

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL J. BYNUM and CANADA
HOCKEY LLC d/b/a EPIC SPORTS,

Plaintiffs

v.

TEXAS A&M UNIVERSITY
ATHLETIC DEPARTMENT *et al.*,

Defendants.

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CIVIL ACTION NO. 4:17-CV-181

JURY TRIAL DEMANDED

**PLAINTIFFS’ MOTION FOR LEAVE TO FILE SUR-REPLY
OPPOSING DEFENDANTS’ MOTION TO DISMISS**

Plaintiffs Michael J. Bynum and Canada Hockey LLC d/b/a Epic Sports file this motion seeking leave to file the sur-reply in opposition to the Athletic Department and Individual Defendants’ motion to dismiss for lack of jurisdiction and failure to state a claim (Dkt. No. 34) attached hereto as “Exhibit 01,” and respectfully state as follows:

DISCUSSION

Defendants Texas A&M University Athletic Department (the “Athletic Department”) and Brad Marquardt, Alan Cannon, and Lane Stephenson (collectively the “Individual Defendants”) filed a reply supporting their motion to dismiss, arguing that “binding” Fifth Circuit and Supreme Court decisions control the issues and that denying their motion would “upend the federal judiciary’s current approach” to claims such as those brought by Plaintiffs in this case. (Dkt. No. 77). This characterization oversimplifies the complex issues of sovereign immunity and constitutional rights regarding intellectual property claims—many of which are important issues of first impression—raised in the motion to dismiss.

Plaintiffs request leave to file a sur-reply to address the arguments asserted by the Athletic Department and Individual Defendants for the first time in their reply brief and to provide additional legal analysis and historical context for the Court's consideration. Specifically, Plaintiffs seek to explain the significance of key authorities relied upon by the parties through a careful examination of the pertinent facts of individual cases, the historical background and constitutional framework underlying these decisions, and the intervening events in the years since they were decided.

This motion is not made for purposes of delay, but to provide as complete and accurate a record as possible for an informed resolution of the Athletic Department and Individual Defendants' motion to dismiss. No prejudice or undue delay would result from granting Plaintiffs' motion for leave, as the motion to dismiss remains outstanding. Plaintiffs therefore respectfully request the Court to grant this motion and consider the arguments and authorities set forth in the sur-reply attached hereto as "Exhibit 01" in deciding the motion to dismiss.

CONCLUSION

For the reasons set forth herein, Plaintiffs Michael J. Bynum and Canada Hockey LLC d/b/a Epic Sports respectfully request the Court to grant their motion for leave to file the sur-reply in opposition to Defendants Texas A&M University Athletic Department, Brad Marquardt, Alan Cannon, and Lane Stephenson's motion to dismiss for lack of jurisdiction and failure to state a claim attached hereto as "Exhibit 01."

Respectfully submitted,

/s/ Tim Johnson

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CERTIFICATE OF CONFERENCE

I hereby certify that I conferred by telephone and email with Melissa Mather, counsel for Defendants Texas A&M University Athletic Department, Brad Marquardt, Alan Cannon, and Lane Stephenson, between May 9–15, 2018, who stated that she could not confirm her position on the requested relief until after reviewing the proposed sur-reply. I further certify that I conferred by telephone and email with Robert Harrell, counsel for Defendant Texas A&M 12th Man Foundation, between May 9–15, 2018, who confirmed that he was not opposed to the relief requested herein.

/s/ Nicholas Dickerson

Nicholas P. Dickerson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record via the Court's CM/ECF system and/or by certified mail, return receipt requested, on this 21st day of May, 2018.

/s/ Nicholas Dickerson

Nicholas P. Dickerson