers, including to other Ivy League schools.<sup>5</sup> In fact, the University's standard "Likely Letter" acknowledges "the importance of making [college selection] decision[s] *with a clear sense of the opportunities available to you.*"

Brown's misrepresentations and material omissions were equally egregious with respect to its current Student-Athletes. Not only were they deliberately kept in the dark, the University actively proceeded as if it were "business as usual" while making repeated false representations. Among other things, Brown continued to tout the affected programs and its *full slate of 38 varsity teams* in fundraising campaigns, including when "*BrownTogether* fundraising for athletics surpassed the \$100 million mark."<sup>6</sup> And over the past several months, Brown has used the affected Student-Athletes in scores of public relations campaigns on its social media channels. The University also encouraged the Student-Athletes (and their coaches) to make plans for future seasons (*e.g.*, for living arrangements, financial aid and other matters) despite *knowing* that many of these students would soon no longer have the opportunity to be varsity athletes at Brown. Yet, as the time for these Student-Athletes to consider transferring to other institutions expired or became effectively impossible, Brown continued to conceal the truth from them so that they would rely on the University's false representations that their varsity teams would continue this upcoming year. It is against this backdrop that the University's claim on its website that "[t]he timing of the launch of the Excellence in Brown Athletics Initiative, including the revised rosters of varsity and club sports, allows current student-athletes the most flexibility to consider their options" is both shameful and offensive.

The result of the University's conduct has been to leave the Student-Athletes who have not graduated in the untenable position of waiting *at least* a year before they can return to (or in the case of Brown's recruits, begin) varsity competition at another institution. For rising seniors, they will almost certainly have no way to complete their last year of varsity play. And, even if some of these students decided to take a gap year while they search for another varsity program to join, they would suffer enormous financial and emotional disruption in the midst of a global pandemic.

It is stunning that a University with the self-proclaimed educational values of Brown would treat its students without the slightest regard for their welfare. Instead, Brown has made it clear

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<sup>5</sup> As late as mid-May, the Recruiting page on the Athletics Department's website included NCAA guidelines for potential recruits of the affected teams. *Athletics Prospective Student-Athlete Questionnaires*, BROWNBears.COM (May 11, 2020, 11:51 AM) <https://brownbears.com/sports/2018/4/27/Recruiting-Online-Forms.aspx> [<https://web.archive.org/web/20200511115151/https://brownbears.com/sports/2018/4/27/Recruiting-Online-Forms.aspx>]

<sup>6</sup> *Campaign giving to support Brown Athletics surpasses \$100 million*. BROWN.EDU (Jan. 31, 2019). <https://www.brown.edu/news/2019-01-31/athleticsfundraising>. As of the date of this letter, the article remains on the University's website.

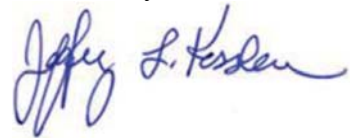
that its surreptitious actions were designed to protect its *own* interests, at the expense of the Student-Athletes. Just last week, you stated during a public community meeting that if a recruit learns that Brown is considering cutting his or her sport, he or she would be “worried about committing to the University.” At that same meeting, Athletic Director Hayes acknowledged that if Brown had been transparent with the Student-Athletes about its decision to cut varsity teams, many “would have looked to opportunities of competing at another institution.” That Brown decided to maintain secrecy because it wanted to prevent the Student-Athletes from taking any actions to protect their interests is reprehensible and illegal.

Specifically, the University’s intentional concealment of its plan to eliminate varsity teams and the resulting harm to the Student-Athletes is precisely the type of fraudulent misrepresentation that has long been held to violate Rhode Island law. *See, e.g., Bogosian v. Bederman*, 823 A.2d 1117, 1120 (R.I. 2003) (a party may not intentionally make “a false representation intending thereby to induce [another] to rely thereon . . .”); *Nisenzon v. Sadowski*, 689 A.2d 1037, 1045 n.11 (R.I. 1997) (a fraudulent misrepresentation is actionable where it is “likely to affect the conduct of a reasonable person . . .”); *Van Slyke v. Bullock*, 1996 R.I. Super. LEXIS 51, at \*7 (R.I. Super. Nov. 16, 1996) (“Rhode Island courts have long held that false promises of future action can be actionable under a theory of false representation”). Rhode Island law is clear that such a cause of action arises where, as here, a party remains silent in the face of “information that renders a prior representation untrue or misleading, or where a party knows the other party is under a mistake of facts basic to the transaction and that the other party . . . would reasonably expect their disclosure.” *R.I. Indus.-Recreational Bldg. Auth. V. CAPCO Steel*, 2015 R.I. Super. LEXIS 90, at \*32 (R.I. Super. July 22, 2015) *accord Home Loans & Inv. Ass’n v. Pattera*, 105 R.I. 763, 768 (R.I. 1969) (“The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff”). The University’s egregious conduct not only makes it liable for actual damages, it also subjects it to claims for punitive damages. *E.g., Recco v. Criss Cadillac Co., Inc.*, 610 A.2d 542, 544-545 (R.I. 1992); *see also Baker v. Knott*, 1980 R.I. Super. LEXIS 88, at \*24-25 (R.I. Super. May 27, 1980).

Moreover, because Brown’s relationship with the Student-Athletes is also “based in contract” (*Doe v. Brown Univ.*, 327 F. Supp. 3d 415 (D.R.I. 2018)), its misrepresentations and material omissions also expose it to contractual liability. Rhode Island law also requires Brown to conduct its affairs affecting students’ on-campus experiences in a manner that is consistent with its implied contractual covenant of good faith and fair dealing. *See, e.g., id.* (allowing good faith and fair dealing claim to proceed against Brown); *McNulty v. Chip*, 116 A.3d 173, 185 (R.I. 2015) (“the implied covenant . . . ensures that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract”); *Bradford Dyeing Ass’n, Inc. v. J. Stog Tech GmbH*, 765 A.2d 1226, 1236 (R.I. 2001) (collecting authorities); *Tidewater Realty, LLC v. State*, 2010 R.I. Super. LEXIS 25, at \*28 (R.I. Super. Feb. 2, 2010). The University fell woefully short of its obligation in this regard when it intentionally concealed that one of the Student-Athletes’ key “fruits” of attending and paying tuition to Brown—participation on their varsity teams—would suddenly be ripped away.

It is the hope of the coalition that we represent that the University will immediately reconsider its actions for the affected teams, as it has with respect to the Men's Cross Country and Track and Field teams. No one wants a legal battle if it can be avoided. To that end, we invite the University to engage in immediate settlement discussions with the coalition so that the parties can attempt to resolve this matter amicably and without legal proceedings. However, time is of the essence and, while we await your response, we reserve all of the Student-Athletes' legal rights and remind the University of its obligation to ensure that all evidence—including all electronically stored information—relevant to this matter is preserved.

Yours truly,



Jeffrey L. Kessler

cc: Eileen Goldgeier, Esq., Vice President & General Counsel  
Jack Hayes, Director of Athletics  
Brown University Board of Fellows  
Brown University Board of Trustees  
Jonathan Amoon, Esq.