ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ESTATE of JOSEPH PATERNO;
AL CLEMENS, member of the Board of Trustees of Pennsylvania State University;

and

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,
former football coaches at Pennsylvania State University

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
("NCAA"),
MARK EMMERT, individually and as President of the NCAA, and
EDWARD RAY, individually and as former Chairman of
the Executive committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
Appendix to NCAA's Opposition to Plaintiffs' Motion for Judgment on the Pleadings

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

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ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	Civil Division Docket No. 2013-2082

APPENDIX TO

NCAA'S OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

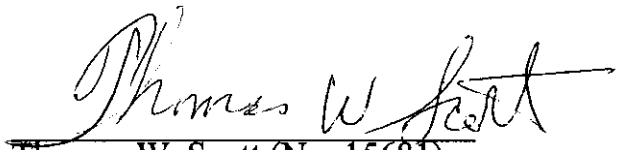
The ESTATE of JOSEPH PATERNO, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al., Defendants, and PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	Civil Division Docket No. 2013-2082

NOTICE TO PLEAD

TO: PLAINTIFFS AND PLAINTIFFS' COUNSEL

You are hereby notified to file a written response to the enclosed New Matter within twenty (20) days from service hereof or a judgment may be entered against you.

Respectfully submitted,



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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al., Defendants, and PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	Civil Division Docket No. 2013-2082

NCAA AMENDED ANSWER WITH NEW MATTER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

The National Collegiate Athletic Association ("NCAA") files the following Amended Answer with New Matter in response to the allegations of Plaintiffs' Second Amended Complaint.

1. This action challenges the unlawful conduct of the NCAA Defendants in connection with their improper interference in and gross mishandling of a criminal matter that falls far outside the scope of their authority. In particular, this lawsuit seeks to remedy the harms caused by unprecedented sanctions included in a Consent Decree imposed by the NCAA Defendants for conduct that did not violate the NCAA's rules and was unrelated to any athletics issue the NCAA could permissibly regulate. As part of their unlawful conduct, and as alleged in more detail below, the NCAA Defendants breached their contractual obligations and violated their duties of good faith and fair dealing, intentionally and tortuously interfered with Plaintiffs' contractual relations, and defamed and commercially disparaged Plaintiffs.

RESPONSE: The allegations in Paragraph 1 are irrelevant, and no response is required. All of the contract claims in this case (and all relief requested therefrom) have been dismissed or withdrawn. This case has been reduced to a set of tort claims asserted by only three remaining Plaintiffs: commercial disparagement and defamation, along with derivative tortious interference and civil conspiracy claims. As such, this case now centers exclusively on the statements contained in the Consent Decree that allegedly refer to Plaintiffs. On those claims, Plaintiffs' carry the burden to demonstrate that those statements are demonstrably false *and* that the NCAA

acted with actual malice (*i.e.*, it either "knew" the statements were false, or acted with reckless disregard for their falsity). However, most of the allegations in the Second Amended Complaint, including those in Paragraph 1, relate only to the dismissed contract claims, such as those regarding (1) the process by which the NCAA resolved the Sandusky matter with Penn State; (2) the content of the NCAA's Division I Constitution and Bylaws; and (3) the procedure by which Penn State accepted the Consent Decree. Those allegations were plainly included to support the contract claims (and/or Plaintiffs' ongoing public relations campaign), and are not relevant to the remaining tort claims. Thus, to the extent the NCAA responds to such allegations, the NCAA shall not be deemed to have admitted or agreed that any such factual averment is relevant to this matter, or that the NCAA has undertaken the burden to prove such fact at trial.

To the extent a response is required, the NCAA specifically denies that the unprecedented failure of institutional integrity and institutional control at Penn State in connection with the Sandusky matter fell outside the "scope of the NCAA's authority." The NCAA also specifically denies that the conduct described in the Freeh Report and Consent Decree did not violate the NCAA's rules and was "unrelated to any athletics issues the NCAA could permissibly regulate." To the contrary, the events surrounding the Sandusky matter at

Penn State fell squarely within the NCAA's authority, indicated a profound lack of institutional integrity and institutional control, and raised serious questions about whether Penn State, as an institution, acted in a manner consistent with the NCAA Constitution and Bylaws. At all times prior to execution of the Consent Decree, the NCAA had the authority to initiate its own enforcement investigation concerning the Sandusky matter or to attempt to pursue an infractions case against Penn State before the NCAA Committee on Infractions. Indeed, when the Sandusky presentment was released in November 2011, it immediately occurred to Penn State President Rodney Erickson that the NCAA might become involved "[b]ecause it involved a relationship to intercollegiate athletics, that our athletics director was charged, and our ... former senior vice president for finance and business." Further, Penn State's own outside counsel, Mr. Gene Marsh (who had served for nine years on the NCAA Committee on Infractions) specifically advised Penn State that the findings in the Freeh Report and Penn State's "embrace" of the Report established violations of the NCAA Constitution and Bylaws and that if Penn State opted for the traditional infractions process, the Committee on Infractions would likely impose harsh sanctions on Penn State, potentially including a suspension in play. Ultimately, because the NCAA and Penn State agreed to the Consent Decree, the NCAA did not invoke its

authority to initiate an enforcement investigation or infractions case against Penn State. Nonetheless, the Consent Decree identified several provisions of the NCAA Constitution and Bylaws that Penn State breached, based on the findings in the Freeh Report.

The remaining allegations in Paragraph 1 constitute Plaintiffs' conclusions of law, which require no response.

2. The NCAA is a voluntary association of member institutions of higher education that operates pursuant to a constitution and an extensive set of bylaws. The constitution and bylaws define and constrain the scope of the NCAA's authority, and are designed to regulate athletic competition between members in a manner that promotes fair competition and amateurism. The constitution and bylaws authorize the NCAA to prohibit and sanction conduct that is intended to provide any member institution with a recruiting or competitive advantage in athletics.

RESPONSE: The NCAA admits that it is a voluntary association of member institutions of higher education. The NCAA further admits that it has a Division I Constitution and Bylaws,[1] which, among many other things, provide that the NCAA may sanction member institutions for violations of the NCAA's Constitution and Bylaws.

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[1] There is more than one NCAA Constitution and set of bylaws; all references herein refer to the 2011-2012 NCAA Division 1 Constitution and Bylaws.

The NCAA specifically denies that the only purpose of the NCAA's Constitution and Bylaws is to "regulate competition between members." The Constitution and Bylaws are "designed" to advance numerous important purposes of the Association and its members, including *but not limited to*: upholding the principle of institutional control and responsibility (NCAA Constitution § 2.1), the protection and enhancement of the physical and educational well-being of student-athletes (*id.* § 2.2), gender equity, diversity, and non-discrimination principles (*id.* §§ 2.3, 2.6, 2.7), sportsmanship and ethical conduct (*id.* § 2.4), maintenance of sound academic standards (*id.* § 2.5), principles of honesty (*id.* § 10.01.1), the principle that administrators and coaches involved in intercollegiate athletics must exhibit exemplary conduct, because of their role as teachers of young people (*id.* § 19.01.2), the promotion and development of educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit (*id.* § 1.2(a)), and to ensure that competitive athletics programs of member institutions are designed to be a vital part of the educational system (*id.* § 1.3.1).

The NCAA specifically denies that the Constitution and Bylaws authorize the NCAA to sanction conduct only when it provides a member institution with a recruiting or competitive advantage in athletics. While the

Bylaws identify recruiting and competitive advantage as potentially relevant factors in certain circumstances, no provision of the Constitution or Bylaws precludes the NCAA from imposing sanctions to address rules violations that did not result in such advantages.

The NCAA further specifically denies that the Constitution and Bylaws "define and constrain the scope of the NCAA's authority." The Constitution and Bylaws are not the exclusive source of the NCAA's authority or the obligations of NCAA member institutions.

The remainder of the allegations in Paragraph 2 constitute Plaintiffs' conclusions of law, which require no response.

3. The NCAA has no authority to investigate or impose sanctions on member institutions for criminal matters unrelated to recruiting or athletic competition at the collegiate level. Moreover, when there is an alleged violation of the NCAA's rules, the constitution and bylaws require the NCAA to provide interested parties with certain, well-defined procedural protections, including rights of appeal. The constitution and bylaws are expressly intended to benefit not only the member institutions, but also individuals subject to potential NCAA oversight and sanctions.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is

required, the allegations in the first sentence of Paragraph 3 constitute Plaintiffs' conclusions of law, which require no response. The NCAA specifically denies those allegations to the extent they contend that the Sandusky matter at Penn State was a "criminal matter[] unrelated to recruiting or athletic competition." To the contrary, the NCAA incorporates by reference its response to Paragraph 1.

The NCAA also denies the allegations in the second sentence of Paragraph 3 as stated. The NCAA incorporates by reference its response to Paragraphs 26, 31, 33-40, and 42-48. The remainder of the allegations in Paragraph 3 constitute Plaintiffs' conclusions of law, which require no response (and which the NCAA has contested in three rounds of preliminary objections necessitated by Plaintiffs' serial amendment of their complaint).

4. In the course of the events that gave rise to this lawsuit, the NCAA Defendants engaged in malicious, unjustified, and unlawful acts, including penalizing and irreparably harming Plaintiffs for criminal conduct committed by a former assistant football coach. But the criminal conduct was not an athletics issue properly regulated by the NCAA. The NCAA Defendants' actions far exceeded the scope of the NCAA's lawful authority and were taken in knowing and reckless disregard of Plaintiffs' rights.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA specifically denies that it "penalized" or harmed any of the Plaintiffs. The Consent Decree resolved Penn State's institutional responsibility for its breaches of the NCAA Constitution and Bylaws in connection with the Sandusky matter, including failures of institutional integrity and institutional control at Penn State. The NCAA admits that the Sandusky matter concerned "criminal conduct" but specifically denies that this conduct was unrelated to any "athletics issue properly regulated by the NCAA." To the contrary, the NCAA incorporates by reference its response to Paragraph 1. The NCAA also specifically denies that entering into the Consent Decree with Penn State was beyond the scope of its authority. To the contrary, the NCAA incorporates by reference its response to Paragraph 1, and further avers that: (1) as a member institution, Penn State is free to waive any rights or process under the NCAA Constitution and Bylaws, and, as such, agree to accept penalties and corrective measures through a consent decree rather than through the traditional infractions process; (2) the NCAA, like any organization, is free to enter into agreements, and the Consent Decree is an exercise of this basic authority; and (3) the NCAA's Executive Committee has extensive authority under the law and pursuant the Division I Manual to

act, including, but not limited to, the authority to "[a]ct on behalf of the Association by adopting and implementing policies to resolve core issues and other Association-wide matters" and to "[i]nitiate and settle litigation." NCAA Constitution and Bylaws (effective Aug. 1, 2011), art. 4.1.2(e), (f). Additionally, after reasonable investigation, the NCAA Defendants are unaware of any "malicious, unjustified or unlawful acts" committed against Plaintiffs or anyone else in conjunction with the Consent Decree. Proof thereof, if relevant, is demanded at trial.

The remaining allegations in Paragraph 4 constitute Plaintiffs' conclusions of law, to which no response is required.

5. Among other things, the NCAA Defendants circumvented the procedures required by the NCAA's rules and violated and conspired with others to violate Plaintiffs' rights, causing Plaintiffs significant harm. The NCAA Defendants took these actions based on conclusions reached in a flawed, unsubstantiated, and controversial report that the NCAA Defendants knew or should have known was not the result of a thorough, reliable investigation; had been prepared without complying with the NCAA's investigative rules and procedures; reached conclusions that were false, misleading, or otherwise unworthy of credence; and reflected an improper "rush to judgment" based on unsound speculation and innuendo. The NCAA Defendants also knew or should

have known that by embracing the flawed report, they would effectively terminate the search for truth and cause Plaintiffs grave harm. Nonetheless, the NCAA Defendants took their unauthorized and unlawful actions in an effort to deflect attention away from the NCAA's institutional failures and to expand the scope of their own authority by exerting control over matters unrelated to recruiting and athletic competition.

RESPONSE: Paragraph 5 constitutes a barrage of legal conclusions, argument, and characterizations of the NCAA's alleged actions, which require no response. To the extent any statements in this Paragraph can be construed as "averment of fact," the NCAA objects to Paragraph 5 on the grounds that its form and content violate the requirements of Pa.R.C.P. No. 1022, which require that every pleading be divided into paragraphs that contain "as far as practicable only one material allegation." The Paragraph should be stricken. To the extent any further response is required, the NCAA specifically denies each of the allegations in this Paragraph, for the reasons set forth throughout this answer, which are incorporated by reference

By way of further answer, the NCAA is unaware of any facts that substantiate that the Freeh Report was an unreliable "rush to judgment" with unsupported conclusions at the time it was released and communicated to the NCAA and formed a basis for the Consent Decree. To the extent relevant,

and consistent with decades of legal authority concerning the burden of proof in cases like this one, proof of those allegations at trial is demanded. In addition, to the extent Plaintiffs are able to prove that any of the statements in the Freeh Report that were incorporated into the Consent Decree are demonstrably false, the NCAA demands proof at trial that the NCAA "knew" or recklessly disregarded their falsity.

6. In failing to comply with required procedures, the NCAA Defendants unlawfully accused Plaintiffs, members of the coaching staff and the Penn State Board of Trustees, of failing to prevent unethical conduct, and deprived them of important procedural protections required under the NCAA's rules.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 6 constitute Plaintiffs' conclusions of law, to which no response is required. To the extent further response is necessary, the NCAA specifically denies that its entry into the Consent Decree with Penn State violated any "required procedures," and that Plaintiffs were entitled to any "procedural protections" under the NCAA rules. To the contrary, the NCAA incorporates by reference its responses to Paragraphs 1-4, 49, 59, 88, and 115-116, as well as the arguments set forth in the three

rounds of preliminary objections necessitated by Plaintiffs' serial amendment of their complaint.

7. For its part, Penn State was forced under extreme duress to acquiescence in the NCAA Defendants' violations of the NCAA's rules and to agree to the imposition of an NCAA-imposed Consent Decree that is unlawful, imposes sanctions that are unauthorized, and makes statements concerning Plaintiffs that sanctioned them and caused significant harm.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 7 constitute Plaintiffs' conclusions of law, to which no response is required. To the extent further response is necessary, the NCAA specifically denies that Penn State was "forced under extreme duress" to enter into the Consent Decree. Penn State was advised by no fewer than five experienced lawyers in the drafting, consideration, negotiation, and execution of the Consent Decree, including a former Chair of the NCAA Committee on Infractions. On information and belief, Penn State understood it remained free to reject an agreed resolution at any time and trigger the traditional enforcement and infractions process or otherwise challenge in litigation the NCAA's authority to act. Ultimately, after extensive

deliberations and advice from counsel, Penn State determined that accepting the Consent Decree was the best option available to the University at the time.

The NCAA further specifically denies that it lacked authority to impose sanctions in the Consent Decree, that entry into the Consent Decree violated NCAA rules, and that NCAA sanctioned any of the Plaintiffs. To the contrary, the NCAA incorporates by reference its response to Paragraphs 1 and 4. The NCAA further denies that it made any statements in the Consent Decree about Jay Paterno or William Kenney and denies that any statements made by the NCAA caused Plaintiffs "significant harm" and, to the contrary, incorporates by reference its response to the allegations in Paragraph 125.

8. Because the NCAA has breached its duties and contractual obligations to Plaintiffs, because Penn State impermissibly acquiesced in those breaches, and because the NCAA Defendants' unlawful and unauthorized conduct has caused and is continuing to cause substantial harms, Plaintiffs are bringing this lawsuit to remedy the harms caused by the NCAA Defendants' conduct, to enforce the NCAA's obligations and rules, and to put an end to the NCAA Defendants' ongoing misconduct.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA is without knowledge or information sufficient to form a

belief as to the truth or falsity of why Plaintiffs are bringing this lawsuit and, on that basis, denies that allegation. The remainder of the allegations in Paragraph 8 constitute Plaintiffs' conclusions of law, which require no response.

9. The Estate of Joseph Paterno (the "Estate") brings this action to enforce the rights of Joseph ("Joe") Paterno. At all relevant times before his death, Joe Paterno was a resident of Pennsylvania.

RESPONSE: The allegations in the first sentence of Paragraph 9 state Plaintiffs' conclusion of law, which requires no answer. To the extent an answer is required, the allegations are denied. On information and belief, the NCAA admits that Joe Paterno was a resident of Pennsylvania.

10. Plaintiff Al Clemens served as a member of the Board of Trustees for more than 18 years, from June 1995 until May 2014 (he was therefore a member of the Board of Trustees in both 1998 and 2001). As a member of the Board, he had a fiduciary responsibility to take actions that are in the best interests of the entire University community. At all relevant times, Mr. Clemens has been a resident of Pennsylvania.

RESPONSE: The NCAA states that no response is needed to the allegations in Paragraph 10 because Al Clemens has dismissed his claims. To

the extent a response is required, then on information and belief, the NCAA admits the allegations in Paragraph 10.

11. Plaintiffs William Kenney and Joseph V. ("Jay") Paterno are former coaches of the Penn State football team and former employees of Penn State. At all relevant times, they were residents of Pennsylvania.

RESPONSE: On information and belief, the NCAA admits the allegations in Paragraph 11.

12. Defendant NCAA is an unincorporated association headquartered in Indianapolis, Indiana. It has members in all fifty states, the District of Columbia, Puerto Rico, and Canada, and effectively enjoys a monopoly over the popular world of college sports.

RESPONSE: The NCAA admits that it is an unincorporated association headquartered in Indianapolis, Indiana with members in all fifty states, the District of Columbia, Puerto Rico, and Canada. The NCAA denies the remaining allegations in Paragraph 12, which set forth conclusions of law, which require no answer.

13. Defendant Mark Emmert is the current president of the NCAA.

RESPONSE: Admitted.

14. Defendant Edward Ray is the president of Oregon State University and the former chairman of the NCAA's Executive Committee.

RESPONSE: Admitted.

15. Penn State is a state-related institution of higher learning based in Centre County, Pennsylvania, and one of the NCAA's member institutions. As alleged in more detail below, Penn State was forced to enter into the Consent Decree as a result of the NCAA Defendants' ongoing misconduct and abuse of power, including but not limited to threats by the NCAA Defendants that Penn State would be subject to the so-called "death penalty" if the Consent Decree is revoked or voided. Plaintiffs have been damaged as a result of these wrongful acts by the NCAA Defendants and by Penn State's acquiescence in the NCAA's efforts to conceal its wrongful conduct.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits the allegations in the first sentence of Paragraph 15. The NCAA specifically denies that Penn State was "forced" to enter into the Consent Decree as a result of the NCAA's "ongoing misconduct and abuse of power." To the contrary, the NCAA incorporates by reference its response to Paragraphs 1, 4, and 7.

The NCAA also specifically denies that it made "threats" that "Penn State would be subject to the so-called 'death penalty' if the Consent Decree is revoked or voided." The NCAA has acknowledged that the Consent Decree

resolved the violations related to the Sandusky matter without application of the traditional infractions process, which carried with it the risk of a suspension in play. In the absence of the Consent Decree, the NCAA would have the right to initiate a traditional infractions investigation and proceeding, which could result in any of the sanctions set forth in the NCAA Bylaws, including the so-called "death penalty." The last sentence of Paragraph 15 constitutes Plaintiffs' conclusions of law and argument, to which no answer is required.

16. Jurisdiction is proper in this Court under 42 Pa. C.S. § 931(a).

RESPONSE: The allegations in Paragraph 16 state Plaintiffs' conclusion of law, which requires no answer.

17. The Court has jurisdiction over the NCAA because it carries on a continuous and systematic part of its general business in Pennsylvania. *See* 42 Pa. C.S. § 5301(a)(3)(iii). The Court also has jurisdiction because, among other things, the NCAA transacted business and caused harm in Pennsylvania with respect to the causes of action asserted herein. *See id.* § 5322(a).

RESPONSE: The allegations in Paragraph 17 state Plaintiffs' conclusion of law, which requires no answer.

18. The Court has jurisdiction over Emmert and Dr. Ray in their personal capacities because they caused harm in Pennsylvania with respect to the tortious causes of action asserted herein. *See id.*

RESPONSE: The allegations in Paragraph 18 state Plaintiffs' conclusion of law, which requires no answer. By way of further answer, on August 21, 2013, the Court entered an order stating that after deciding on all other preliminary objections, it "will set a separate schedule for the objections relating to personal jurisdiction [as to Dr. Emmert and Dr. Ray] as necessary." Scheduling Order 1 (Aug. 16, 2013). To date, Dr. Emmert's and Dr. Ray's personal jurisdiction objections have not been resolved and, therefore, they have no obligation to answer the Second Amended Complaint at this time. Dr. Emmert and Dr. Ray hereby preserve their objection that the Court lacks personal jurisdiction over them.

19. The Court has jurisdiction over Penn State because it is chartered under state law. *See* Act of February 22, 1855, P.L. 46, § 1 (codified at 24 P.S. § 2531).

RESPONSE: The allegations in Paragraph 19 state Plaintiffs' conclusion of law, which requires no answer.

20. Venue is proper in Centre County under Pennsylvania Rules of Civil Procedure 1006(a) and 2156(a). The NCAA regularly conducts business and

association activities in this County, the causes of action arose in this County, and the transactions and/or occurrences out of which the causes of action arose took place in this County.

RESPONSE: The allegations in Paragraph 20 state Plaintiffs' conclusion of law, which requires no answer.

21. The NCAA is an unincorporated association of institutions of higher education with the common goal of achieving athletic and academic excellence. The NCAA was first formed in 1906 and is today made up of three membership classifications — Divisions I, II, and III.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 21 are admitted.

22. The NCAA's basic purpose is to maintain intercollegiate athletics as an integral part of university educational programs and the athlete as an integral part of the student body and, by doing so, to retain a clear line of demarcation between intercollegiate athletics and professional sports.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits that a purpose of the NCAA is to maintain intercollegiate athletics as an integral part of university educational programs

and the athlete as an integral part of the student body and, by doing so, to retain a clear line of demarcation between intercollegiate athletics and professional sports. The NCAA denies that such purpose is its only purpose. The NCAA denies any remaining allegations in Paragraph 22.

23. Student athletes are not paid, but the NCAA brings in substantial revenues each year. In 2012 alone, the NCAA generated $872 million in revenue, $71 million of which was treated as "surplus" and retained by the organization.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits that student athletes are not paid a salary. The NCAA's publicly-available Consolidated Financial Statements are written documents that speak for themselves. To the extent the allegations in Paragraph 23 vary therewith, the NCAA denies those allegations.

24. The NCAA is governed by a lengthy set of rules that define both the scope of the NCAA's authority and the obligations of the NCAA's member institutions. The relevant set of rules for purposes of this lawsuit is the 2011–2012 NCAA Division I Manual, which is available at http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx. (A copy of relevant portions of the NCAA's Manual is attached to this Complaint as Exhibit A.)

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds that Paragraph 24 characterizes the NCAA Division 1 Manual, which is a publically available document that speaks for itself. To the extent the allegations in Paragraph 24 vary therewith, the NCAA denies those allegations.

To the extent further response is required, the NCAA denies the allegations in the first sentence of Paragraph 24 as stated. The scope of the NCAA authority is determined by the Division I Manual as well as ordinary principles of law. In addition, each division of the NCAA has a manual containing a constitution, operating bylaws, and administrative bylaws, which instruct the daily operations of the NCAA and obligations of the member institutions. The NCAA denies that the relevant set of rules for purposes of this lawsuit is the 2011-2012 Division I Manual because Plaintiffs' Count I, breach of contract, has been dismissed. The NCAA admits that the 2011-2012 NCAA Division I Manual is available at http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx, and that a copy of portions of the NCAA 2011-2012 Manual was attached to the Complaint as Exhibit A. The NCAA denies any remaining allegations in Paragraph 24.

25. The rules governing NCAA sports, as reflected in the Manual, are developed through a membership-led governance system. Under that system, member institutions introduce and vote on proposed legislation. In turn, member institutions are obligated to apply and enforce the member-approved legislation, and the NCAA has authority to use its enforcement procedures when a member institution fails to fulfill its enumerated obligations.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds as follows: Paragraph 25 references or characterizes the NCAA Division I Manual, which is a written document that speaks for itself. To the extent the allegations in Paragraph 25 vary therewith, the NCAA denies those allegations.

To the extent further response is required, the NCAA admits that certain rules governing NCAA sports are developed through a membership-led organization, but it denies that the rules reflected in the Manual are the exclusive source of rules governing NCAA sports. The NCAA admits the allegations in the second sentence, but denies the allegations in the third sentence as stated. Member institutions are obligated to comply with the member-approved legislation, and the NCAA has authority to use its infractions process when a member fails to do.

26. The NCAA's rules are premised on the principle of according fairness to student athletes and staff, whether or not they may be involved in potential rules violations. The rules expressly protect and benefit students, staff, and other interested parties, recognizing that fair and proper procedures are important because the NCAA's actions can have serious repercussions on their lives and careers.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute.

Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process and incorporates by reference its response to Paragraphs 2 and 4.

27. In substance, the NCAA's rules govern "basic athletics issues such as admissions, financial aid, eligibility and recruiting." In that context, the rules contain principles of conduct for institutions, athletes, and staff, including the principles of "institutional control" and "ethical conduct."

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds as follows: the allegations in Paragraph 27 reference or characterize rules that are set forth in the NCAA Division I Manual, a written document that speaks for itself. To the extent the allegations in Paragraph 27 vary therewith, the NCAA denies those allegations. Further, the allegations in Paragraph 27 state Plaintiffs' conclusion of law, which requires no answer.

To the extent further response is required, the allegations in Paragraph 27 are denied as stated. Plaintiffs mischaracterize Article 1.3.2,, which states:

"Legislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting." The allegations in the second sentence of Paragraph 27 are denied as stated. The Division I Manual recognizes principles of institutional control and ethical conduct, among others, which are important to advancing the numerous important purposes of the Association and its members, including, but not limited to, those listed in response to Paragraph 2 and incorporated herein.

28. The principle of "institutional control," found in Article 6 of the Constitution, places the responsibility for "compliance with the rules and regulations of the Association" on each member institution. "Institutional control" is defined as "[a]dministrative control," "faculty control," or both. Article 6 contains no enforcement provision.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds as follows: the allegations in Paragraph 28 reference or characterize rules that are set forth in the NCAA Division I Manual, a written document that speaks for itself. To the extent the allegations in Paragraph 28 vary therewith, the NCAA denies those

allegations. Further, the allegations in Paragraph 28 state Plaintiffs' conclusion of law, which requires no answer.

To the extent further response is required, the NCAA admits that "institutional control" is defined as "[a]dministrative control," "faculty control," or a combination of the two, but it denies the remaining allegations if Paragraph 28 as stated. The NCAA states that the principle of "institutional control" is found in Articles 1, 2, and 6 of the Division I Constitution and in various bylaws. The enforcement provisions for the Division I Manual are set forth in Articles 19 and 32; Article 19 expressly references institutional control. Each member institution has the responsibility to control its own institution in compliance with the rules and regulations of the NCAA. The NCAA denies any remaining allegations in Paragraph 28.

29. The principle of "ethical conduct," found in Article 10 of the Bylaws, is intended to "promote the character development of participants." Article 10 refers to "student-athlete[s]" and defines unethical conduct with reference to a list of examples, all of which involve violations related to securing a competitive athletic advantage. Article 10 provides that any corrective action for the unethical conduct of an athlete or staff member shall proceed through the enforcement process set forth in Article 19 of the Bylaws.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds as follows: the allegations in Paragraph 29 reference or characterize rules that are set forth in the NCAA Division I Manual, a written document that speaks for itself. To the extent the allegations in Paragraph 29 vary therewith, the NCAA denies those allegations. Further, the allegations in Paragraph 29 state Plaintiffs' conclusion of law, which requires no answer.

To the extent further response is required, the allegations in Paragraph 29 are denied as stated. The importance of ethics is reinforced throughout the Division I Manual, and "ethical conduct" specifically is found in Articles 2, 10, and 32. Section 2.4 of the Division I Constitution contains the Principle of Sportsmanship and Ethical Conduct, which is intended to not only promote the character development of participants, but also to enhance the integrity of higher education and to promote civility in society. In order to further that purpose, the NCAA Constitution affirms that everyone associated with intercollegiate athletics programs should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility. These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics program. Article 10 is not limited to student

athletes, but also encompasses the conduct of prospective student-athletes and current or former institutional staff members, including individuals who perform uncompensated work for the institution or the athletics department. Article 10 provides a non-exhaustive list of examples of unethical conduct, which are not limited to securing a competitive athletic advantage, including, for example, "[r]efusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation..." Section 10.4 states that institutional staff members who violate the principle of ethical conduct shall be subject to the probationary periods set forth in Bylaw 19.5.2.2, but Article 10 does not identify the enforcement procedures that are to be employed. The NCAA denies any remaining allegations in Paragraph 29.

30. The authorized enforcement process, detailed in Articles 19 and 32, is required to begin with an investigation, conducted by the NCAA enforcement staff. In conducting an investigation, the staff is required to comply with the operating policies, procedures, and investigative guidelines established in accordance with Article 19.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies

to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

31. The staff has responsibility for gathering information relating to possible rules violations and for classifying alleged violations. Information that an institution has failed to meet the conditions and obligations of membership is to be

provided to the enforcement staff, and must be channeled to the enforcement staff if received by the NCAA president or by the NCAA's Committee on Infractions.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent

Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

32. The rules recognize two types of violations subject to the NCAA's enforcement authority: (1) "major" violations, and (2) "secondary" violations.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not

relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

33. The NCAA's enforcement staff may interview individuals suspected of violations, but they must provide notice of the reason for the interview, and the individual has a right to legal counsel. Interviews must be recorded or summarized and, when an interview is summarized, the staff is required to attempt to obtain a signed affirmation of accuracy from the interviewed individual. The enforcement staff is responsible for maintaining evidentiary materials on file at the national office in a confidential and secure manner.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are

conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

34. If the enforcement staff learns of reasonably reliable information indicating that a member institution has violated the NCAA's rules, it must provide a "notice of inquiry" to the chancellor or president of the institution, disclosing the nature and details of the investigation and the type of charges that appear to be involved. The "notice of inquiry" presents the institution with an opportunity to address the issue and either convince the NCAA that no wrongdoing has occurred or, if there is wrongdoing, cooperate and play a role in the investigation.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this

Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

35. If the enforcement staff determines after conducting its initial inquiry that there is sufficient information to support a finding of a rules violation, the staff

must then send a "notice of allegations" to the institution. That notice must list the NCAA rule alleged to have been violated and the details of the violation. If the allegations suggest the significant involvement of any individual staff member or student, that individual is considered an "involved individual" and must be notified and provided with an opportunity to respond to the allegations. The issuance of the notice of allegations initiates a formal adversarial process, which allows the institution and involved individuals the opportunity to respond and defend themselves.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4. The NCAA further denies that any Plaintiff was an "involved individual," a position it has extensively explained in its multiple rounds of preliminary objections briefing.

36. The rules protect any individual who is alleged to have significant involvement in an alleged rules' violation, regardless of whether that person is personally available to participate in the investigation process. The rules do not limit the definition of "involved individual" and it is understood that the rules apply to any individual accused of being significantly involved in an alleged rules' violation. When an individual is not personally available to participate in the process, involved individuals have been allowed to participate through counsel or an appropriate representative.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the Court struck this Paragraph in its March 30, 2015 Opinion and Order dismissing the Paterno Estate's contract claim. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent

Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4. The NCAA further denies that any Plaintiff was an "involved individual," a position it has extensively explained in its multiple rounds of preliminary objections briefing.

37. After the notice of allegations is issued, the matter is referred to the Committee on Infractions. A member institution has the right to pre-hearing notice of the charges and the facts upon which the charges are based, and an opportunity to be heard and to produce evidence. The institution and all involved individuals have the right to be represented by legal counsel at all stages of the proceedings.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

38. The Committee must base its decision on evidence that is "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs." Oral or documentary information may be presented to the Committee, subject to exclusion on the ground that it is "irrelevant, immaterial or unduly repetitious." Individuals have the opportunity, and are encouraged, to present all relevant information concerning mitigating factors.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles

19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process.

39. The Committee may not under any circumstances rely on information provided anonymously.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies

to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement, and infractions process and incorporates by reference its response to Paragraphs 2 and 4.

40. After the Committee has completed its review, it is authorized to impose sanctions in appropriate circumstances. The sanctions for violating the rules are calibrated to the rules' substantive prohibitions. Permissible sanctions for major violations include the imposition of probationary periods, reduction in

permissible financial aid awards to student athletes, prohibitions on postseason competition, vacation of team records (but only in cases where an ineligible student athlete has competed), and financial penalties. Those penalties aim to erase the competitive advantage that the violations were intended to achieve.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds as follows: the allegations in Paragraph 40 reference or characterize rules that are set forth in the NCAA Division I Manual, a written document that speaks for itself. To the extent the allegations in Paragraph 40 vary therewith, the NCAA denies those allegations. Further, the allegations in Paragraph 40 state Plaintiffs' conclusion of law, which requires no answer.

To the extent further response is required, the allegations in Paragraph 40 are denied as stated. If the NCAA undertakes an enforcement proceeding pursuant to Articles 19 and 32, then the allegations in the first sentence of Paragraph 40 are accurate. The NCAA is without knowledge or information sufficient to understand what Plaintiffs mean by "calibrated" in the second sentence, and on that basis denies the allegations in the second sentence of Paragraph 40. However, the NCAA admits that the penalties imposed pursuant to Article 19 and 32 enforcement proceedings for "major violations"

may be more severe than the penalties for "secondary violations." The NCAA further admits that the Committee on Infractions is permitted to impose the sanctions listed in Paragraph 40, but the NCAA denies that those are the only permissible sanctions. The Committee on Infractions is permitted to impose any other penalties as appropriate for major violations, including vacation of wins for violations not involving competition by an ineligible student. The NCAA admits that the Committee on Infractions is permitted to impose penalties with the purpose of erasing a competitive advantage, but it denies that such must be a purpose in imposing penalties. The NCAA denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree, and incorporates by reference its responses to the allegations in Paragraphs 2 and 4. The NCAA denies any remaining allegations in Paragraph 40.

41. The most severe sanction available to the NCAA is the "death penalty," so called because, in prohibiting an institution's participation in a sport for a certain period of time, it has enormous consequences for a program's future ability to recruit players, retain staff, and attract fans and boosters. It is well known that imposing the "death penalty" can ruin the livelihood of those associated with an institution's program and harm involved individuals well beyond the penalty's immediate economic impact. For these and other reasons, the

rules allow the death penalty to be imposed only on "repeat violators" — *i.e.*, institutions that (i) commit a major violation, seeking to obtain an extensive recruiting or competitive advantage, and (ii) have also committed at least one other major violation in the last five years.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds as follows: the allegations in Paragraph 41 reference or characterize rules that are set forth in the NCAA Division I Manual, a written document that speaks for itself. To the extent the allegations in Paragraph 41 vary therewith, the NCAA denies those allegations. Further, the allegations in Paragraph 41 state Plaintiffs' conclusion of law, which requires no answer.

To the extent further response is required, the NCAA admits that suspension of play is a sanction that may substantially impact a program, but the NCAA denies the remaining allegations in the first two sentences of Paragraph 41. Those allegations contain argument and opinion, not factual averments. The NCAA denies the remaining allegations in Paragraph 41. The most severe sanction available to the NCAA is expulsion from the Association, not a suspension in play, and suspension in play is not limited to repeat violators. In addition, although a repeat violator must have committed

at least one other major violation in the last five years (among other things), there is no requirement that the institution must have sought to obtain an extensive recruiting or competitive advantage in committing a major violation. The NCAA also denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree, and incorporates by reference its responses to the allegations in Paragraphs 2 and 4. The NCAA denies any remaining allegations in Paragraph 41.

42. At the conclusion of the hearing, the Committee is required to issue a formal Infractions Report detailing all the Committee's findings and the penalties imposed. The Committee must submit the report to the institution and all involved individuals. The report shall be made publicly available only after the institution and all involved individuals have had an opportunity to review the report. Names of individuals must be deleted before the report is released to the public or forwarded to the Infractions Appeals Committee. The report must also describe the opportunities for further administrative appeal.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles

19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

43. The rules provide a member institution the right to appeal to the Infractions Appeals Committee if the institution is found to have committed major violations. In addition, an individual has the right to appeal if he or she is named in the Committee on Infractions' report finding violations of the NCAA's rules.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

44. On appeal, the penalties imposed must be overturned if they constitute an abuse of discretion. Factual findings must be overturned if they are clearly contrary to the evidence presented, if the facts found do not constitute a violation of the NCAA's rules, or if procedural errors occurred in the investigation process. The Infractions Appeals Committee's decision is final and cannot be reviewed by any other NCAA authority.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute.

Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

45. The rules include certain alternatives to the formal investigative and hearing process outlined above. For example, an institution is encouraged to self-report violations, and a self-report is considered as a mitigating factor when imposing sanctions. A self-report typically involves a formal letter sent to the enforcement staff by a member institution setting forth the relevant facts. After receiving a self-report, the enforcement staff has a duty to conduct an investigation, to determine whether the self-reported violation is "secondary" or "major," and to prepare and send a notice of allegations to the institution. Based on the enforcement staff's investigation, if a major violation is identified and the staff is satisfied with the institution's self-report, the parties may agree to use a summary disposition process.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the

Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

46. The summary disposition process and an expedited hearing procedure may be used only with the unanimous consent of the NCAA's enforcement staff; all involved individuals, and the participating institution. During the summary

disposition process, the Committee on Infractions is required to determine that a complete and thorough investigation of possible violations has occurred, especially where the institution, and not NCAA enforcement staff, conducted the investigation. After the investigation, the involved individuals, the institution, and enforcement staff are required to submit a joint written report. A hearing need not be conducted if the Committee on Infractions accepts the parties' submissions, but the Committee must still prepare a formal written report and publicly announce the resolution of the case.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

47. If the Committee accepts the findings that a violation occurred but does not accept the parties' proposed penalties, it must hold an expedited hearing limited to considering the possibility of imposing additional penalties. After that hearing, the Committee must issue a formal written report, and the institution and all involved individuals have the right to appeal to the Infractions Appeals Committee any additional penalties that may be imposed.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles

19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, are conclusions of law, which require no response. Finally, the allegations in this Paragraph are irrelevant and should be struck.

RESPONSE: The NCAA admits that in entering into the Consent Decree it did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. This fact is not in dispute. Therefore, a discussion of the requirements and principles of the Manual applicable to the traditional enforcement and infractions process is not relevant to any factual dispute. However, the NCAA denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference its response to Paragraphs 2 and 4.

48. These enforcement policies and procedures are subject to amendment only in accordance with the legislative process set forth in Article 5. No other NCAA body, including the Executive Committee and the Board of Directors, has authority to bypass or amend these procedures and impose discipline or sanctions on any member institution. The Executive Committee and the Board of Directors

are authorized only to take actions that are legislative in character, to be implemented association-wide on a prospective basis.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, the NCAA responds as follows: the allegations in Paragraph 48 reference or characterize rules that are set forth in the NCAA Division I Manual, a written document that speaks for itself. To the extent the allegations in Paragraph 48 vary therewith, the NCAA denies those allegations. Further, the allegations in Paragraph 48 state Plaintiffs' conclusion of law, which requires no answer.

To the extent further response is required, the NCAA denies the allegations in the first sentence of Paragraph 48 as stated. The NCAA denies that the enforcement policies and procedures of the Division I Manual are subject to amendment according to the processes set forth only in Article 5. For example, Article 19 also contains relevant procedures. The NCAA also denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree, and incorporates by reference its responses to the allegations in Paragraphs 2 and 4. And the NCAA denies that in acting on matters of Association-wide import, the Executive Committee could only take legislative action on a prospective basis. The

NCAA denies the allegations in the last two sentences of Paragraph 48. The former NCAA governing bodies, the Executive Committee and Division I Board of Directors, were authorized to take all actions in their authority under the general principles of law.

49. These procedural protections are a significant and vital part of the bargain involved in each member's decision to participate in the NCAA. Because of the leverage the NCAA has over its member institutions, and because of the significant consequences NCAA sanctions can have for institutions and their administrators, faculty, staff, and students, the NCAA has an express obligation to ensure that any sanctions are fair and imposed consistent with established procedures.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. Moreover, the allegations in this Paragraph attempt to characterize rules and principles that are stated in the Division I Manual, a written document that speaks for itself and which applies to the NCAA's traditional enforcement and infractions process under Articles 19 and 32, as of July 2012. To the extent Plaintiffs mischaracterize the content of the Division I Manual, those allegations are denied. Additionally, Plaintiffs' allegations, which attempt to identify and define certain NCAA legal obligations under the Division I Constitution and Bylaws, and reach

conclusions under contract law regarding third-party beneficiaries, are conclusions of law, which require no response. The NCAA also lacks sufficient knowledge or information regarding what each member considered to be a significant and vital part of their bargain in deciding to participate in the NCAA, especially given that many joined long before the current procedural protections existed, and on that basis denies those allegations. Finally, the NCAA incorporates by reference its extensive arguments presented in multiple rounds of preliminary objections briefing that no Plaintiff is a third-party beneficiary of the Division I Manual.

50. The NCAA's Constitution recognizes that it is the NCAA's responsibility to "afford the institution, its staff and student-athletes fair procedures in the consideration of an identified or alleged failure in compliance." According to the mission statement of the NCAA's enforcement program, "an important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions."

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 50 are admitted.

51. On November 4, 2011, the Attorney General of Pennsylvania charged Jerry Sandusky, a former assistant football coach, former assistant professor of

physical education, and former employee of Penn State, with various criminal offenses, including aggravated criminal assault, corruption of minors, unlawful contact with minors, and endangering the welfare of minors. Sandusky was convicted and, on October 9, 2012, was sentenced to 30 to 60 years in prison.

RESPONSE: On information and belief, the allegations in Paragraph 51 are admitted.

52. On November 9, 2011, the Penn State Board of Trustees removed University President Graham Spanier from his position. Rodney Erickson was named interim president, and later became the permanent president of the University. The Board also removed Joe Paterno from his position as head football coach.

RESPONSE: On information and belief, the allegations in Paragraph 52 are admitted.

53. On November 11, 2011, the Penn State Board of Trustees formed a Special Investigations Task Force, which engaged the law firm of Freeh Sporkin & Sullivan, LLP (the "Freeh firm") to investigate the alleged failure of certain Penn State personnel to respond to and report certain allegations against Sandusky. The Freeh firm was also asked to provide recommendations regarding University governance, oversight, and administrative policies and procedures to help Penn

State adopt policies and procedures to more effectively prevent or respond to incidents of sexual abuse of minors in the future.

RESPONSE: On information and belief, the NCAA admits that the Penn State Board of Trustees engaged the law firm of Freeh Sporkin & Sullivan, LLP in November 2011. The full purpose and scope of the Freeh Firm's engagement is set forth in an engagement letter and the Freeh Report, as modified or expanded by any additional direction from the Penn State Board of Trustees. To the extent the allegations in Paragraph 53 vary therewith, the NCAA denies those allegations.

54. The Freeh firm was not engaged, and had no authority, to investigate or even consider whether any of the actions under its review constituted violations of the NCAA's rules. It was never retained by the Penn State Board of Trustees for this purpose.

RESPONSE: Denied as stated. The purpose and scope of the Freeh Firm's engagement is set forth in its engagement letter and the Freeh Report, as modified or expanded by any additional direction from the Penn State Board of Trustees. In addition, on information and belief, Penn State was hopeful that facts and information identified in the Freeh firm's investigation could be used to respond to questions set forth in the NCAA's November 17, 2011 letter, which the University received after retaining the Freeh firm.

Penn State further hoped that by conducting its own independent investigation of the Sandusky affair, it would deter the NCAA from conducting its own investigation. Indeed, Penn State explicitly requested that it not answer the NCAA's preliminary questions about the Sandusky Affair until the completion of the Freeh investigation. Ultimately, while the Freeh Report did not expressly analyze whether its findings constituted violations of the NCAA Constitution and Bylaws, Penn State accepted that it could serve as a sufficient factual predicate for the NCAA and Penn State to agree that the findings constituted violations for purposes of entering into the Consent Decree.

55. The reprehensible incidents involving Sandusky were criminal matters that had nothing to do with securing a recruiting or competitive advantage for Penn State and its athletics program. Defendant Mark Emmert, president of the NCAA, would later acknowledge that "[a]s a criminal investigation, it was none of [the NCAA's] business."

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits that the incidents involving Sandusky were reprehensible. The NCAA specifically denies that the Sandusky scandal at Penn State had "nothing to do with securing a recruiting or competitive

advantage for Penn State or its athletics program," that President Emmert has "acknowledge[d]" that the Sandusky affair was "none of [the NCAA's] business," especially once the Freeh Report was released, or that the NCAA otherwise lacked authority to address the issues at Penn State. To the contrary, NCAA incorporates by reference its response to the allegations in Paragraph 1.

56. Nonetheless, as early as November 2011, the NCAA accused certain Penn State personnel (including Plaintiffs) of being significantly involved in alleged violations of the NCAA's rules.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 56 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim. To the extent a response is required, the NCAA specifically denies that the "NCAA accused certain Penn State personnel (including Plaintiffs) of being significantly involved in alleged violations of the NCAA's rules." To the contrary, and as the Court has twice held, the NCAA's November 17, 2011 letter explained that, in light of the

information in the Sandusky presentment, the NCAA would review Penn State's exercise of institutional control over its athletics program, and that the NCAA had not, at that point, determined what action to take with respect to Penn State, if any. The letter, which did not identify any of the Plaintiffs, presented four questions that Penn State should answer to allow the NCAA to determine any next steps. The November 17, 2011 letter was not the initiation of any formal enforcement inquiry or investigation by the NCAA, nor did it "accuse" Plaintiffs of involvement in NCAA rules violations.

57. On November 17, 2011, Emmert sent a letter to President Erickson of Penn State expressing concern over the grand jury presentments and asserting that the NCAA had jurisdiction over the matter and might take action against Penn State. (A copy of the letter is attached to this complaint as Exhibit B.) Emmert's letter stated that "individuals with present or former administrative or coaching responsibilities may have been aware of this behavior" and that such "individuals who were in a position to monitor and act upon learning of potential abuses appear to have been acting starkly contrary to the values of higher education, as well as the NCAA." Emmert's letter also stated that "the NCAA will examine Penn State's exercise of institutional control over its intercollegiate athletics program, as well as the actions, and inactions, of relevant responsible personnel."

RESPONSE: **The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 57 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. The November 17, 2011 letter to President Erickson was sent and is attached to the Second Amended Complaint as Exhibit B. That letter is in writing and speaks for itself, and the NCAA incorporates by reference its response to the allegations in Paragraph 56.**

58. Joe Paterno, the long-standing head coach of Penn State football, was expressly referenced in the grand jury presentment and was one of the individuals that Emmert and the NCAA had decided to investigate. In fact, Emmert referenced Coach Joe Paterno in his letter, stating that, under NCAA Bylaw 11.1.2.1, "[i]t shall be the responsibility of an institution's head coach to promote an atmosphere for compliance within the program supervised by the coach, and to monitor the activities regarding compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the coach."

RESPONSE: **The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 58 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim. To the extent a response is required, the NCAA admits that the grand jury presentment referenced Joe Paterno. The NCAA specifically denies that the "NCAA had decided to investigate" any individual—or to take any action whatsoever—at the time the November 17, 2011 letter was sent. The letter, which is in writing and speaks for itself, does not reference Coach Joe Paterno, and the NCAA further incorporates by reference its response to the allegations in Paragraph 56.**

59. When Emmert sent this letter to President Erickson, Joe Paterno was alive and, as an individual referenced in the letter and involved in the investigation, was entitled to certain rights and protections provided under the NCAA's rules. Contrary to the rules, however, the NCAA Defendants failed to provide Joe Paterno with these essential protections and violated the NCAA's rules.

RESPONSE: **The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 59 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim.**

To the extent a response is required, the NCAA admits that when President Emmert sent the November 17, 2011 letter to President Erickson, "Joe Paterno was alive." The remainder of the Paragraph sets forth conclusions of law, which requires no answer.

60. Emmert's letter did not identify any specific provision in the NCAA's Constitution or Bylaws that granted the NCAA authority to become involved in criminal matters outside the NCAA's basic purpose and mission. Nor did the letter identify any NCAA rule that Penn State or any of the individuals being investigated, including Joe Paterno and other coaches and administrators, had allegedly violated. Emmert nonetheless asserted that the NCAA's Constitution "contains principles regarding institutional control and responsibility" and "ethical conduct," and that those provisions may justify the NCAA's involvement.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 60 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. The letter is in writing and speaks for itself, and the NCAA incorporates by reference its responses to the allegations in Paragraphs 56 through 58.

By way of further answer, the letter clearly references several provisions of the NCAA Constitution and Bylaws that could be applicable to the Sandusky matter. The NCAA specifically denies that the Sandusky scandal was "outside the NCAA's basic purpose and mission." The events surrounding the Sandusky matter at Penn State fell squarely within the NCAA's authority, indicated a profound lack of institutional integrity and institutional control, and raised serious questions about whether Penn State, as an institution, acted in a manner consistent with the NCAA Constitution and Bylaws. The NCAA also specifically denies that it was "investigat[ing]"

Penn State or any "individuals" at that time. The NCAA incorporates its response to Paragraph 56.

61. When Emmert sent his November 17, 2011 letter, he posed four written questions to which the NCAA sought responses. Those questions related directly to actions or steps that individuals had taken, including "[h]ave each of the alleged persons to have been involved or have notice of the issues identified in and related to the Grand Jury Report behaved consistent with principles and requirements governing ethical conduct and honesty? If so, how? If not, how?" At the time of the letter, Joe Paterno was alleged to have been involved in the issues identified in the Grand Jury Report.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 61 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim.

To the extent a response is required, the NCAA admits that the November 17, 2011 letter "posed four written questions to which the NCAA sought responses," and that at the time of the letter, the Grand Jury publically

alleged that Joe Paterno was involved in the issues identified in the Grand Jury Report. The letter is in writing and speaks for itself, and the NCAA incorporates by reference its responses to the allegations in Paragraphs 56 through 58 and Paragraph 60.

62. Instead of demanding that Penn State provide answers to its questions, and without offering Joe Paterno or other individuals the right to participate in the process, the NCAA waited for the Freeh firm to complete its investigation. Attorneys and investigators working for the Freeh firm collaborated with the NCAA and frequently provided information and briefings to the NCAA. During the course of the seven-and-a-half-month investigation, the Freeh firm regularly contacted representatives of the NCAA to discuss areas of inquiry and other strategies. The final report released by the Freeh firm states that as part of its investigative plan, the firm cooperated with "athletic program governing bodies," *i.e.,* the NCAA. (The Freeh firm also cooperated with other governing bodies, including the Big Ten Conference (the "Big Ten").)

RESPONSE: In its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required.

To the extent a response is required, the NCAA admits that, at Penn State's request, it waited for the Freeh firm to complete its investigation before requesting that Penn State provide answers to the questions set forth in the NCAA's November 17, 2011 letter to Penn State. The NCAA specifically denies that "[a]ttorneys and investigators working for the Freeh firm collaborated with the NCAA and frequently provided information and briefings to the NCAA," and further specifically denies that "the Freeh firm regularly contacted representatives of the NCAA to discuss areas of inquiry and other strategies." The Freeh investigation was an independent investigation, and the NCAA did not determine the scope of the investigation, nor did it play any role in the development of the Freeh firm's conclusions, receive any substantive briefings on findings and conclusions, or review any drafts or partial drafts of the Freeh Report. From November 2011 to July 2012, the contacts between the NCAA and the Freeh firm were limited in nature, primarily involved process updates, and were well-known to Penn State and publicly disclosed in the Freeh Report itself.

63. According to Emmert in a speech to the Detroit Economic Club on September 21, 2012, the NCAA waited for the results of the Freeh firm's investigation because the firm "had more power than we have — we don't have subpoena power, which was more or less granted to them by the Penn State Board

of Trustees." As late as January 2014, Emmert continued to state publicly that he believed that the Freeh firm had been vested with subpoena power, at least as far as employees of Penn State were concerned.

RESPONSE: The NCAA admits that Dr. Emmert made the statement in the first sentence of Paragraph 63, but denies that he said that the NCAA waited for the results of the Freeh firm's investigation solely because it had more power than the NCAA. Rather, the NCAA waited for the Freeh firm to complete its investigation at the request of Penn State. The NCAA admits that a news report indicates that Dr. Emmert stated publicly that that he believed the Freeh firm had been vested with subpoena power within Penn State.

64. On January 22, 2012, following the NCAA's initiating its investigation and during the time the NCAA Defendants were waiting for the Freeh firm to complete its investigation rather than following its own rules for investigations, Joe Paterno died. Plaintiff the Estate of Joseph Paterno succeeded to his rights and interests.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 64 because Count I, breach of contract, has been dismissed. To the

extent a response is required, the NCAA responds that the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim.

To the extent a response is required, the NCAA admits that Joe Paterno died on January 22, 2012 and that the Freeh investigation was not complete at that time. The NCAA specifically denies that it had by that date "initiated an investigation" or that it was not "following its own rules for investigations" at that time. To the contrary, the NCAA incorporates its response to Paragraphs 56 and 60. The allegation that the "Estate of Joseph Paterno succeeded to his rights and interests" upon his death is a conclusion of law, which requires no answer.

65. The NCAA's inquiry prompted an investigation by the Big Ten, which sent a letter to President Erickson requesting that it be given the same treatment as the NCAA in the investigative process. Even though this was a criminal matter that fell far outside their purview, Penn State allowed both the NCAA and the Big Ten to participate in the investigation by the Freeh firm.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA is without knowledge or information sufficient to form a belief as to what prompted the Big Ten to send a letter or whether that letter

initiated a Big Ten investigation and, on that basis, denies those allegations. The NCAA specifically denies that it had initiated an inquiry or investigation as of November 2011, that the Sandusky scandal "fell far outside [the NCAA's] purview," and that the NCAA and the Big Ten "participate[d] in the investigation by the Freeh firm." The NCAA incorporates by reference its responses to the allegations in Paragraphs 60, 62, and 65. The Big Ten letter referenced or characterized in Paragraph 65 is in writing and speaks for itself.

66. On July 12, 2012, the Freeh firm released its report (the "Freeh Report"), a 144-page document with approximately 120 pages of footnotes and exhibits. The report did not disclose that representatives of the NCAA and the Big Ten participated in the process with the Freeh firm from the outset of the investigation.

RESPONSE: In its March 30, 2015 Opinion and Order, which, *inter alia*, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. To the extent a response is required, the NCAA admits that the Freeh Report was released on July 12, 2012 and that it contains 144 pages with 120 additional pages of footnotes and exhibits. The NCAA specifically denies that the "NCAA and the Big Ten participated in the process with the Freeh Firm from the outset of the

investigation." The Freeh Report is in writing and speaks for itself, and explicitly states, *inter alia*, that the Freeh Firm "cooperat[ed] with law enforcement, government and non-profit agencies, including the National Center for Missing and Exploited Children (NCMEC), and athletic program governing bodies." The NCAA's limited interaction with the Freeh investigation was appropriate and fully known to Penn State. Answering further, the NCAA incorporates by reference its response to the allegations in Paragraph 62.

67. The Freeh Report stated that top university officials and Coach Joe Paterno had known about Sandusky's conduct before Sandusky retired as an assistant coach in 1999, but failed to take action. According to the report, Penn State officials conspired to conceal critical facts relating to Sandusky's abuse from authorities, the Board of Trustees, the Penn State community, and the public at large.

RESPONSE: Paragraph 67 references or characterizes the Freeh Report, which is a written document that speaks for itself and details the findings that are characterized in Paragraph 67. The NCAA admits that the Freeh Report found that "[t]aking into account the available witness statements and evidence, the Special Investigative Counsel finds that it is more reasonable to conclude that, in order to avoid the consequences of bad

publicity, the most powerful leaders at the University – Spanier, Schultz, Paterno, and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large."

Answering further, the Freeh Report's findings regarding the response of University officials, including Coach Joe Paterno, to information about Sandusky's abuse of children in 1998 (referenced in the first sentence of Paragraph 67) are detailed throughout the Report, including, among other places, in the Executive Summary and Chapter 2 (titled "Response of University Officials to the Allegation of Child Sexual Abuse Against Sandusky – 1998").

68. Within hours of the release of the Freeh Report — and before members of the Penn State Board of Trustees had an opportunity to read the full report, discuss it, or vote on its contents — certain Penn State officials held a press conference and released a written statement asserting that the Board of Trustees accepted full responsibility for the purported failures outlined in the Freeh Report.

RESPONSE: The NCAA admits that within hours of the release of the Freeh Report, certain Penn State representatives held a press conference and released a written statement asserting that the Board of Trustees accepted full responsibility for the purported failures outlined in the Freeh Report. The

NCAA lacks information sufficient to admit or deny the allegation that the press conference was held, and the written statement was released, "before members of the Penn State Board of Trustees had an opportunity to read the full report, discuss it, or vote on its contents." The NCAA also denies that the Board of Trustees were required to vote on the contents of the Freeh Report.

69. Later the same day, Emmert announced that there had been an "acceptance of the report" by the Penn State Board of Trustees. As he and other NCAA officials later explained, the NCAA decided to rely on the Freeh Report, and he publicly announced that once the NCAA "had the Freeh Report, the university commissioned it and released it without comment, so [the NCAA] had a pretty clear sense that the University itself accepted the findings." According to Emmert, the NCAA "and the University both found the Freeh Report information incredibly compelling" and "so with the University accepting those findings," the NCAA found "that body of information to be more than sufficient to impose" penalties.

RESPONSE: The NCAA admits that that Penn State Board of Trustees announced that it accepted the Freeh Report. To the extent that the quotation purportedly from Dr. Emmert in the first sentence is taken from a document, that document speaks for itself. Because the source of the quotation is not identified, the NCAA lacks information sufficient to admit or deny that

allegation. The NCAA denies that Dr. Emmert made the statement alleged in the second sentence. Rather, Dr. Ed Ray made that statement. The third sentence is denied as stated because it omits parts of Dr. Emmert's statement. He stated in full, "We and the university both found the Freeh report information incredibly compelling. They interviewed more than 460 individuals, examined more than 3 million documents and e-mails. They provided an examination that was more exhaustive than anything any of us have ever seen in the university. So with the university accepting those findings, we've found that that body of information to be more than sufficient to impose the penalties that we put into place."

70. In reality, however, no full vote of the Board of Trustees was ever taken. The Freeh Report was not approved by the Board of Trustees. The Board of Trustees never took any official action based on the Freeh Report. Nor did the full Board ever accept its findings or reach any conclusions about its accuracy.

RESPONSE: On information and belief, the NCAA admits that no official vote of the full Board of Trustees was taken regarding the Freeh Report in July, 2012. The NCAA specifically denies that the Freeh Report was never "approved by the Board of Trustees," that the "Board of Trustees never took any official action based on the Freeh Report," "[n]or did the full Board ever accept its findings or reach any conclusions about its accuracy."

To the contrary, the Board of Trustees retained the Freeh Firm to conduct an investigation concerning the Sandusky matter, and specifically directed the Freeh Firm to prepare and publish a report of its investigative findings. The day the Report was released, Penn State publicly released a statement about the Freeh Report. Members of the Penn State Board, with assistance from counsel and other advisors, prepared and released the statement prior to any substantive discussion with NCAA personnel about the Freeh Report. The statement provided that "[t]he Board of Trustees, as the group that has paramount accountability for overseeing and ensuring the proper functioning and governance of the University, accepts full responsibility for the failures that occurred." The statement further provided that "[t]here can be no ambiguity" about the Report's conclusion that "certain people at the University who were in a position to protect children or confront the predator failed to do so ... [w]e are deeply sorry..." Further, the Consent Decree stated that Penn State "accepts the findings of the Freeh Report for purposes of this resolution," and quoted verbatim several of the Freeh Report's key findings. The Executive Committee of the Board of Trustees met and approved President Erickson's execution of the Consent Decree on July 22, 2012, and during a full session of the Board in August 2012, members of the Board expressed their support for President Erickson's decision to execute the

Consent Decree, which included an acceptance of the Freeh Report's findings. In addition, the Board did not rescind or repudiate the Consent Decree and, instead, repeatedly affirmed the University's commitment to compliance with the Consent Decree, including the extensive recommendations set forth in the Freeh Report.

71. The NCAA announced that it had no need to "replicat[e]" what it characterized (incorrectly) as an "incredibly exhaustive effort by the Freeh [firm]." But the Freeh Report did not comply with the NCAA's rules and procedures. In preparing its report, the Freeh firm did not purport to conduct an investigation into alleged NCAA rule violations. It did not record or summarize witness interviews as specified in the NCAA's rules. Nor did it include in its report any findings concerning alleged NCAA rule violations. The report's conclusions were not based on evidence that is "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs," as the NCAA's rules require. And individuals named in the report were not given any opportunity to challenge its conclusions.

RESPONSE: The Freeh Report details the Freeh firm's investigative process and approach. The NCAA admits that it stated it had no need to duplicate the "effort by the Freeh [firm]" which it characterized as "incredibly exhaustive." The NCAA specifically denies that this

characterization was "incorrect" or that in conducting an investigation on behalf of the Penn State Board the Freeh firm had any obligation to comply with "rules and procedures" that govern the NCAA when it conducts an investigation.

The NCAA further admits that the Freeh Report did not include any conclusions concerning whether its findings constituted violations of the NCAA Constitution and Bylaws. The remaining allegations are denied as stated. Penn State agreed that the Freeh Report could serve as a sufficient factual predicate for the NCAA and Penn State to agree that the findings constituted violations for purposes of entering into the Consent Decree. Indeed, Penn State's own outside counsel, Mr. Gene Marsh (who had served for nine years on the NCAA Committee on Infractions) specifically advised Penn State that the findings in the Freeh Report and Penn State's "embrace" of the Report established violations of the NCAA Constitution and Bylaws and that if Penn State opted for the traditional infractions process, the Committee on Infractions would likely impose harsh sanctions on Penn State, potentially including a suspension in play.

The NCAA also specifically denies that the Freeh Report's conclusions were not based on "evidence that is 'credible, persuasive, and of a kind on which reasonably prudent persons rely in the conduct of serious affairs." To

the contrary, the Freeh investigation was led by a former FBI director and federal judge, Louis Freeh, who Penn State Trustee Ken Frazier described as having "unimpeachable credentials and unparalleled experience in law and criminal justice." The Freeh investigation's process was robust and consistent with the process regularly used by corporations, universities, and other entities conducting internal investigations in order to develop factual information and make important business, legal, or other strategic decisions, as well as federal prosecutors and regulatory authorities, who routinely base criminal and regulatory settlements on such investigations. The Freeh firm's findings are supported by documentary evidence, interviews, sworn testimony, and reasonable inferences drawn therefrom, as set forth explicitly in the Freeh Report. To the extent relevant, and consistent with decades of legal authority concerning the burden of proof in cases like this one, proof of this allegation at trial is demanded.

Finally, the NCAA denies the allegations in the last sentence of Paragraph 71 as stated. Individuals were provided the opportunity to participate in the Freeh investigation and, upon information and belief, Coach Paterno or his representative did participate in the Freeh investigation.

72. In preparing its report, the Freeh firm did not complete a proper investigation, failed to interview key witnesses, and instead of supporting its

conclusions with evidence, relied heavily on speculation and innuendo. The report relies on unidentified, "confidential" sources and on questionable sources lacking any direct or personal knowledge of the facts or support for the opinions they provided. Many of its main conclusions are either unsupported by evidence or supported only by anonymous, hearsay information of the type specifically prohibited by the NCAA rules.

RESPONSE: The NCAA admits that the Freeh Firm did not or was unable to interview all persons with potentially relevant information. The NCAA specifically denies that the Freeh firm did not "complete a proper investigation," "relied heavily on speculation and innuendo," relied upon "questionable sources," and that "many of its main conclusions are either unsupported by evidence or supported only by anonymous, hearsay information." By way of further answer, the NCAA incorporates by reference its response to the allegations in Paragraph 71.

73. The Freeh Report was an improper and unreliable "rush to injustice," and it has been thoroughly discredited. Prominent experts, including Richard Thornburgh, former Attorney General of the United States, have independently concluded that the Freeh Report is deeply flawed and that many of its key conclusions are wrong, unsubstantiated, and unfair.

RESPONSE: **Denied. The NCAA specifically denies that the "Freeh Report was an improper and unreliable 'rush to justice,' and it has been thoroughly discredited." The NCAA further denies that so-called "[p]rominent experts" have "independently concluded that the Freeh Report is deeply flawed." (emphasis added). Rather, the Freeh Report is a comprehensive account of an extensive and impressive independent investigation led by a former FBI director and federal judge, Louis Freeh, which took place over the course of seven months. The NCAA incorporates by reference its response to the allegations in Paragraph 71. The NCAA is aware of no information that has "discredited" the Freeh Report. Far from "independent," the so-called "prominent experts" referenced in this Paragraph were selected, retained, and compensated by the Paterno family itself, and their so-called "critiques" do not succeed in raising any serious questions about the Freeh investigation's process or findings.**

74. Contrary to suggestions made in the Freeh Report, there is no evidence that Joe Paterno covered up known incidents of child molestation by Sandusky to protect Penn State football, to avoid bad publicity, or for any other reason. There is no reason to believe, as the Freeh firm apparently did, that Joe Paterno understood the threat posed by Sandusky better than qualified child welfare professionals and law enforcement, who investigated the matter, made no

findings of abuse, and declined to bring charges. There is no evidence that Joe Paterno or any other members of the athletic staff conspired to suppress information because of publicity concerns or a desire to protect the football program.

RESPONSE: The NCAA specifically denies that "there is no evidence that Joe Paterno covered up known incidents of child molestation by Sandusky to protect Penn State football, to avoid bad publicity, or for any other reason," and specifically denies the remainder of the allegations in the Paragraph, which constitute argument concerning the same general averment.

The NCAA did not conduct its own investigation of these matters, but instead relied upon the investigation and findings of the Freeh firm, which it believed were credible and accurate. The Freeh investigation was led by a former FBI director and federal judge, Louis Freeh, who Penn State Trustee Ken Frazier described as having "unimpeachable credentials and unparalleled experience in law and criminal justice." The Freeh investigation's process was robust and consistent with the process regularly used by corporations, universities, and other entities conducting internal investigations in order to develop factual information and make important business, legal, or other strategic decisions. The Freeh firm's findings—

including those concerning Coach Paterno—are supported in the Freeh Report by documentary evidence (including contemporaneous email communication), interviews, sworn testimony, and reasonable inferences drawn therefrom. The supporting evidence is set forth throughout the Freeh Report, including in the Executive Summary, chapters 2-4, and the accompanying exhibits, among other places. To the extent relevant, proof of the allegations in Paragraph 74 are demanded at trial.

75. According to Frank Fina, the Chief Deputy Attorney General for Pennsylvania and the architect of the prosecution's case against Sandusky, no evidence supports the conclusion that Joe Paterno was part of a conspiracy to conceal Sandusky's crimes. *See* Armen Keteyian, *Sandusky Prosecutors: Penn State Put School's Prestige Above Abuse,* CBS News, Sept. 4, 2013, *available at* http://www.cbsnews.cominews/Sandusky-prosecutors-penn-state-put-schools-prestige-above-abuse.

RESPONSE: The article referenced or characterized in Paragraph 75 is a written document that speaks for itself. The NCAA specifically denies, however, that Frank Fina stated there was "no evidence [to] support[] the conclusion that Joe Paterno was part of a conspiracy to conceal Sandusky's crimes." (emphasis added). The comments attributed to Mr. Fina in the article referenced in Paragraph 75 do not include that purported statement as

a verbatim quote. In any event, Mr. Fina's full comments also note that as Coach Paterno said himself, he "didn't do enough. [He] should have done more." According to the article, Mr. Fina also spoke favorably of the Freeh Report, stating that "[i]n a detailed independent investigative report commissioned by the Penn State Board of Trustees, former FBI Director Louis Freeh found Spanier, Schultz, and Curley repeatedly concealed facts about the abuse from authorities," that Messrs. Spanier, Schultz and Curley "deserve to be charged" for such conduct, and that he "hope[s] justice will be served..."

76. Despite the fact that it supposedly conducted 430 interviews, the Freeh film did not speak to virtually any of the persons who had the most important and relevant information concerning Sandusky's criminal conduct. Three of the most crucial individuals — Gary Schultz, Timothy Curley, and Joe Paterno — were never interviewed. Michael McQueary, the sole witness to the 2001 incident, was also not interviewed.

On information and belief, the NCAA admits that the Freeh Firm conducted over 430 interviews, but that it did not interview Mr. Schultz, Mr. Curley, Mr. Paterno, and Mr. McQueary. The NCAA specifically denies the Freeh firm "did not speak to virtually any of the persons who had the most important information concerning Sandusky's criminal conduct," and notes

further than the Freeh Report specifically references sworn testimony provided by Joe Paterno and Michael McQueary. The NCAA incorporates by reference its response to the allegations in Paragraph 71.

77. The failure to conduct key interviews was all the more consequential because of the lack of relevant documents. Although the Freeh firm purported to review over 3.5 million documents, the Freeh Report itself references and relies on only approximately 30 documents, including 17 e-mails. Not one of those e-mails was sent to or from Joe Paterno, and he was not copied on any of them.

RESPONSE: Paragraph 77 references or characterizes the Freeh Report and its exhibits, which are written documents that speak for themselves. The NCAA specifically denies the suggestion that the Freeh firm investigation's process was somehow deficient, that it "failed" to conduct key interviews, or that it did not identify relevant documents. To the contrary, the Freeh investigation identified critical emails and other documents concerning the events surrounding the Sandusky matter, including multiple e-mails referencing communications between certain of the three indicted members of Penn State leadership (Spanier, Curley and Schultz) and Coach Joe Paterno. The NCAA incorporates by reference its response to the allegations in Paragraph 71. Further, the NCAA is without sufficient information to admit or deny whether the Freeh firm "relie[d] on only approximately 30

documents, including 17 emails," or whether any of the emails it relied upon "was sent to or from Joe Paterno," or copied him.

78. The Freeh Report ignored decades of expert research and behavioral analysis concerning the appropriate way to understand and investigate a child sexual victimization case. If the Freeh firm had undertaken a proper investigation, it would have learned that pedophiles are adept at selecting and grooming their subjects, concealing or explaining away their actions from those around them, and covering their tracks. As experts have determined, Sandusky was a master at these techniques, committing his crimes without detection by courts, social service agencies, police agencies, district attorneys' offices, co-workers, neighbors, and even his own family members. Sandusky was also able to conceal his criminal conduct from employees, volunteers, and families affiliated with The Second Mile, a non-profit organization serving underprivileged and at-risk children and youth in Pennsylvania.

RESPONSE: The NCAA specifically denies that the Freeh firm did not "undertake[] a proper investigation," and incorporates by reference its responses to Paragraphs 71. The NCAA lacks sufficient information to admit or deny whether the Freeh firm considered the "expert research and behavioral analysis" concerning pedophiles referenced in Paragraph 78 when it conducted its investigation and prepared its Report. Nor does the NCAA

have sufficient information to admit or deny whether Sandusky was a "master" at certain "techniques" employed by pedophiles, or whether Sandusky was able to "conceal his criminal conduct from employees, volunteers, and families affiliated with The Second Mile."

79. In short, the Freeh Report provided no evidence of a cover-up by Joe Paterno or any other Penn State coach and no evidence that Sandusky's crimes were caused by Penn State's football program. A reasonable, objective review of the Report would have revealed that fact to any reader. *See Critique of the Freeh Report: The Rush To Injustice Regarding Joe Paterno* (Feb. 2013), *available at* http://paterno.com.

RESPONSE: The NCAA specifically denies that the Freeh Report provided "no evidence of a cover-up by Joe Paterno or any other Penn State coach," nor that a "reasonable, objective review of the Report would have revealed that fact to any reader." The NCAA incorporates by reference its response to the allegations in Paragraph 71 and 74, and, to the extent relevant and consistent with decades of legal authority concerning cases like this one, demands proof of these allegations at trial. Numerous "reasonable, objective" observers, including senior leaders at Penn State, concluded that the Freeh Report was reliable and accurate. The NCAA further notes, far from an example of an "objective review," the "Critique of the Freeh Report"

referenced in Paragraph 79 was prepared by the Paterno family's outside counsel, who also serve as their counsel in the instant litigation.

80. The investigative work of the Freeh firm has come under scrutiny and criticism from highly respected sources in other matters. For example, former U.S. Circuit Judge and U.S. Department of Homeland Security Secretary Michael Chertoff recently found that another report from the Freeh firm was "structurally deficient, one-sided and seemingly advocacy-driven," was "deeply flawed," and "lack[ed] basic indicia of a credible investigation." *Universal Entertainment Corporation: Independent Review Finds the Freeh Report on Allegations Against Kazuo Okado "Deeply Flawed,"* Wall St. J., Apr. 22, 2013 (internal quotation marks omitted), *available at* http://online.wsj.com/article/PR-00-20130422-905271.html.

RESPONSE: The NCAA specifically denies the allegations in the first sentence of Paragraph 80. Director Freeh remains highly respected and continues to serve as investigative counsel in complex, high-stakes matters. The Wall Street Journal article and report prepared by Secretary Chertoff referenced or characterized in Paragraph 80 are written documents that speak for themselves. By way of further answer, the allegations of this Paragraph, which relate a newspaper account of a third party's purported assessment of a different investigative report prepared by the Freeh firm, is so

lacking in relevance, materiality and reliability that it should be stricken as impertinent matter, requiring no further answer.

81. The NCAA has been subject to heavy criticism for the arbitrariness of its enforcement program as it is applied, for its mishandling of alleged rules violations, and for an overall lack of integrity and even corruption in its enforcement decisions. Commentators have noted that the NCAA's enforcement decisions are often driven by improper monetary and political considerations.

RESPONSE: The NCAA states that no response is needed to the allegations in Paragraph 81 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA denies the allegations in Paragraph 81 as stated. The NCAA admits that its enforcement program, which necessarily involves sanctioning university sports programs with ardent followings, often is the subject of criticism. The NCAA operates its enforcement and infractions processes consistent with its rules and imposes appropriate penalties should violations occur.

82. Recent reports have disclosed problems that have long infected the organization. For example, one report determined that in the course of an investigation against the University of Miami, the NCAA's enforcement staff acted contrary to its legal counsel's advice and failed to adhere to the membership's understanding of the limits of the NCAA's investigative powers. Emmert has

publicly admitted that, under his leadership, the NCAA has failed its membership. *See Report Details Missteps, Insufficient Oversight; NCAA Commits To Improve* (Feb. 19, 2013), *available at* http://www.ncaa.com/news/ncaa/article/2013-02-18/report-details-missteps-insufficient-oversight-ncaa-commits-improve.

RESPONSE: Denied as stated. The allegations in the second sentence of Paragraph 82 misstate the referenced document. The NCAA admits that a report prepared by Kenneth L. Wainstein of Cadwalader, Wickersham & Taft LLP concerning certain issues related to an investigation of the University of Miami, which explicitly sets forth its own findings and conclusions.

The NCAA specifically denies that "recent reports have disclosed problems that have long infected the organization," or that the NCAA has "failed its membership" under President Emmert's leadership. The NCAA incorporates by reference its response to Paragraph 81. Rather, the Report prepared by Mr. Wainstein (1) concluded that "this series of missteps is not typical of the Enforcement Staff's operations"; (2) commented that Mr. Wainstein's team was "uniformly impressed with the caliber of the Staff members and with the depth of their commitment to the mission of the NCAA"; (3) commended the "cooperation and dedication of resources by the NCAA" to the subsequent investigation and review, and (4) concluded that the

"appropriateness of [President Emmert's] conduct ... is evident from the NCAA's response" once he became aware of the issue, "and specifically from his decisions to fully disclose the issue and to take all possible steps to ensure that the parties at risk in the investigation suffer no prejudice...."

By way of further answer, the allegations of this Paragraph, which relate to the traditional enforcement and infractions process and an entirely different university and different conduct at that university, is so lacking in relevance, materiality and reliability that it should be stricken as impertinent matter, requiring no further answer.

83. Senate majority leader Harry Reid (D-Nev.) has called for Congress to investigate the NCAA's flawed enforcement process, citing the NCAA's "absolute control over college athlet[ics]" and its infamous handling of the case against Jerry Tarkanian, former head coach of the men's basketball team at the University of Nevada, Las Vegas. Alexander Bolton, *Reid: Congress Should Investigate NCAA's "Absolute" Power,* The Hill, Apr. 9, 2013, *available at* http://thehill.com/homenews/senate/292603-reid-congress-should-investigate-ncaa-powers.

RESPONSE: The NCAA states that no response is needed to the allegations in Paragraph 83 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that the

NCAA admits that The Hill published an article on April 9, 2013 stating that "Senate Majority Leader Harry Reid (D-Nev.) on Tuesday said Congress should investigate the NCAA over long-running complaints about its enforcement process." The NCAA specifically denies that it has a flawed enforcement process and that its handling of the "case against Jerry Tarkanian" is "infamous." The NCAA incorporates by reference its responses to Paragraphs 81 and 82.

By way of further answer, the allegations of this Paragraph, which relate to one senator's political statement having nothing to do with Penn State is so lacking in relevance, materiality and reliability that it should be stricken as impertinent matter, requiring no further answer.

84. Before this matter involving Penn State, the NCAA had never before interpreted its rules to permit intervention in criminal matters unrelated to athletic competition. There are numerous publicly reported examples of criminal conduct by student athletes where the university leadership is alleged to have covered up or enabled the crimes, and the NCAA never became involved.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits that there are other instances of solely "criminal conduct by student athletes." The NCAA also specifically denies that "this

matter involving Penn State" was solely a "criminal matter[] unrelated to athletic competition" or otherwise beyond the purview of legitimate NCAA concern, or that, in this case, the NCAA "interpreted its rules" in the manner suggested in Paragraph 84. To the contrary, the NCAA incorporates by reference its response to the allegations in Paragraph 1.

85. Before this matter involving Penn State, the NCAA had imposed sanctions for lack of institutional control only in cases involving conduct that violated one of its bylaws. The NCAA had never before cited failure of institutional control as the sole basis for imposing sanctions on any member school.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, *inter alia*, dismissed the Paterno Estate's contract claim.

86. The NCAA Defendants recognized that, in this case, they did not "have all the facts about individual culpability," and that imposing sanctions could cause "collateral damage" to many innocent parties. Nonetheless, they viewed the scandal involving Sandusky as an opportunity to deflect attention from mounting criticisms, to shore up the NCAA's faltering reputation, to broaden the NCAA's

authority beyond its defined limits, and to impose massive sanctions on Plaintiffs and Penn State for their own benefit.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits that Dr. Ed Ray was quoted as stating that the NCAA did not "have all the facts about individual culpability." The NCAA further responds that that it did not conduct an investigation or institute an infractions case and, in fact, that it expressly reserved the right to do that with respect to any individuals at the conclusion of the criminal proceedings.

The NCAA denies as stated the allegation that the NCAA recognized that "imposing sanctions could cause 'collateral damage.'" Rather, Dr. Emmert stated that *a suspension in play* could have "collateral damage ... on people who were essentially innocent bystanders."

The NCAA denies all of the allegations in the second sentence of Paragraph 86. To the contrary, the NCAA agreed to enter into the Consent Decree with Penn State, inter alia, to address an "unprecedented failure of institutional integrity" at Penn State, a breach of the standards expected by and articulated in the NCAA Constitution and Bylaws, and an "extraordinary affront to the values all members of the Association have pledged to uphold." Further, the NCAA entered into the Consent Decree because Penn State

determined it was the best option available to the University at the time, and viewed it as preferable to the traditional infractions process. No sanctions were imposed on individuals. The NCAA further refers to its response to Paragraphs 1 and 4.

87. The NCAA Defendants agreed to work together to make Penn State an example and to single out its coaches and administrators for harsh penalties, regardless of the facts and with full knowledge that their actions would cause Plaintiffs substantial harm. In particular, the NCAA Defendants took a series of unauthorized and unjustified actions intentionally to harm, or in reckless disregard of, the rights and interests of involved parties. In an abuse of their positions, the NCAA Defendants forced Penn State to accept the sanctions they dictated by threatening to seek the "death penalty," even though the sanctions were not authorized, appropriate, or justified by any identified NCAA rule violation.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA responds that the allegations in Paragraph 87 constitute conclusions of law and argument that require no response. To the extent a response is required, NCAA specifically denies that it took any action to "make Penn State an example or to single out its coaches and administrators for harsh penalties, regardless of the facts." As to the reasons the NCAA

entered into the Consent Decree and the factual predicate, the NCAA incorporates by reference its response to Paragraphs 71 and 86. By way of further answer, the NCAA's actions in entering into the Consent Decree were appropriate, and well within its authority. The NCAA further specifically denies that the Consent Decree includes any penalties for "coaches and administrators." All of the sanctions are institutional in nature and were imposed solely upon and accepted by Penn State. The NCAA did not initiate a formal investigatory and disciplinary process with regard to individuals. In addition, the NCAA specifically denies that it "forced Penn State to accept the sanctions they dictated by threatening to seek the death penalty," and, to the contrary, incorporates by reference its response to Paragraphs 7, 95 and 107.

88. As part of this unlawful course of action, Emmert, Dr. Ray, and other members of the NCAA conspired together with the Freeh firm to circumvent the NCAA rules, strip Plaintiffs of their procedural protections under those rules, and level allegations in the absence of facts or evidence supporting those allegations. As a result of that agreement, the NCAA's Executive Committee, under the leadership of Dr. Ray, purported to grant Emmert authority to "enter into a consent decree with Penn State University that contains sanctions and corrective measures related to the institution's breach of the NCAA Constitution and Bylaws and core values of intercollegiate athletics based on the findings of the Freeh Report and

Sandusky criminal trial." The Committee outlined the sanctions to be taken against Penn State and described its purported authority to act as arising from its power under Article 4 of the NCAA Constitution "to resolve core issues of Association-wide import."

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in the first sentence of Paragraph 88 constitute Plaintiffs' conclusions of law, which require no response. To the extent further response is necessary, the NCAA specifically denies all of the allegations, for the reasons set forth throughout this answer. ***See, e.g.,*** **response to Paragraphs 1, 3-5, 62. The NCAA admits that its Executive Committee authorized Dr. Emmert to enter into a Consent Decree with Penn State and that one source of the Executive Committee's authority to do so was its Article 4 right to resolve core issues of Association-wide import, and the precise language of that authorization is contained in the July 21, 2012 Report of the NCAA Executive Committee, incorporated by reference herein.**

89. On July 13, 2012, Emmert contacted President Erickson to advise him that the NCAA Executive Committee had decided to accept the Freeh Report and substitute its flawed findings for the NCAA's obligation to conduct its own investigation pursuant to the required procedures set forth in the NCAA rules.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA specifically denies that, on July 13, 2012, President Emmert "advised" President Erickson that the "NCAA Executive Committee had decided to accept the Freeh Report." By way of further answer, following the release of the Freeh Report, senior NCAA personnel engaged in thoughtful, careful, and extensive internal deliberations concerning the best and most appropriate response to the unprecedented case at Penn State. In addition, also following the release of the Freeh Report, President Erickson and President Emmert engaged in dialogue about the NCAA's and Penn State's next steps. At some point during those discussions, they discussed a possible alternative to the traditional infractions process. At the conclusion of this dialogue, this alternate approach became the Consent Decree, to which both parties agreed, including Penn State, which concluded it was preferable to the traditional enforcement and infractions process.

The NCAA also specifically denies that, under the circumstances, the NCAA was obligated to "conduct its own investigation" under the provisions of the NCAA rules or otherwise or that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree. The NCAA also specifically denies that the Freeh Report's findings are "flawed,"

incorporates by reference its response to Paragraphs 5,73, 80, and 83, and, to the extent relevant, demands proof of such allegations at trial.

90. The NCAA Defendants and Penn State knew or should have known that the Freeh Report was an unreliable rush to judgment and that the conclusions reached in the report were unsupported. The NCAA Defendants and Penn State also knew or should have known that by accepting the Freeh Report as a basis for imposing sanctions instead of following the NCAA's own rules and procedures, including the rules and procedures that were designed to protect the rights of Plaintiffs, they would dramatically increase the publicity given to its unreliable conclusions and effectively terminate the search for the truth.

RESPONSE: In its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. In any event, the allegations in Paragraph 90 constitute Plaintiffs' conclusions of law and argument, to which no response is required.

To the extent a response is required, the NCAA specifically denies that it "knew or should have known" that the Freeh Report was "unreliable" or that its conclusions were "unsupported." To the contrary, the NCAA incorporates by reference its responses to Paragraphs 5, 72, and 73.

The NCAA also specifically denies that by using the Freeh Report and its findings as the main factual predicate for the Consent Decree, the NCAA and Penn State "dramatically increase[d] [the] publicity" of the Freeh Report over the coverage the Report would have independently received or that which an NCAA enforcement proceeding would have garnered. The NCAA also denies that the Freeh Report "effectively terminate[d] the search for the truth." Plaintiffs' own allegations and commissioned "expert" critiques demonstrate that those who disagreed with the Freeh Report's findings were not deterred from criticizing it or otherwise searching for what they consider "the truth."

91. The NCAA Defendants and Penn State knew or should have known that the conduct described in the Freeh Report was not a violation of the NCAA's rules and could not substitute for the procedures required under the NCAA's rules. Among other things, both .the NCAA Defendants and Penn State knew that the NCAA's staff had not completed a thorough investigation, as required under the NCAA's rules. The staff had not identified any major or secondary violations committed by Penn State in connection with the criminal matters involving Sandusky. The actions taken by the NCAA Defendants were not authorized by any general legislation adopted by the NCAA's member institutions. Neither Penn

State nor any involved individual authorized the NCAA to use a summary disposition process and, in any event, the NCAA did not comply with that process.

RESPONSE: The allegations in Paragraph 91 constitute Plaintiffs' conclusions of law and argument, to which no response is required. The NCAA incorporates by reference its response to Paragraphs 5 and 90.

To the extent further response is required, the NCAA admits that the NCAA enforcement staff did not conduct an investigation pursuant to Articles 19 and 32 of the Sandusky matter, but specifically denies that it was required to do so.

The NCAA also specifically denies it "knew or should have known" that the findings in the Freeh Report did not violate NCAA rules. The NCAA also specifically denies that its actions were not authorized, or that it could not use the Freeh Report as the main factual predicate for the Consent Decree. The NCAA incorporates by reference its response to Paragraphs 71, 86, 87, and 90.

The NCAA also specifically denies that the Consent Decree was the product of the "summary disposition process" described in Article 32.7, or that there was any obligation that the Consent Decree be consistent with that process. In the Consent Decree, the NCAA and Penn State agreed to resolve

Penn State's institutional responsibility for the Sandusky matter without resort to the traditional infractions process.

92. At no time did Penn State self-report any rules violations to the NCAA.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 92 are denied. To the contrary, Penn State intended that the NCAA would rely on the results of the Freeh firm's investigation, and Penn State self-reported to the NCAA potential violations of NCAA rules related to other sports.

93. Emmert took the position that because the Penn State Board of Trustees had commissioned the Freeh Investigation, the NCAA would take it upon itself to treat the Freeh Report as the equivalent of a self-report in an infractions case.

RESPONSE: Denied as stated. The NCAA and Penn State agreed that the Freeh Report could be used as the factual predicate for the Consent Decree, and that Penn State's institutional responsibility for the Sandusky matter could be resolved without resort to the traditional infractions process.

94. Penn State's outside counsel, Eugene Marsh, who was specially engaged to deal with the NCAA on this issue, had several conversations with

NCAA representatives between July 16 and July 22, 2012. In the course of those conversations, despite the clear indication in the NCAA's rules that the "death penalty" was reserved for cases of repeat violators of major rules, the NCAA indicated that the "death penalty" was a possibility for the Penn State football program, but that other alternatives would also be considered.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 94 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required.

To the extent a response is required, the NCAA admits that Penn State retained Mr. Gene Marsh—a former Chair of the NCAA Committee on Infractions—to advise it concerning the Sandusky matter and to interface with the NCAA on its behalf. The NCAA further admits that Mr. Marsh had several conversations with NCAA representatives between July 16 and July 22, 2014. The NCAA specifically denies the allegations in the second sentence

as stated, including that the so-called "death penalty" is reserved for cases or repeat violators of major NCAA rules, as described in its response to Paragraph 41. Certain NCAA personnel expressed their view to Mr. Marsh that if Penn State opted for the traditional enforcement process, suspension of play would be a potential sanction.

95. As discussions progressed, the NCAA told Marsh that the majority of the NCAA Board of Directors believed that the "death penalty" should be imposed. That statement was used as further leverage to extract a severe package of sanctions from Penn State. But it was untrue. According to published statements by Dr. Ray, made after the issuance of the NCAA's Consent Decree, the NCAA Board had voted to reject the imposition of the "death penalty."

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA states that no response is needed to the allegations in Paragraph 28 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA responds that the allegations in Paragraph 95 are denied as stated. Prior to July 21, 2012, certain NCAA personnel indicated to Marsh an understanding that a majority of the Executive Committee believed that a suspension of play was an appropriate sanction for Penn State. Following negotiations between the NCAA and Penn

State regarding the Consent Decree, on July 21, 2012 the NCAA Executive Committee approved and accepted a negotiated package of sanctions that Penn State voluntarily accepted, which ultimately did not include a suspension of play.

96. The discussion was an unlawful and non-negotiable "cram down" of a list of predetermined sanctions and penalties that was designed to, and in fact did, create an atmosphere of duress and thereby force Penn State to accept sanctions that the NCAA Defendants knew, or should have known, were not proper under the NCAA's rules and that would violate Plaintiffs' rights. The NCAA's focus was not on actual bylaw violations, but on purported concerns about the football-centric "culture" at Penn State based on the flawed and unsubstantiated conclusions set out in the Freeh Report. As Emmert later acknowledged, the NCAA's goal was to punish and penalize Penn State's football program and the individuals associated with the program, including Plaintiffs.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. To the extent a response is

required, the allegations in Paragraph 96 contain Plaintiffs' legal conclusions and argument, which require no response. Further, the allegations in Paragraph 96 are denied for the reasons stated in Paragraphs 5, 7, and 90 and because Penn State successfully negotiated changes in the package of sanctions and initially proposed language of the Consent Decree.

As to the allegations in the second sentence of Paragraph 96, the NCAA admits that the Consent Decree was based in part on the conclusions set forth in the Freeh Report and its acceptance by Penn State, but denies that these conclusions were "flawed and unsubstantiated" for reasons discussed throughout this Answer and the NCAA's multiple preliminary objections memoranda. To the extent relevant, proof of this allegation is demanded at trial.

The NCAA further specifically denies that its "focus" was not on "bylaw violations" but instead on "purported concerns about the football-centric 'culture' at Penn State." The Consent Decree explicitly addresses both issues, among others. The NCAA incorporates by reference its response to Paragraphs 1, 4, 71, 86, and 87, concerning the reasons it entered into the Consent Decree with Penn State.

The NCAA specifically denies the allegations in the third sentence of Paragraph 96. Further, as set forth in the Consent Decree, Penn State's

sanctions were "designed to not only penalize the University for contravention of the NCAA Constitution and Bylaws, but also to change the culture that allowed this activity to occur and realign it in a sustainable fashion with the expected norms and values of intercollegiate athletics." Accordingly, the Consent Decree included a punitive and corrective component. Further, the Consent Decree's express purpose was to address institutional violations and not to punish any individual, including Plaintiffs.

97. In his discussions that same week with President Erickson, Emmert warned Erickson that he was not to disclose the content of their discussions with Penn State's Board of Trustees. The NCAA threatened Erickson by telling him that if there was a leak about the proposed sanctions to the media, the discussion would end and imposition of the "death penalty" would be all but certain. At no point during that week did Erickson share with the full Board the array of crippling and historic penalties being threatened by Emmert and the NCAA.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, upon information and belief, the NCAA admits that while President Erickson briefed the Executive Committee of the Penn State Board of Trustees prior to executing the Consent Decree, he did not brief the full Board in advance. The NCAA otherwise denies Paragraph 97 as stated. It was

entirely Penn State's decision to brief the Executive Committee of the Board of Trustees—but not the full Board—prior to execution of the Consent Decree. The NCAA never told President Erickson not to brief the full Penn State Board of Trustees about the Consent Decree or that a suspension of play was "all but certain" in the case of a leak. Both the NCAA and Penn State believed that confidentiality was important, and that careful deliberations would not be possible if the discussions were engulfed in a media storm.

98. Although the NCAA frequently takes *years* to conduct and complete an investigation, the NCAA Defendants moved to impose sanctions on Penn State almost immediately after the Freeh firm released its report. The NCAA was willing to rely on the Freeh Report as the basis for its sanctions because it had been privy to the work of the Freeh Firm since late 2011 and had taken steps to influence the focus of its investigation and the nature of its findings.

RESPONSE: In its March 30, 2015 Opinion and Order, which, *inter alia*, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. To the extent a response is required, the NCAA denies that it "frequently takes years" to conduct and complete an NCAA investigation; the length of investigations varies and depends on a number of facts and circumstances.

The NCAA denies as stated that it "moved to impose sanctions on Penn State almost immediately after the Freeh firm released its report." The NCAA waited for many months for the Freeh firm to complete its investigation. Following the release of the Freeh Report the NCAA and Penn State engaged in dialogue about their next steps, which dialogue ultimately resulted in the Consent Decree, and permitted Penn State to resolve any potential NCAA concerns without an extended enforcement process. The NCAA also specifically denies the last sentence of Paragraph 98, including that it "had taken steps to influence the focus of [the Freeh] investigation and the nature of its findings." The NCAA incorporates by reference its response to Paragraphs 71-72. If relevant, consistent with the applicable burden of proof, proof is demanded at trial that the NCAA had taken steps to influence the focus of the Freeh Firm's investigation and the nature of its findings.

99. On Friday or Saturday, July 20 or 21, 2012, Marsh received an email in the form of a nine page document, the NCAA's draft "Consent Decree." Once this document was received, it remained largely unchanged except for a few minor clarifications.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits the allegations in the first sentence of

Paragraph 99. The NCAA specifically denies that "once this document was received, it remained largely unchanged except for a few minor clarifications." To the contrary, the NCAA incorporates by reference its response to the allegations in Paragraph 96.

100. The Consent Decree's title, the "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University," accurately reflects the coercive nature of the Consent Decree. The Consent Decree was signed by Rodney Erickson and Mark Emmert and released to the public on July 23, 2012. (A copy of the Consent Decree imposed by the NCAA is attached to this Complaint as Exhibit C.)

RESPONSE: The NCAA admits that Exhibit C to the Complaint is a copy of the Consent Decree, which was released to the public on July 23, 2012 and has the full title "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted By The Pennsylvania State University." The NCAA denies that Rodney Erickson and Mark Emmert signed the Consent Decree on July 23, 2012; upon information and belief, President Erickson signed the Consent Decree on July 22, 2012. The NCAA specifically denies that the Consent Decree was "coercive" in "nature," and incorporates by reference its responses to the allegations in Paragraph 7.

101. Before signing the NCAA-imposed Consent Decree, Erickson did not comply with the governing requirements of the Charter, Bylaws, and Standing Orders of Penn State. Erickson failed to present the Consent Decree to the Board for its approval, even though the Board is the final repository of all legal responsibility and authority to govern the University. Nor did he call for a meeting of the Board or its Executive Committee. Erickson complied with the demands of the NCAA, and he failed to inform the Board about these issues in advance of signing the imposed Consent Decree.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA responds that the allegations in Paragraph 101 contain Plaintiffs' conclusions of law, which require no response. To the extent further response is required, then upon information and belief, the NCAA admits that while President Erickson briefed the Executive Committee of the Penn State Board of Trustees prior to executing the Consent Decree, he did not, at Penn State's discretion, brief the full Board in advance. The NCAA specifically denies that President Erickson "did not comply" with Penn State's governing requirements prior to executing the Consent Decree.

The allegations in the last two sentences of Paragraph 101 are denied as stated. Upon information and belief, President Erickson frequently consulted

with members of the Executive Committee of the Board of Trustees in the period leading up to execution of the Consent Decree, including through multiple meetings of the Executive Committee. President Erickson called a meeting of the Executive Committee on July 22, 2012 to discuss the terms of the Consent Decree prior to its execution. During this meeting, the Executive Committee was advised that Penn State could reject the Consent Decree and pursue the infractions process, but that it would not fare well if it did so.

The NCAA also specifically denies that the NCAA demanded that President Erickson not inform the full Board "about these issues in advance" of signing the Consent Decree. The NCAA incorporates by reference its response to Paragraph 97.

102. Erickson did not have the legal or delegated authority to bind the Penn State Board of Trustees to the Consent Decree imposed by the NCAA.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA responds that the allegations in Paragraph 102 state Plaintiffs' conclusions of law, which require no response. To the extent further response is required, the allegations are denied. Penn State counsel advised President Erickson (correctly) that he was authorized to execute the Consent Decree on behalf of Penn State. The Executive Committee of the

Board of Trustees concurred in this decision. In the Consent Decree, Penn State represented to the NCAA that President Erickson was authorized to execute the agreement.

103. The Consent Decree did not identify any conduct that, under the NCAA's rules, would qualify as either a secondary or a major violation. Nonetheless, the NCAA and Penn State stipulated that Penn State had violated the principles of "institutional control" and "ethical conduct" contained in the NCAA Constitution, and that Penn State's employees had not conducted themselves as the "positive moral models" expected by Article 19 of the Bylaws.

RESPONSE: The NCAA states that no response is needed to the allegations in Paragraph 28 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA specifically denies that the Consent Decree does not identify any conduct that constitutes a violation of the NCAA's rules. The Consent Decree expressly identifies provisions of the NCAA Constitution and Bylaws that, based on the findings in the Freeh Report, Penn State breached. The NCAA denies the allegations in the second sentence as stated. In the Consent Decree, the NCAA and Penn State agreed the "findings of the Freeh Report constitute violations of the Constitutional and Bylaw principles" described in the November 17, 2011 letter, and that "Penn State breached the standards expected by and

articulated" in a number of specific NCAA Constitution and Bylaw provision. The NCAA also denies that the Division I Manual precluded it from agreeing with Penn State to enter into the Consent Decree, for the reasons set forth throughout this Answer.

104. The Consent Decree's purported "factual findings" related to the alleged conduct of Coach Joe Paterno and the Board of Trustees members in 1998 and 2001, as well as other former Penn State staff and administrators.

RESPONSE: The NCAA specifically denies the allegations in the first sentence as stated. The Consent Decree itself expressly states that its "conclusions rely on" certain of the Freeh Report's "key factual findings with respect to the University's oversight and its football program." Consent Decree at 3 (emphasis added). The NCAA admits that the Consent Decree repeats verbatim the findings from the Freeh Report that are referenced or characterized in Paragraphs 104(a), 104(b), and 104(c).

105. These statements are all erroneous and were based on unreliable and unsubstantiated conclusions in the Freeh Report.

RESPONSE: The NCAA specifically denies that statements in the Consent Decree referenced in the preceding Paragraph are "erroneous," or that the Freeh Report contains "unreliable and unsubstantiated conclusions." The referenced statements are, in fact, taken verbatim from the Freeh Report.

The NCAA incorporates by reference its response to the allegations in Paragraph 71. Further, the NCAA is unaware of any facts that substantiate the Plaintiffs' allegation that key factual findings of the Freeh Report were "all erroneous and were based on unreliable and unsubstantiated conclusions." To the extent relevant, proof of those allegations at trial is demanded.

106. The NCAA admitted that, ordinarily, "[t]he sexual abuse of children on a university campus by a former university official" would "not be actionable by the NCAA." But the NCAA asserted that it had authority to interfere because "it was the fear of or deference to the omnipotent football program that enabled a sexual predator to attract and abuse his victims." According to the NCAA, "the reverence for Penn State football permeated every level of the University community," and "the culture exhibited at Penn State is an extraordinary affront to the values all members of the Association have pledged to uphold."

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 106 are denied as stated. The allegation attempts to characterize a paragraph from the Consent Decree that states, in full:

"The NCAA concludes that this evidence presents an unprecedented failure of institutional integrity leading to a culture in which a football program was held in higher esteem than the values of the institution, the values of the NCAA, the values of higher education, and most disturbingly the values of human decency. The sexual abuse of children on a university campus by a former university official—and even the active concealment of that abuse—while despicable, ordinarily would not be actionable by the NCAA. Yet, in this instance, it was the fear of or deference to the omnipotent football program that enabled a sexual predator to attract and abuse his victims. Indeed, the reference for Penn State football permeated every level of the University community. That imbalance of power and its result are antithetical to the model of intercollegiate athletics embedded in higher education. Indeed, the culture exhibited at Penn State is an extraordinary affront to the values all members of the Association have pledged to uphold and calls for extraordinary action."

Consent Decree at 4.

107. Based on this erroneous and unsupported conclusion, the NCAA determined that the sanctions must not only be designed to penalize Penn State, Plaintiffs, and other involved individuals, but also to "change the culture that allowed this activity to occur and realign it in a sustainable fashion with the expected norms and values of intercollegiate athletics." In order to avoid the risk of further sanctions, including the ungrounded threat by the NCAA that it would seek the "death penalty," Penn State executed the Consent Decree despite the fact that, by so doing, it was agreeing to and acquiescing in a direct violation of the rights of Plaintiffs.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA denies the allegations in the first sentence of Paragraph 107 as stated. With respect to the purpose of the sanctions, the Consent Decree itself states: [T]he NCAA has determined that the University's sanctions be designed to not only penalize the University for contravention of the NCAA Constitution and Bylaws, but also to change the culture that allowed this activity to occur and realign it in a sustainable fashion with the expected norms and values of intercollegiate athletics. Moreover, the NCAA recognizes that in this instance no student-athlete is responsible for these events, and therefore, the NCAA has fashioned its sanctions in consideration of the potential impact on all student-athletes." The sanctions in the Consent Decree were not intended to—and did not—penalize Plaintiffs.

The NCAA specifically denies that the findings in the Freeh Report are "erroneous and unsupported," and incorporates by reference the NCAA's response to Paragraphs 71 and 105.

The NCAA admits that Penn State entered into the Consent Decree, in part, to avoid the risk of harsher sanctions that could result from the traditional infractions process. The NCAA specifically denies that it ever

threatened Penn State with a suspension in play. The NCAA incorporates by reference its response to the allegations in Paragraphs 94 and 95.

Paragraph 107's statement that Penn State was "agreeing and acquiescing in a direct violation of the rights of Plaintiffs" is a conclusion of law, which requires no response, and the NCAA has opposed that legal position since the inception of this case.

108. The Consent Decree is an indictment of the entire Penn State community, including individual institutional leaders, members of the Board of Trustees, those responsible for and participants in athletic programs, the faculty, and the student body. The Consent Decree charges that every level of the Penn State community created and maintained a culture of reverence for, fear of, and deference to the football program, in disregard of the values of human decency and the safety and well-being of vulnerable children.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA specifically denies the allegations in the first sentence of Paragraph 108, including that the "Consent Decree is an indictment of the entire Penn State community." The Consent Decree resolves Penn State's institutional shortcomings related to the Sandusky matter in that Penn State and the NCAA agreed that the findings of the Freeh Report constitute

violations of the NCAA Constitution and Bylaws and, on that basis, Penn State accepted a set of punitive and corrective measures..

The NCAA denies the allegations in the second sentence of Paragraph 108 as stated. The Consent Decree quotes verbatim the finding of the Freeh Report that Penn State maintained "a culture of reverence for the football program that is ingrained at all levels of the campus community."

109. The NCAA and its officials, including Emmert and Dr. Ray, recognized that the issues they sought to address in the Consent Decree were not about disciplining the athletics program for NCAA rules violations.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 109 are denied. In the Consent Decree, the NCAA and Penn State agreed that the findings in the Freeh Report constituted violations of the NCAA Constitution and Bylaws. Further, as the Consent Decree specifically states, the sanctions in the Consent Decree were "designed" both to "penalize the University for contravention of the NCAA Constitution and Bylaws" and "also to change the culture that allowed this activity to occur..."

110. According to Dr. Ray, even though the NCAA never undertook its own investigation or followed its own required processes, it could rely on the

Freeh Report because the NCAA's "executive committee has the authority when it believes something is of a big enough and significant enough nature that it should exercise its ability to expedite the process of reviewing cases." In fact, no provision of the rules gives the NCAA that authority.

RESPONSE: Denied as stated. The NCAA admits that a July 29, 2012 USA Today article titled "Ed Ray: 'I started at this from the scorched earth approach" quotes Dr. Ray as saying: "The executive committee has the authority when it believes something is of a big enough and significant enough nature that it should exercise its ability to expedite the process of reviewing cases." The NCAA denies that statement is, or is intended to be, a precise description of the Executive Committee's authority to authorize President Emmert to enter into the Consent Decree, and also denies that the NCAA Executive Committee lacked such authority under NCAA rules or the law. The NCAA incorporates by reference its response to Paragraphs 1, 2, 4, and 88. The NCAA further denies that the quotation in Paragraph 110 constitutes an explanation for why the NCAA "could rely on the Freeh Report," and incorporates by reference its responses to Paragraphs 1, 2, 4, and 88.

By way of further answer, the NCAA admits that it never undertook its own investigation of the Sandusky matter," but denies that it did not follow

any "required processes" when entering into the Consent Decree. The NCAA incorporates by reference its response to Paragraphs 1, 2, 4, 34, and 45.

111. According to Emmert, the decision not to comply with required procedures was an "experiment" by the NCAA. Emmert has stated that it was appropriate for the NCAA to rely on the Freeh Report because the Freeh firm had "subpoena power." In fact, the Freeh firm did not have any such power. Emmert has also publicly stated that the NCAA decided not to comply with required procedures because completing a thorough investigation would have "taken another year or two" and, in his view, a proper investigation "would have yielded no more information than what was already in front of the [NCAA's] executive committee." In addition the NCAA Defendants had directed the Freeh firm to focus on issues related to institutional control.

RESPONSE: Denied as stated. In the Consent Decree, the NCAA and Penn State agreed that the findings in the Freeh Report, which were based on a lengthy and comprehensive investigation—by a former director of the FBI, and commissioned by Penn State's own Board of Trustees—established a factual basis to conclude that Penn State breached the standards articulated in the NCAA Constitution and Bylaws. The NCAA specifically denies that it "directed the Freeh firm to focus on issues related to institutional control." The NCAA also incorporates its response to Paragraphs 62-63.

112. The Consent Decree imposed a $60 million dollar fine, a four-year post-season ban, a four-year reduction of grants-in-aid, five years of probation, vacation of all football wins from 1998 to 2011, waiver of transfer rules and grant-in-aid retention (to allow entering or returning student athletes to transfer to other institutions and play immediately), and a reservation of rights to initiate formal investigatory and disciplinary process and to impose sanctions on any involved individuals in the future.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 112 are denied as stated. The NCAA admits that the Consent Decree included a number of punitive and corrective institutional sanctions, including (1) a $60 million fine; (2) four-year postseason ban; (3) four-year reduction of grants-in-aid; (4) five years of probation; (5) vacation of wins since 1998; (6) waiver of transfer rules and grant-in-aid-retention; (7) adoption of all recommendation presented in Chapter 10 of the Freeh Report; (8) implementation of Athletics Integrity Agreement; and (9) appointment of an independent Athletics Integrity Monitor for a five-year period. The NCAA also admits that the Consent Decree states: "[t]he NCAA reserves the right to initiate a formal

investigatory and disciplinary process and impose sanctions on individuals after the conclusion of any criminal proceeding..."

113. Under the terms of the Consent Decree President Erickson agreed not to challenge the decree and waived any right to a "determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rule, and any judicial process related to the subject matter of the Consent Decree."

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations are denied as stated. Under the terms of the Consent Decree, Penn State (not just President Erickson) "expressly agree[d] no to challenge the consent decree and waive[d] any claim to further process, including without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process related to the subject matter of this Consent Decree."

114. Among others, William Kenney and the Estate of Joseph Paterno filed timely appeals of the Consent Decree with the NCAA Infractions Appeals Committee.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA responds that the allegations in this Paragraph constitute

Plaintiffs' conclusions of law, to which no response is required. To the extent further answer is necessary, the NCAA specifically denies that William Kenney, the Estate of Joseph Paterno, or any others referenced in Paragraph 114 "filed timely appeals of the Consent Decree with the NCAA Infractions Appeals Committee." The NCAA admits that these persons, among others, filed documents with the NCAA that they characterized as "appeals" from the Consent Decree. The NCAA denies that these individuals had a right to file any appeal of the Consent Decree with the Infractions Appeal Committee.

115. The NCAA refused to accept those appeals. It did not contend, however, that the Estate was not entitled to appeal because Joe Paterno had died after it initiated an investigation. Instead, the NCAA took the position that, because it had not sanctioned Penn State through the traditional enforcement process required under the NCAA's own rules, the procedural protections (such as the right to an appeal) provided by those rules were unavailable, even for the individuals named, referenced, or sanctioned in the Consent Decree. In short, the "experiment" authorized by the NCAA Defendants meant that individuals who were involved and directly harmed by the Consent Decree were given no opportunity to challenge the NCAA's abuse of authority or the erroneous factual assertions on which it based the Consent Decree.

RESPONSE: **The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA responds that in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. As to any remaining allegations, the NCAA denies the allegations in the two sentences of Paragraph 115 as stated. The NCAA did not accept the referenced purported appeals because the purported appellants had no right to appeal the Consent Decree**

The last sentence in Paragraph 115 constitutes Plaintiffs' conclusions of law and argument, which require no response. To the extent further response is necessary, the NCAA specifically denies that any individuals were "involved and directly harmed by the Consent Decree," that the NCAA "abuse[d] [its] authority," and that the "factual assertions on which it based the Consent Decree" were "erroneous." To the contrary, the NCAA incorporates by reference its responses to Paragraphs 71 and 105.

116. Even though the Consent Decree relied on purported "facts" that were contrary to the evidence and did not establish a violation of the NCAA's rules,

those issues were never considered by the Appeals Committee and involved individuals were denied the procedural protections required by the NCAA's rules.

RESPONSE: The NCAA states that no response is needed to the allegations in Paragraph 28 because Count I, breach of contract, has been dismissed. To the extent a response is required, the NCAA admits that the findings of the Freeh Report that are cited in the Consent Decree, and the NCAA's and Penn State's agreement that those findings constituted violations of the NCAA Constitution and Bylaws, "were never considered by the Appeals Committee." The NCAA specifically denies that the findings of the Freeh Report cited in the Consent Decree are "contrary to the evidence," and further specifically denies that such findings "did not establish a violation of the NCAA's rules." To the contrary, the NCAA incorporates by reference its responses to Paragraphs 42-44, 71, and 105 and, to the extent relevant, demands proof at trial of these allegations.

The allegation that "involved individuals were denied the procedural protections required by the NCAA's rules" constitutes a conclusion of law, to which no response is required. The NCAA has set forth its legal arguments in opposition to this contention in at least three rounds of preliminary objections, and incorporates them by reference here.

117. The Consent Decree was widely disseminated and received significant national attention. The NCAA's decision to embrace the Freeh Report was widely viewed as extremely damaging to the Penn State football program and the reputations of those associated with it, including Plaintiffs.

RESPONSE: Denied as stated. The NCAA admits that the Consent Decree was, and is, a public document and that it received significant national media attention. The NCAA specifically denies the allegations in the second sentence of Paragraph 117. The NCAA incorporates its response to Paragraph 124. If relevant, proof is demanded at trial that it was the NCAA's decision to embrace the Freeh Report that was "extremely damaging" to Plaintiffs' reputations.

118. The NCAA announced in September 2013 that it would reduce the penalties against Penn State. Beginning with the 2013-14 year, the number of scholarships available to Penn State is supposed to increase each year, until Penn State returns to a full allocation in 2016.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits the allegations in the first sentence of Paragraph 118. The NCAA denies the allegations in the second sentence of Paragraph 118 as stated. Beginning with the 2014-15 academic year, the number of

scholarships available to Penn State would increase each year until Penn State returns to a full allocation in the 2015-16 academic year.

119. The NCAA announced in September 2014 that it would lift the ban on Penn State's participation in post-season bowl games and would restore all of its football scholarships.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim.

120. Although the NCAA has lifted the most meaningful sanctions against Penn State, it has done nothing to correct the knowingly false statements made against Plaintiffs in the Consent Decree or to remedy the enormous harms caused to Plaintiffs. As a result, many of the most significant sanctions imposed by the Consent Decree that remain in place are those sanctions that have been imposed on Plaintiffs.

RESPONSE: The Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim. In any event, the allegations are Plaintiffs' conclusions of law which require no response. To the extent a response is required, the NCAA specifically denies that it made any "knowingly false statements" concerning

Plaintiffs in the Consent Decree, or that it caused "enormous harms" to Plaintiffs. The NCAA incorporates by reference its responses to Paragraphs 7, 71, 105, 117, and 164-171.

121. Despite lifting many of the sanctions against Penn State, the NCAA Defendants have continued their unlawful conduct and have continued to abuse their authority, stating that if the Consent Decree is ever voided, Penn State will face the prospect of the NCAA imposing the "death penalty" on its football program.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA responds that the Court struck this Paragraph in its March 30, 2015 Opinion and Order, which, inter alia, dismissed the Paterno Estate's contract claim. In any event, the allegations are Plaintiffs' conclusions of law which require no response. To the extent a response is required, the NCAA specifically denies that it has "continued" any "unlawful conduct" or "abuse of authority." The NCAA incorporates by reference its response to the allegations in Paragraph 15.

122. Plaintiffs have been substantially harmed, and will continue to incur future harm, as a direct and intentional result of the NCAA Defendants'

unauthorized and unlawful conduct and the Consent Decree imposed on Penn State by the NCAA.

RESPONSE: The allegations in Paragraph 122 constitute Plaintiffs' conclusions of law to which no response is required.

123. Plaintiffs were unlawfully deprived of the required procedures due to them under the NCAA's rules.

RESPONSE: The allegations in Paragraph 123 constitute Plaintiffs' conclusions of law to which no response is required.

124. Other substantial harms suffered by Plaintiffs as a result of the conduct by the NCAA Defendants and the Consent Decree imposed on Penn State by the NCAA include, among many other things:

a. Joe Paterno was alive when the NCAA began its investigation and alleged to be significantly involved in the incidents that were the focus of the NCAA's investigations. He was denied the procedures to which he was entitled under the NCAA's rules, and the Estate was denied its right as the successor to the rights of Joe Paterno.

b. Joe Paterno and, after his death, the Estate suffered severe damage to his good name and reputation, resulting in irreparable and substantial pecuniary harm to the current and long-term value of his estate as well as other substantial harms to his family and estate.

c. William Kenney and Jay Paterno suffered damage to their reputations and standing as football coaches, and have been unable to secure comparable employment despite their qualifications and the existence of employers who would otherwise be willing to hire them.

d. Clemens, as a member of the Board of Trustees, was a fiduciary of the University, responsible for the governance and the welfare of the institution. He was rendered unable to fully carry out his administrative and other functions in managing and governing the University because of the NCAA Defendants' interference. As a result, he suffered substantial injury as a Board Member due to a negative impact on Penn State's budget and the University's ability to attract high-caliber students and faculty, whether associated with the football program or not.

e. The considerable achievements of Coach Joe Paterno and former student athletes have been wiped out by the NCAA's unjustified and unlawful sanctions, which were imposed on Penn State, including vacating all of the Penn State football team's wins during the athletes' careers and also separately directing that "the career wins" of Joe Paterno would "reflect the vacated wins." This has injured his reputation, negatively affecting the value of his Estate.

RESPONSE: In its March 30, 2015 Opinion and Order, which, *inter alia*, dismissed the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. To the extent a response is required, the allegations in Paragraph 124 constitute Plaintiffs' conclusions of law to which no response is required. To the extent further response is necessary:

- The NCAA specifically denies that it ever commenced an investigation concerning the Sandusky matter, much less when Joe Paterno was alive. The NCAA also specifically denies that either Joe Paterno or the Estate were denied any procedures to which they were entitled under the NCAA Bylaws. To the contrary, the NCAA incorporates by reference its responses to Paragraphs 56-58, 60, 71, and 91.
- The NCAA specifically denies that because of the *NCAA's conduct and/or the Consent Decree*, Joe Paterno and, after his death, the Estate, "suffered severe damage to his good name and reputation," resulting in pecuniary harm to the estate. Any such damage or pecuniary harm resulted from a host of other causes, including but not limited to: the Sandusky presentment and

criminal trial, Coach Paterno's termination by Penn State, the Freeh Report, the removal of Coach Paterno's statue, the overwhelming negative media coverage that started with the release of the Sandusky indictment and continued unabated for months, and Coach Paterno's death itself.

- **The NCAA specifically denies that because of the *NCAA's conduct and/or the Consent Decree*, William Kenney and Jay Paterno "suffered damage to their reputations and standing as football coaches," and were "unable to secure comparable employment." Indeed, the NCAA took no action with respect to William Kenney and Jay Paterno, and they are not referenced in the Consent Decree or even the Freeh Report. Their alleged inability to "secure comparable employment" was primarily the result their own pre-existing reputations and qualifications as coaches.**
- **Al Clemens has withdrawn all of his claims in this case, and therefore no response is required to Paragraph 124(d).**
- **The NCAA specifically denies that it "wiped out" the "considerable achievements of Coach Joe Paterno and former student athletes." For instance, despite vacating Penn State team wins in the Consent Decree (and correspondingly reflecting the**

vacated wins in the head coach's career record, consistent with its historical practice), individual records and performances of players who participated in the contests were not altered.

125. The Consent Decree has interfered with the administration of Penn State, and limited the faculty's ability to attract and retain high-caliber faculty, administrators, staff, and students, which has reduced the value of the faculty's own positions and their ability to compete within their fields. The NCAA's unauthorized involvement in criminal matters outside its authority and purview has prevented interested partics from being treated fairly and has undermined the search for truth. Instead of allowing the Freeh Report to be properly evaluated, the NCAA has crystallized its errors and flagrantly violated its own rules.

RESPONSE: **All of the Trustees and faculty members identified in the original complaint as purported Plaintiffs have been dismissed by the Court or have withdrawn their claims. As such, no response is required to the allegations in Paragraph 125. Further, the allegations of Paragraph 125 include Plaintiffs' conclusions of law and argument, to which no response is required. To the extent further response is necessary, the NCAA specifically denies that the Sandusky matter fell outside its "authority and purview," that it "undermined the search for truth" and "crystallized" any purported "errors" in the Freeh Report. The NCAA further specifically denies that the Freeh Report contained "errors." To the contrary, the NCAA incorporates by reference its responses to Paragraphs 1-5, 71-74, and 88.**

COUNT I: BREACH OF CONTRACT

126. Plaintiffs incorporate by reference paragraphs 1 through 125 as if fully set forth herein.

RESPONSE: **The NCAA repeats and realleges its answers to Paragraphs 1 through 125, as if set forth fully herein.**

127. At all relevant times, Penn State was an Active Member of the NCAA, and the NCAA had a valid and enforceable agreement with Penn State, in the form of its Constitution, Operating Bylaws, and Administrative Bylaws.

RESPONSE: **The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the NCAA admits that at all relevant times, Penn State was an active member of the NCAA, and the Division I Manual contains a Constitution, Operating Bylaws, and Administrative Bylaws. The remaining allegations in Paragraph 127 state Plaintiffs' conclusion of law, which requires no answer.**

128. The NCAA and Penn State both intended, upon entering into this contract, to give the benefit of the agreement to any third parties that would be alleged to be involved in any findings of rule violations against a member institution.

RESPONSE: **The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 128 constitute Plaintiffs' conclusions of law to which no response is required. To the extent an answer is required, the allegations are denied. To the contrary, the NCAA intended to provide specific procedural mechanisms only to involved individuals, as that term is defined in Article 32, when it undertakes an enforcement proceeding pursuant to Articles 19 and 32 but did not intend to convey third party beneficiary rights with regard to all provisions of the Division I Manual or to all**

individuals with any degree of involvement in a potential rules violation. And on information and belief, the NCAA believes Penn State had the same intention.

129. Joe Paterno was specifically named and sanctioned in the Consent Decree, and he was also specifically named in the grand jury report referenced in Emmert's November 17, 2011 letter. Al Clemens, as a member of the Board of Trustees in 1998 and 2001, was also alleged to have engaged in conduct that formed the basis for the Consent Decree (and, therefore, was deemed significantly involved in violations of the NCAA rules). They were "involved individuals" under the NCAA's rules, were intended third party beneficiaries of the agreement between the NCAA and Penn State, and they (or their representatives) may enforce the provisions of that agreement against the NCAA.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, in its March 30, 2015 Opinion and Order dismissing the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint. To the extent further response is required, the allegations in Paragraph 129 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, the NCAA denies these allegations. Specifically, the

NCAA admits that Joe Paterno was referenced in the Consent Decree and the grand jury presentment, but it denies that Joe Paterno or Al Clemens were sanctioned in the Consent Decree or that they were involved individuals or third-party beneficiaries of the Division I Manual. The NCAA incorporates its response to Paragraphs 4 and 87 and three rounds of preliminary objections briefing.

130. The agreement between the NCAA and Penn State contains an implied covenant of good faith and fair dealing that requires the NCAA to refrain from taking unlawful, arbitrary, capricious, or unreasonable actions that have the effect of depriving member institutions and involved individuals of their rights under the agreement.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 130 constitute Plaintiffs' conclusions of law to which no response is required.

131. Defendant NCAA materially breached its contractual obligations and violated the implied covenant of good faith and fair dealing by, among other things:

a. purporting to exercise jurisdiction over a matter not caused by the football program, much less one related to a basic athletics issue such as admissions, financial aid, eligibility, and recruiting;

b. taking action and imposing sanctions via its Executive Committee, which has power only to address association-wide issues on a prospective basis, and no power to sanction individual members;

c. refusing to proceed against Penn State through the required traditional enforcement process, the only method of imposing sanctions that is authorized under the rules;

d. refusing to accept any appeals of the Consent Decree;

e. treating the Freeh Report as a "self-report" even though the Freeh Report was never voted on by the full Board of Trustees; even though the Freeh Report failed to identify, much less analyze, any purported NCAA rules violations; and even though the Freeh Report failed to comply with required procedures and reached conclusions based on irrelevant or inadmissible evidence developed pursuant to an unreliable and deficient investigation;

f. imposing sanctions on the basis of alleged violations of vague, inapplicable principles in the NCAA's Constitution, such as the principle of institutional control and the principle of ethical conduct, both of which relate

only to athletics issues, recruiting violations, or other matters properly regulated by the NCAA;

g. imposing sanctions that are available only in cases of "major" violations without explaining why the conduct identified in the Consent Decree constituted a "major" violation intended to provide the institution with an extensive recruiting or competitive advantage;

h. imposing the penalty of vacation of wins on Penn State even though no ineligible student athlete was found to have competed during the years affected;

i. stating that the career record of Joe Paterno would reflect the vacated wins;

j. threatening to impose the "death penalty" on Penn State football when it had no authority to do so because Penn State is not and never has been a repeat offender;

k. failing to conduct its own investigation or explain its own investigative procedures, and relying instead on the flawed Freeh Report, a procedurally and substantively inadequate substitute for the NCAA's investigation and compliance with required procedures;

l. failing to recognize that Plaintiffs, who are named or referred to in the Consent Decree, are "involved individuals" under the NCAA's own rules;

m. failing to afford Plaintiffs "fair procedures" during the NCAA's determinations and deliberations;

n. imposing a Consent Decree on Penn State that it knew made false and unsubstantiated statements about Plaintiffs and was based on the flawed Freeh Report; and

o. continuing to threaten to impose the "death penalty" on Penn State football, even after many of the sanctions imposed under the Consent Decree against Penn State have been lifted (but sanctions against Plaintiffs have not).

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, in its March 30, 2015 Opinion and Order dismissing the Paterno Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint. To the extent a response is required, the NCAA responds that the allegations in Paragraph 131 are Plaintiffs' conclusions of law, which require no response. Further, each sub-paragraph of Paragraph 131 repeats allegations stated earlier in the

Complaint, for which the NCAA incorporates its response from those Paragraphs to each respective sub-paragraph.

132. The president of Penn State, Rodney Erickson, did not, could not, and lacked any authority to, waive Plaintiffs' rights and entitlement as "involved individuals" to the procedures listed above by signing the Consent Decree imposed by the NCAA.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 132 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, those allegations are denied for the reasons stated in Paragraphs 26, 89, and 113, incorporated herein.

133. Defendant Penn State materially breached its contractual obligations and violated the implied covenant of good faith and fair dealing by, among other things:

a. acquiescing to a confidential procedure for imposition of sanctions that would directly impact Plaintiffs;

b. accepting a range of sanctions that deprived involved individuals of their procedural rights under the NCAA enforcement scheme,

ostensibly to avoid any risk of the "death penalty," even though it would not have been applicable in the circumstances; and

c. executing a Consent Decree that it knew included false and unsubstantiated statements about Plaintiffs and was based on the flawed Freeh Report.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, the allegations in Paragraph 133 constitute Plaintiffs' conclusions of law to which no response is required. Further, each sub-paragraph of Paragraph 131 repeats allegations stated earlier in the Complaint, for which the NCAA incorporates its response from those Paragraphs to each respective sub-paragraph.

134. As a direct and proximate result of these breaches by the NCAA and Penn State, Plaintiffs have suffered substantial injuries, economic loss, opportunity loss, reputational damage, emotional distress, and other damages. Those injuries and damages were foreseeable to the NCAA and Penn State when they breached the contract and Plaintiffs' rights.

RESPONSE: The NCAA incorporates its response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, in its March 30, 2015 Opinion and Order dismissing the Paterno

Estate's contract claim, the Court struck those allegations in this Paragraph that were newly alleged in the Second Amended Complaint, and therefore no response is required. To the extent a response is required, the allegations in Paragraph 134 state Plaintiffs' conclusion of law, which requires no answer.

COUNT II: INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

135. Plaintiffs incorporate by reference paragraphs 1 through 125 as if fully set forth herein.

RESPONSE: The NCAA repeats and realleges its answers to Paragraphs 1 through 134, as if set forth fully herein.

136. Plaintiffs William Kenney and Jay Paterno had prospective and existing employment, business, and economic opportunities with many prestigious college and professional football programs, including at Penn State, as a result of the favorable reputations that each of them had earned during their service as coaches of the Penn State football program. This was or should have been known to the NCAA Defendants.

RESPONSE: The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first sentence of Paragraph 136, and on that basis denies them. The NCAA denies that it knew or should have known the information in Paragraph 136 and is unaware

of any fact to support that allegation. Proof of that allegation is demanded at trial.

137. With knowledge of Plaintiffs' future prospective employment, business, and economic opportunities, the NCAA Defendants took the purposeful actions described in this Complaint to harm Coach Kenney and Coach Jay Paterno and to interfere with their contractual relations.

RESPONSE: The allegations in Paragraph 137 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, the NCAA denies that it had knowledge of Plaintiffs' purported future prospective employment, business, and economic opportunities. The remaining allegations are denied for the reasons stated in response to Paragraphs 1-5, 70-74, and 136, incorporated herein.

138. The NCAA Defendants lacked justification for their intentional interference with Plaintiffs' contractual relationships, or alternatively, the NCAA Defendants abused any privilege they had to take the actions outlined in this Complaint.

RESPONSE: The allegations in Paragraph 138 constitute Plaintiffs' conclusions of law to which no response is required.

139. As a direct and proximate result of the wrongful, arbitrary, capricious, and unreasonable actions of the NCAA Defendants, and as described in more detail

below, Coach Kenney and Coach Jay Paterno have been unable to secure comparable employment opportunities in their chosen field.

RESPONSE: The allegations in Paragraph 139 constitute Plaintiffs' conclusions of law to which no response is required. Further, the NCAA is unaware of any fact to substantiate the allegation that the NCAA was a proximate cause in Plaintiffs' purported inability to secure comparable employment opportunities in their chosen field. To the extent relevant, proof is demanded at trial.

140. The conduct of the NCAA Defendants in tortuously interfering with Plaintiffs' contractual relations was malicious and outrageous and showed a reckless disregard for the rights of Coach Kenney and Coach Jay Paterno.

RESPONSE: The allegations in Paragraph 140 constitute Plaintiffs' conclusions of law to which no response is required.

141. As a direct and proximate result of these actions by the NCAA Defendants, Coach Kenney and Coach Jay Paterno have suffered economic loss, opportunity loss, reputational damage, emotional distress, and other damages.

RESPONSE: The allegations in Paragraph 141 constitute Plaintiffs' conclusions of law to which no response is required. The NCAA denies that is responsible for any damages allegedly suffered by Plaintiffs. In addition, after reasonable investigation, the NCAA is unable to ascertain the truth or falsity

of Plaintiffs' damages claims, both as to causation and amount, and proof thereof, if relevant, is demanded at trial.

142. As of the date of the Consent Decree imposed by the NCAA, Coach Kenney had served as a Division I collegiate football coach for 27 years. He spent three years as a graduate assistant at the University of Nebraska, and 24 years coaching at Penn State. For most of his career, he coached offensive linemen and tight ends. He was well respected within the profession and was responsible for training and developing dozens of college football players who went on to play in the National Football League ("NFL"), including several first-round draft choices.

RESPONSE: On information and belief, the NCAA admits the allegations in the first two sentences of Paragraph 142. The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 142, and on that basis denies them.

143. After Coach Kenney was let go by Penn State following the 2012 football season, he made a determined effort to secure other employment as a football coach. He applied for open positions with various Division I college football programs, including Illinois, Wisconsin, Purdue, Virginia Tech, Florida State, Massachusetts, North Carolina State, Boston College, Arizona, Delaware, Syracuse, and several others. He also applied for open coaching positions in the NFL, with franchises such as the New York Giants, the Indianapolis Colts, and the

Cleveland Browns. Coach Kenney was experienced and well-qualified for these positions.

RESPONSE: The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 143, and on that basis denies them.

144. Coach Kenney received a few interviews with college and professional teams. His interviewers asked him questions focused on the NCAA's unsupported finding that he and other coaches had ignored "the red flags of Sandusky's behaviors" at Penn State, and not Coach Kenney's credentials and approach as a football coach. Despite interviews or discussions with schools such as the University of Massachusetts and NFL teams such as the New York Giants and the Indianapolis Colts, he was not offered a position. In most instances, the positions he applied for went to less experienced and less qualified candidates.

RESPONSE: For the reasons stated in Paragraphs 4-5, 70-74, 104-105, 139, and 141, incorporated herein, the NCAA specifically denies that the Consent Decree contained a finding regarding Coach Kenney; that the Consent Decree's statement that some coaches, administrators, and football program staff members "ignored 'the red flags of Sandusky's behaviors'" was unsupported; and that the Consent Decree was a cause of Coach Kenney's failed job applications. The NCAA is without knowledge or information

sufficient to form a belief as to the remaining allegations of Paragraph 144, and on that basis denies them.

145. During the course of his pursuit for new employment, Coach Kenney learned that other college teams and NFL programs did not want to deal with the potential recruiting issues and the adverse public reaction that would likely follow their decision to hire him. Coach Kenney made inquiries at or applied to at least one Division I school that instructed its Head Coach not to interview or consider hiring any former coaches from Penn State. Coach Kenney was exceptionally well-qualified for the positions for which he applied and was interviewed, and upon information and belief, he would have received job offers from these programs had it not been for the disparaging accusations leveled against him by the NCAA Defendants.

RESPONSE: The allegations in the last sentence of Paragraph 145 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, the NCAA denies that it disparaged Coach Kenney, for the reasons described in Paragraphs 5, 70-74, 104-105, 139, 141, and 144, incorporated by reference herein. The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 145, and on that basis denies them. Further, after reasonable investigation, the NCAA is unaware of any fact to

substantiate the allegation that William Kenney did not receive job offers from the referenced programs because of allegedly disparaging statements by the NCAA. If relevant, proof at trial is demanded.

146. After over a year of frustration and disappointment, Coach Kenney eventually secured employment as an offensive line coach at Western Michigan University. While Coach Kenney enjoys his new role and greatly appreciates the opportunity, he earns significantly less in salary than he once earned at Penn State, or would have earned had he been hired by one of the larger Division I programs or NFL teams. Coach Kenney's professional career has suffered an extraordinary set-back and his future opportunities and earning potential have been harmed by the NCAA Defendants.

RESPONSE: The allegations in the last sentence of Paragraph 146 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, the NCAA denies that that it harmed Coach Kenney's future opportunities or earning potential for the reasons stated in Paragraph 5, 7, 70-74, 124, 104-105, 139, and 141, incorporated herein. The NCAA admits that Mr. Kenney is currently a coach at Western Michigan University. The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 146, and, on that basis, denies them.

147. As of the date of the Consent Decree, Coach Jay Paterno had served as a Division I collegiate football coach for 21 years. He began his coaching career as a graduate assistant at the University of Virginia, coached for one year each at the University of Connecticut and James Madison University, and then coached for 17 years at Penn State. At Penn State, Coach Jay Paterno spent 12 years as the quarterbacks coach and play-caller. Before the NCAA Defendants imposed the Consent Decree, Coach Jay Paterno was a top candidate for open head coaching positions at other institutions. He had received awards and accolades for his coaching efforts at Penn State, and he had been approached during his time there by other universities and search firms exploring his potential interest in head coaching vacancies.

RESPONSE: Upon information and belief, the NCAA admits the allegations in the first three sentences of Paragraph 147. The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 147, and, on that basis, denies them.

148. After Coach Jay Paterno was let go by Penn State following the 2012 football season, he sought other employment either as a head football coach or a media commentator. Transitioning from his position to a head coaching role was a

logical and customary progression for someone with his experience and reputation. He was well-qualified to receive such an offer.

RESPONSE: The NCAA denies that Jay Paterno was let go by Penn State following the 2012 football season. Specifically, upon information and belief, the NCAA believes that Jay Paterno was let go by Penn State following the 2011 football season. The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 148 and, on that basis, denies them.

149. He applied for the open head coaching positions at the University of Connecticut and James Madison University, where he had worked earlier in his career. Based on his qualifications and experience, he was a strong candidate for each position. But he was not even interviewed by either school, and the open positions went to candidates with less coaching experience.

RESPONSE: The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 149 and, on that basis, denies them.

150. Coach Jay Paterno also applied for head coaching vacancies at the University of Colorado and Boston College. He was not granted an interview at either school. He also inquired about the head coaching position at another Division I school in the mid-Atlantic region, but the university administration

considered the coaches from Penn State "too toxic," given the findings of the Consent Decree. The program in question did not grant interviews to any candidates from Penn State. Coach Jay Paterno was extremely well-qualified for the positions he sought and would have received job offers from these programs had it not been for the disparaging accusations leveled against him by the NCAA Defendants in the Consent Decree imposed on Penn State.

RESPONSE: The allegations in the last sentence of Paragraph 150 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, the NCAA denies that it disparaged for the reasons described in Paragraphs 5, 70-74, 104-105, 139, and 141, and 166, incorporated by reference herein. The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 150 and, on that basis, denies them. Further, after reasonable investigation, the NCAA is unaware of any evidence to substantiate the allegation that the Consent Decree or allegedly disparaging statements by the NCAA were the proximate cause of his failure to receive an employment offer at the referenced institutions. If relevant, proof at trial is demanded.

151. Coach Jay Paterno also engaged in discussions with various media companies, including ESPN, CBS Sports, and Fox Sports, about serving as a

college football commentator. He had prior dealings with officials at each company, and they were aware of his experience as a columnist for StateCollege.com for nearly three years. Before the NCAA Defendants imposed the Consent Decree, ESPN advised Coach Jay Paterno that they were interested in his services and suggested that they wanted to have him involved in a spring 2012 telecast and at least a couple of in-studio college football shows. The plan was to have him start working as a commentator during the 2012 football season. These discussions were later discontinued. Upon information and belief, officials at the network were nervous about the Sandusky scandal and the NCAA's unsupported finding that he and other coaches had ignored "the red flags of Sandusky's behaviors" at Penn State.

RESPONSE: For the reasons stated in Paragraphs 4-5, 70-74, 104-105, 139, 141, and 166, incorporated herein, the NCAA specifically denies that the Consent Decree contained a finding regarding Jay Paterno; that the Consent Decree's statement that some coaches, administrators, and football program staff members "ignored 'the red flags of Sandusky's behaviors'" was unsupported; and that the Consent Decree was a cause of Jay Paterno's failed job applications. The NCAA is without knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 151, and on that basis denies them. Further, after reasonable investigation, the NCAA is

unaware of any evidence to substantiate the allegation that the Consent Decree was the proximate cause of his failure to receive an employment offer at the referenced institutions. If relevant, proof at trial is demanded.

152. Coach Jay Paterno had further discussions with ESPN during the off-season before the 2013 season about the possibility of having him work as a commentator during lower-profile college football games. Despite these discussions, that position never came to fruition and no offer was forthcoming. During the spring of 2013, Coach Jay Paterno had similar discussions with representatives of CBS Sports and Fox Sports, who had earlier expressed some interest in his services. Again, nothing materialized. His hiring was considered too controversial, because if they placed him on-the-air, the networks would have no choice but to have Coach Jay Paterno publicly address past events and developments arising from the Sandusky scandal, given the statements made by the NCAA Defendants.

RESPONSE: For the reasons stated in Paragraphs 7, 120, 124, 136, 137, 147-150, incorporated herein, the NCAA specifically denies that statements by the NCAA caused Jay Paterno to not be employed. The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 152 and, on that basis, denies them. Further, after reasonable investigation, the NCAA is unaware of any evidence

to substantiate the allegation that the Consent Decree was the proximate cause of his failure to receive an employment offer at the referenced institutions. If relevant, proof at trial is demanded.

153. Coach Jay Paterno is not currently employed, other than as a freelance sports columnist.

RESPONSE: The NCAA is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 153 and, on that basis, denies them.

COUNT III: INJURIOUS FALSEHOOD/ COMMERCIAL DISPARAGEMENT

154. Plaintiffs incorporate by reference paragraphs 1 through 125 as if fully set forth herein.

RESPONSE: The NCAA repeats and realleges its answers to Paragraphs 1 through 153, as if set forth fully herein.

155. The Consent Decree published and relied on statements that disparaged Joe Paterno and the property of the Estate. It unfairly and improperly maligned Joe Paterno's moral character and the fulfillment of his duties as Head Coach at Penn State, and concerned his business and property.

RESPONSE: The allegations in Paragraph 155 constitute Plaintiffs' conclusions of law to which no response is required.

156. Before the unlawful action of the NCAA Defendants imposing the Consent Decree on Penn State, Joe Paterno or his Estate possessed a property interest in his name and reputation, and there was a readily available, valuable commercial market concerning Joe Paterno's commercial property.

RESPONSE: The allegations in Paragraph 156 constitute Plaintiffs' conclusions of law to which no response is required.

157. The statements in the Consent Decree regarding Joe Paterno's character and conduct as Head Coach and concerning the business and property of his Estate were false and defamatory.

RESPONSE: The allegations in Paragraph 156 constitute Plaintiffs' conclusions of law to which no response is required.

158. The statements in the Consent Decree regarding Joe Paterno's character and conduct were libel per se, because they imputed dishonest conduct to Joe Paterno.

RESPONSE: The allegations in Paragraph 158 constitute Plaintiffs' conclusions of law to which no response is required.

159. These statements were widely disseminated by the NCAA, on its website and through numerous press outlets across the country.

RESPONSE: The NCAA admits that the Consent Decree was available on its website. [Confirm]. The remaining allegations of Paragraph 159 are

denied as stated. The NCAA otherwise objects that the phrase "widely disseminated" is vague and ambiguous. The NCAA further responds that the findings of the Freeh Report that were quoted verbatim in the Consent Decree had already received significant publicity.

160. The NCAA Defendants either intended the publication of these statements to cause pecuniary loss or reasonably should have recognized that publication would result in pecuniary loss to the Estate of Joseph Paterno.

RESPONSE: The allegations in Paragraph 160 constitute Plaintiffs' conclusions of law to which no response is required.

161. The Estate did in fact suffer pecuniary loss, reputational harm, and other damages, as a result of the publication of these statements due to the actions of third persons relying on the statements. The commercial interests and value of the Estate substantially and materially declined as a direct result of the NCAA Defendants' conduct.

RESPONSE: The allegations in Paragraph 161 constitute Plaintiffs' conclusions of law to which no response is required. Further, the NCAA denies that it is responsible for any damages allegedly suffered by the Estate of Joseph Paterno. After reasonable investigation, the NCAA is unable to quantify any damages of any sort suffered or incurred by the Estate of Joseph Paterno and proof thereof, if relevant, is demanded at trial.

162. The NCAA Defendants either knew that the statements they made and published were false or acted in reckless disregard of their falsity.

RESPONSE: The allegations in Paragraph 162 constitute Plaintiffs' conclusions of law to which no response is required.

163. The NCAA Defendants' conduct was malicious and outrageous and showed a reckless disregard for the rights of Joe Paterno and his Estate.

RESPONSE: The allegations in Paragraph 163 constitute Plaintiffs' conclusions of law to which no response is required.

COUNT IV: DEFAMATION

164. Plaintiffs incorporate by reference paragraphs 1 through 125 as if fully set forth herein.

RESPONSE: The NCAA repeats and realleges its answers to Paragraphs 1 through 163, as if set forth fully herein.

165. The NCAA Defendants adopted the false statements in the Freeh Report and put the NCAA's imprimatur on the baseless allegations that the Board of Trustees "did not perform its oversight duties" and "failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable." These statements concerned Al Clemens, who was a member of the Board of Trustees in 1998 and 2001.

RESPONSE: **The NCAA states that no response is needed to the allegations in Paragraph 165 because Count I, breach of contract, has been dismissed. To the extent a response is required, the allegations in Paragraph 165 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, those allegations are denied for the reasons stated in response to Paragraphs 71 and 120, incorporated herein.**

166. The NCAA also stated that "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him." This statement concerned Jay Paterno and William Kenney, who were assistant coaches of the Penn State football program during the relevant times.

RESPONSE: **The NCAA admits that the Consent Decree quotes verbatim the Freeh Report's finding that "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him." The NCAA denies any remaining allegations in Paragraph 166 for the reasons stated in Paragraphs 1-4, 49, 59, 88, and 115-116, as well as the arguments set forth in the three rounds of preliminary objections necessitated by Plaintiffs' serial amendment of their complaint, and because neither the statement or the Freeh Report even mentions Jay Paterno or William Kenney.**

167. These statements were entirely unsupported by evidence and made with intentional, reckless, or negligent disregard for their truth.

RESPONSE: The allegations in Paragraph 167 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, those allegations are denied for the reasons stated in response to Paragraphs 72 and 90, incorporated herein. Further, the NCAA is unaware of any facts that substantiate Plaintiffs' allegations in Paragraph 167. To the extent relevant, proof of those allegations at trial is demanded.

168. The statements were published in the Consent Decree imposed on Penn State, which the NCAA disseminated to the entire world on its website, or were made in front of large audiences and disseminated through national news media.

RESPONSE: The NCAA admits that the statements were published in the Consent Decree imposed on Penn State and that the Consent Decree was available on the NCAA's website. The NCAA admits that it held a press conference and made the Consent Decree publicly available, but it denies that the NCAA made each challenged statement in the Consent Decree in front of large audiences or disseminated them through national news media. The NCAA denies the remaining allegations and incorporates its response to Paragraph 159.

169. These statements were false, defamatory, and irreparably harmed Plaintiffs' reputations and lowered them in the estimation of the nation. Every recipient of the statements understood their defamatory meaning and understood that the Plaintiffs were the objects of the communication.

RESPONSE: The allegations in Paragraph 169 constitute Plaintiffs' conclusions of law to which no response is required.

170. The publication of the statements resulted in actual harm to Plaintiffs because it adversely affected their reputations; caused them emotional distress, mental anguish, and humiliation; and inflicted financial and pecuniary loss on them.

RESPONSE: The allegations in Paragraph 170 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, those allegations are denied for the reasons stated in response to Paragraphs 7, 124 and 141, incorporated herein. Further, the NCAA denies it is responsible for any damages allegedly suffered by Plaintiffs. In addition, after reasonable investigation, the NCAA is unable to ascertain the truth or falsity of Plaintiffs' damages claims, both as to causation and amount, and proof thereof, if relevant, is demanded at trial

171. The NCAA Defendants had no privilege to publish the false and defamatory statements, or if they did, they abused that privilege.

RESPONSE: **The allegations in Paragraph 171 constitute Plaintiffs' conclusions of law to which no response is required.**

COUNT V: CIVIL CONSPIRACY

172. Plaintiffs incorporate by reference paragraphs 1 through 125 as if fully set forth herein.

RESPONSE: **The NCAA repeats and realleges its answers to Paragraphs 1 through 171, as if set forth fully herein.**

173. Dr. Ray, Emmert, and other unknown NCAA employees, along with the Freeh firm, conspired to work together to avoid the NCAA enforcement procedures in order to impose unwarranted and unprecedented sanctions on Penn State, thereby unlawfully harming Plaintiffs as set forth herein, breaching the contract between the NCAA and Penn State (as reflected in the NCAA's rules), and depriving Plaintiffs of their rights, including their rights under that contract. These actions were unlawful or taken for an unlawful purpose.

RESPONSE: **The allegations in Paragraph 173 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, those allegations are denied for the reasons stated in response to Paragraphs 6, 123, 130, 133, incorporated herein.**

174. Among other things, Dr. Ray, Emmert, and other unknown NCAA employees, along with the Freeh firm, agreed to:

a. bypass the NCAA's rules and procedural requirements in conducting the Penn State investigation;

b. deprive Plaintiffs of their rights, including their rights to notice and an opportunity to be heard, before imposing unprecedented sanctions; and

c. agree to sanction Penn State and implicate the entire Penn State community in wrongdoing, based on an obviously flawed investigation that did not consider whether the conduct at issue had violated any of the NCAA's rules.

RESPONSE: The allegations in Paragraph 174 constitute Plaintiffs' conclusions of law to which no response is required. To the extent a response is required, those allegations are denied for the reasons stated in response to Paragraphs , 6, 48, 71, 73, 80, 83, 89, 123, 130, 133, and 173, incorporated herein.

175. Dr. Ray, Emmert, and other NCAA employees, along with the Freeh firm acted with malice. They intended to injure Plaintiffs through their actions or acted in reckless disregard of Plaintiffs' rights. They had no valid justification for their actions.

RESPONSE: The allegations in Paragraph 175 constitute Plaintiffs' conclusions of law to which no response is required.

176. Dr. Ray, Emmert, and other NCAA employees, along with the Freeh firm, performed a series of overt acts in furtherance of this conspiracy, including but not limited to the following:

a. the NCAA Executive Committee chaired by Dr. Ray and the Division I Board of Directors purported to grant Emmert authority to investigate Penn State and impose sanctions, despite knowing they did not have the power to do so;

b. Dr. Ray, Emmert, and other NCAA employees worked closely and coordinated with the Freeh firm to help it prepare a report that they knew or should have known included false conclusions that had not been reached by means of an adequate investigation;

c. Emmert advised President Erickson that the NCAA would use the Freeh Report as a substitute for its own investigation, in reckless disregard of the falsity and inadequacy of that report, and the various NCAA procedural rules violations committed thereby;

d. Emmert and unknown NCAA employees communicated to Penn State that the "death penalty" was on the table for Penn State, despite knowing that no such penalty could have lawfully been imposed under the NCAA rules;

e. Emmert threatened that if Penn State went to the media, the death penalty would be certain, thus extorting silence from President Erickson; and

f. President Erickson agreed not to discuss the NCAA's demands with anyone, including the Board of Trustees of the University, in order to avoid imposition of the death penalty.

RESPONSE: The allegations in Paragraph 176 constitute Plaintiffs' conclusions of law to which no response is required. Further, each sub-paragraph of Paragraph 131 repeats allegations stated earlier in the Complaint, for which the NCAA incorporates its response from those Paragraphs to each respective sub-paragraph of 176.

177. Emmert imposed the Consent Decree on Penn State based on the allegations in the Freeh Report, although doing so was impermissible under the NCAA's own rules.

RESPONSE: Denied for the reasons stated in response to Paragraphs 56, 60, 64 and 71, incorporated herein, and because President Emmert did not act unilaterally. The Consent Decree is an agreement between the NCAA and Penn State.

178. As a result of this conspiracy, Plaintiffs suffered actual damages.

RESPONSE: The allegations in Paragraph 178 constitute Plaintiffs' conclusions of law to which no response is required. Further, the NCAA denies it is responsible for any damages allegedly suffered by Plaintiffs. In addition, after reasonable investigation, the NCAA Defendants are unable to ascertain the truth or falsity of Plaintiffs' damages claims, both as to causation and amount, and proof thereof, if relevant, is demanded at trial.

179. The conduct of the NCAA Defendants in engaging in this civil conspiracy was malicious and outrageous and showed a reckless disregard for Plaintiffs' rights.

RESPONSE: The allegations in Paragraph 179 constitute Plaintiffs' conclusions of law to which no response is required.

NEW MATTER

By way of further response, the NCAA avers the following New Matter to the Second Amended Complaint:

Ratification (Count I)

180. On July 22, 2012, Penn State University President Rodney Erickson executed the "Binding Consent Decree Imposed By The National Collegiate Athletic Association and Accepted By the Pennsylvania State University" (the "Consent Decree").

181. The Consent Decree identified certain "findings and conclusions," and specifically quoted certain "key factual findings" from the Freeh Report, including findings related to the Board of Trustees. The Consent Decree stated that Penn State "acknowledges" that the facts set forth in the Freeh Report "constitute violations of the Constitutional and Bylaw principles described in the [November 17, 2011] letter."

182. The Consent Decree identified certain sanctions to be imposed on Penn State, which included a "punitive component" and a "corrective component."

183. The Consent Decree states that "the University represents ... that it has taken all actions necessary, to execute and perform this Consent Decree and the AIA and will take all actions necessary to perform all actions specified under this Consent Decree and the AIA in accordance with the terms hereof and thereof."

184. The Consent Decree also states that "Penn State expressly agrees not to challenge the consent decree and waives any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process related to the subject matter of this Consent Decree."

185. After entering into the Consent Decree, Penn State repeatedly confirmed its commitment to performing its obligations under the Consent Decree,

including in various court proceedings, and never sought to avoid or annul the Consent Decree.

186. The Board of Trustees, and Plaintiff Clemens in particular, expressed their support for President Erickson's decision to execute the Consent Decree. The Board of Trustees did not rescind or repudiate the Consent Decree and, instead, repeatedly affirmed the University's commitment to compliance with the Consent Decree.

187. Based on the actions of Penn State, the Board of Trustees (of which he is a member), and his own individual actions, Plaintiff Clemens' claim in Count I—and any and all relief he seeks thereunder—is barred by the affirmative defense of **ratification**.

Consent and/or Absolute Privilege (Plaintiff Clemens – Counts IV and V)

188. The NCAA incorporates by reference paragraphs 1 through 187 as if fully set forth herein.

189. Before the Consent Decree was executed or made public, (1) the Board of Trustees retained the firm of Freeh, Sporkin & Sullivan, LLP (the "Freeh Firm") to conduct an investigation concerning the Sandusky matter, (2) the Freeh Firm, as directed by the Board of Trustees, prepared and published a report of its investigate findings, which included the exact statements that Plaintiff Clemens alleges are defamatory in this action; and (3) members of the Board of Trustees

prepared and published a statement about the Freeh Report which stated that the Board of Trustees took "full responsibility for the failures that occurred" and acknowledged certain failures by the Board of Trustees.

190. The Consent Decree stated that Penn State "accepts the findings of the Freeh Report for purposes of this resolution," and quoted verbatim the Freeh Report's findings about the failures of the Board of Trustees.

191. Based on the actions of the Board of Trustees (of which he is a member), and his own individual actions, Plaintiff Clemens' claims under Count IV and V are barred by the affirmative defense of **consent** and/or **absolute privilege**.

Estoppel (Plaintiff Clemens – All Counts)

192. The NCAA incorporates by reference paragraphs 1 through 191 as if fully set forth herein.

193. Based on the actions of the Board of Trustees (of which he is a member), and his own individual action, each of Plaintiff Clemens' claims—and all relief sought thereunder—are barred by the doctrines of **equitable estoppel** and **estoppel by acquiescence**.

Truth or Substantial Truth (Counts II, III, IV, and V)

194. The NCAA incorporates by reference paragraphs 1 through 193 as if fully set forth herein.

195. Plaintiffs' claims under Count II (tortious interference), Count III (commercial disparagement), Count IV (defamation), and Count V (civil conspiracy) should be dismissed because the statements that Plaintiffs allege were defamatory or disparaging were **true or substantially true**. [2]

* * *

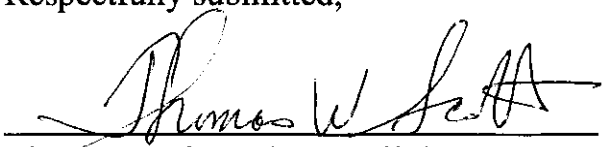
196. To the extent Pennsylvania Rule of Civil Procedure 1032 mandates that any and all affirmative defenses not set forth are waived, the NCAA asserts any and all affirmative defenses contemplated by Pennsylvania Rules of Civil Procedure 1030 and 1032 to the extent that continuing investigation or discovery reveals facts which show that any such defenses may be pertinent up to and including the time of trial.

WHEREFORE, the NCAA demands that judgment be entered in its favor and against Plaintiffs at Plaintiffs' cost.

---

[2] Plaintiffs carry the burden to demonstrate that the allegedly disparaging and defamatory statements were false. *See, e.g., Tucker v. Phila. Daily News*, 577 Pa. 598, 625, 848 A.2d 113, 130 (2004) ("The U.S. Supreme Court has also rejected 'the common-law presumption that defamatory speech is false' and has, in its place, set forth 'a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.'" (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986))). For the avoidance of doubt, however, the NCAA includes "truth or substantial truth" as an affirmative defense in its New Matter. Nothing in the NCAA's new matter should be deemed as an assumption by the NCAA of the burden to demonstrate the truth of the challenged statements.

Respectfully submitted,



Date: June 16, 2015

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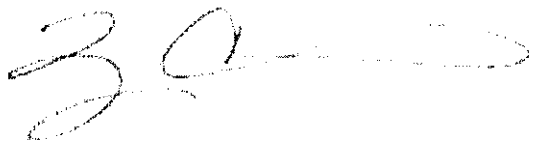
Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

VERIFICATION

I hereby verify that the statements in the foregoing Amended Answer with New Matter are true and correct to the best of my knowledge, information and belief. I make this verification subject to 18 Pa.C.S.A. §4904, relating to unsworn falsification to authorities.



Dated: June 15, 2015

Zandria C. Conyers
Director of Legal Affairs and
Associate General Counsel

EXHIBIT B

3 Goodrich Amram 2d § 1034(b):14

Goodrich Amram 2d
Database updated June 2015
Civil Action

Christine M. Gimeno, J.D., LL.M.

Rule 1034. Motion for Judgment on the Pleadings
Commentary

§ 1034(b):14 Opportunity to amend pleadings in response to motion

West's Key Number Digest

West's Key Number Digest, Pleading ⚷350(1)

During the pendency of the motion for judgment on the pleadings a party may amend his or her pleading, even though it may remove the issues pending in the motion, and may make the motion moot. [192] Whenever a defect in a party's pleading can be cured by amendment, a motion for judgment on the pleadings should not be granted without affording that party an opportunity to amend his or her pleading. [193] Thus, when the court determines, on a motion for judgment by the defendant, that the complaint fails to state an actionable claim, the court may grant the plaintiff an opportunity to amend. [194] Similarly, the court may grant leave to a defendant to amend the answer while a motion for judgment on the pleadings is pending in order to correct general denials that would otherwise have the effect of admissions, [195] or where the amendment would present a meritorious defense sufficient to withstand the motion. [196] An opportunity to amend the pleadings in response to a motion for judgment on the pleadings need not be granted, however, where it is apparent that any attempt to correct the defect or insufficiency in the pleading would be futile. [197]

Practice Tip:

After judgment on the pleadings is entered upon the granting of a motion, it is generally too late to amend the pleadings in response to the motion. [198] Nevertheless, in one instance, an amendment of the complaint in a medical malpractice action was permitted, following the entry of a judgment on the pleadings in favor of the defendants, where the pleadings disclosed clearly and unequivocally that the plaintiff's action against the physicians had not been commenced within the two-year limitations period following the allegedly unnecessary surgery, and the defendants' answer raised the defense of the statute of limitations as new matter, leave to amend the reply to allege facts to avoid the defense was granted where the plaintiff's application for reconsideration of the entry of judgment on the pleadings was accompanied by an affidavit citing that the plaintiff first became aware of the injury from the unnecessary surgery on his back within two years of the commencement of the action. [199]

Observation:

Where the trial court grants a party an opportunity to amend a defective pleading while a motion for judgment on the pleadings is pending, and the party against whom the motion is directed neglects to file an amended pleading, judgment on the pleadings is properly granted. [200]

192 Swift v. Milner, 371 Pa. Super. 302, 538 A.2d 28 (1988); Beardell v. Western Wayne School Dist., 91 Pa. Commw. 348, 496 A.2d 1373, 27 Ed. Law Rep. 223 (1985).

Treatises and Practice Aids

For a general discussion of the discretionary authority of the court to grant leave to amend a pleading, see Goodrich-Amram § 1033:5 (2d ed.).

193 Bata v. Central-Penn Nat. Bank of Philadelphia, 448 Pa. 355, 293 A.2d 343 (1972); Williams By and Through Williams v. Lewis, 319 Pa. Super. 552, 466 A.2d 682 (1983).

194 Williams By and Through Williams v. Lewis, 319 Pa. Super. 552, 466 A.2d 682 (1983).

195 Pilotti v. Mobil Oil Corp., 388 Pa. Super. 514, 565 A.2d 1227 (1989); Swift v. Milner, 371 Pa. Super. 302, 538 A.2d 28 (1988).

196 Bata v. Central-Penn Nat. Bank of Philadelphia, 423 Pa. 373, 224 A.2d 174 (1966); Pilotti v. Mobil Oil Corp., 388 Pa. Super. 514, 565 A.2d 1227 (1989).

197 Balush v. Borough of Norristown, 292 Pa. Super. 416, 437 A.2d 453 (1981); Wimbish v. School Dist. of Penn Hills, 59 Pa. Commw. 620, 430 A.2d 710 (1981).

198 Bata v. Central-Penn Nat. Bank of Philadelphia, 448 Pa. 355, 293 A.2d 343 (1972); Christie v. Kun, 2 Pa. D. & C.2d 582, 1955 WL 5210 (C.P. 1955).

199 Puleo v. Broad St. Hospital, 267 Pa. Super. 581, 407 A.2d 394 (1979).

200 Swift v. Milner, 371 Pa. Super. 302, 538 A.2d 28 (1988).

EXHIBIT C

2009 WL 6969700 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania,
Civil Division - Equity.
Northampton County

Margaret HOLLAND n/k/a Meg Holland, Plaintiff,
v.
Jamie LANTZ, Defendant.

No. C-0048-CV-2008-11555.
June 18, 2009.

Order of Court

William F. Moran, J.

AND NOW, this 18th day of June 2009, Plaintiff's Motion for Judgment on the Pleadings is hereby DENIED, as set forth more fully below in the attached Statement of Reasons.

STATEMENT OF REASONS

Presently before the Court is Plaintiff's Motion for Judgment on the Pleadings. This matter commenced on October 30, 2008 with the filing of Plaintiff's Complaint, instituting an action in ejectment against Defendant and seeking equitable relief in the form of an Order of Court directing Defendant to remove a fence adjacent to his property but situate on Plaintiff's property. Defendant filed an Answer and New Matter on November 20, 2008 and the present Motion for Judgment on the Pleadings was then filed on March 26, 2009. The matter came before the Honorable William F. Moran via the Argument Court list of May 5, 2009. The parties having submitted briefs on the motion, the matter is now ready for disposition.

Standard of Law

A motion for judgment on the pleadings functions as a pretrial mechanism, the purpose of which is to allow a court to evaluate the sufficiency of a case. *DiAndrea v. Reliance Savings and Loan Association,* 456 A.2d 1066, 1069 (Pa. Super. Ct. 1986). A party may file such motion at any time after the pleadings are closed but within such time as to cause no unreasonable delay in the case coming to trial. PA.R.CIV.P. 1034. In ruling on a motion for judgment on the pleadings, a court may only consider the content of the pleadings themselves and any documents attached thereto, and must accept as true all well-pleaded facts contained therein. *Wachovia Bank, N.A. v. Ferretti,* 935 A.2d 565, 571 (Pa. Super. Ct. 2007). Further, the court may consider only those facts which have been specifically admitted by the party against whom the motion is made. *Id.* Finally, we note that a court may grant a motion for judgment on the pleadings only when it is clear as a matter of law that no dispute of fact exists between the parties, and therefore, the moving party is entitled to judgment as a matter of law. *Kosor v. Harleysville Mut. Ins. Co.,* 595 A.2d 128, 129 (1991).

Discussion

Plaintiff predicates her motion for judgment on the pleadings on the contention that Defendant's Answer to the underlying Complaint raises no issues of material fact. Specifically, Plaintiff argues that Defendant's Answer and New Matter set forth

nothing more than general denials amounting to admissions, and fails to set forth any valid defense to the action. However, by a brief contra the motion, Defendant asserts the validity of the defenses raised therein, and argues that the Answer contains denials which are specific in nature, thereby raising genuine issues of material fact for the Court to decide. Accordingly, Defendant asserts that the Court must deny Plaintiff's motion.

Under the Rules of Civil Procedure, a general denial in a pleading is deemed an admission. PA.R.CIV.P. 1029 (1994). A denial is deemed specific if it denies the facts averred and affirmatively avers that which did or did not occur. *Id.* Whether an answer constitutes a general denial requires an examination of the pleadings in their entirety. As to the pleading of affirmative defenses, the Court notes that it is not enough to state ones' defenses without summarizing the facts upon which such defenses are based. PA.R.CIV.P. 1019(a) (2001).

Upon examination of Defendant's Answer, the Court notes that Defendant makes specific objections as to averments regarding the permit process applicable to the construction of the subject fence. Yet, all of the other portions of the Answer appear to consist of nothing more than general denials. As to the New Matter, we note that while several defenses are raised therein, Defendant fails to set forth facts in support of the same. Although Defendant's Answer and New Matter are inartfully pled and suffer technical insufficiencies, it would be contrary to the public policies of this Commonwealth to enter judgment on the pleadings on the basis of such insufficiencies. "Where there is any uncertainty or doubt, it should not be assumed that a party cannot plead with more specificity. The court should consider the advisability of directing a party to amend." *Pilotti v. Mobil Oil Corp.*, 565 A.2d 1227, 1229 (Pa. Super. Ct. 1989) quoting *Del Quadro v. City of Philadelphia,* 437 A.2d 1262, 1263 (Pa. Super. Ct. 1981).

In light of the foregoing, Plaintiff's motion for judgment on the pleadings is hereby DENIED without prejudice, and Defendant shall have twenty (20) days within which to file an Amended Answer and New Matter in accordance with the Rules of Civil Procedure and the case law governing the same.

BY THE COURT:

.....

WILLIAM F. MORAN,

J.

End of Document

EXHIBIT D

2001 WL 1807905
Only the Westlaw citation is currently available.
Pennsylvania Court of Common Pleas.

JAMES J. GORY MECHANICAL CONTRACTING, INC., Plaintiff
v.
PHILADELPHIA HOUSING AUTHORITY, Defendant

No. 453. | July 11, 2001.

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

HERRON, J.

***1** Plaintiff James J. Gory Mechanical Contracting, Inc. initiated the instant action against Defendant Philadelphia Housing Authority for breach of a construction contract. Unfortunately, both the facts and the procedural history of this matter reveal the Defendant's seeming inability to accomplish tasks in a reasonable period of time, as well as chronic missteps, errors and delays attributable to the Defendant in the conduct of this litigation. The Court has found in favor of the Plaintiff and against the Defendant and has awarded appropriate damages in the amount of $239,984.75, exclusive of interest.

FINDINGS OF FACT

1. James J. Gory Mechanical Contracting, Inc. ("Gory") is a Pennsylvania corporation engaged in business as a mechanical and plumbing construction contractor. N.T. [1] I:9.

[1] All references to Notes of Testimony ("N.T.") are to testimony taken on April 17 and 18, 2000 at trial ("Trial") in Courtroom 443, City Hall, before the Honorable John W. Herron. References to testimony taken on April 17 are marked with a Roman numeral "I," and references to testimony from April 18 are marked with a Roman numeral "II."

2. James J. Gory ("Mr.Gory") has been Gory's president and owner for the past 14 years. N.T. I:9. Mr. Gory has been licensed as a master plumber for 34 years, has extensive work experience in the construction industry and extensive experience in preparing estimates and bids for public works construction contracts. N.T. I:9-I:11.

3. The Philadelphia Housing Authority ("PHA") is the owner of a public housing development known as "Emlen Arms," located at 6733 Emlen Street, Philadelphia, Pennsylvania 19119. N.T. I:12.

The Emlen Arms Project and the Contract

4. On May 9, 1996, PHA and Gory entered into a public works construction contract for plumbing construction ("Contract") in connection with the modernization of Emlen Arms ("Project"). N.T. I:10-I:11; Plaintiff's Ex. 5. [2] As part of the Project, Emlen Arms' nine floors would be gutted and remodeled, beginning with the bottom floor and continuing up to the ninth floor. N.T. I:21-I:22.

[2] The Contract was composed of several documents, including the General Conditions of the Contract for Construction, Public and Indian Housing Programs" and "PHA General Conditions." Plaintiff's Exs. 2 and 3.

5. Gory was responsible for the Project's plumbing and sprinkler work ("Plumbing Work"). N.T. I:11. The original Contract price for the Gory's Plumbing Work was $1,227,900.00. *Id.* I:12.

6. About the same time, PHA entered into three other contracts for the Project: a "General Construction" contract with Daniel J. Keating ("Keating"); a "Mechanical Construction" contract with Ross/ ARACO and an "Electrical Construction" contract with Nucero. N.T. I:12.

7. The Contract set forth a set of "Special Contract Requirements." Plaintiff's Ex. 4. The Special Contract Requirements identified Barclay White/ McCrae ("Barclay") as the Project construction manager and Sheward & Associates ("Sheward") as the Project architect. *Id.* at ¶¶ 3-4.Each of Barclay and Sheward was "PHA's authorized representative to the extent set forth below and elsewhere in this contract."*Id.* at ¶¶ 5A, 7A.

8. According to the Special Contract Requirements, Barclay was to provide "services necessary to manage and coordinate construction on" the

Project. Plaintiff's Ex. 4 at ¶ 5A. Barclay's specific duties included the following:

Preparing a comprehensive Project plan and schedule and requiring that each prime contractor take necessary and appropriate measures to maintain the schedule.

*2 Requiring each prime contractor to coordinate work on the Project with the work to be performed with other contractors.

Establishing procedures for coordination between each prime contractor, PHA, other contractors, Sheward and the residents of Emlen Arms.

Calling meetings, which were to be attended by each prime contractor and their subcontractors and material suppliers, as necessary for effective pursuit and coordination of the work.

Determining the adequacy of each prime contractor's personnel and equipment and the availability of necessary materials and suppliers.

Taking action necessary to maintain the Project schedule.

Id. at ¶ 5B.

9. The Special Contract Requirements also included "Preliminary Project Milestones," which set forth "the number of calendar days by which defined work activities on the Project are to be completed."Plaintiff's Ex. 4 at D-37. According to the Preliminary Project Milestones, the Project was to be completed within 500 days of the date on which the notice to proceed was issued. *Id.*

10. The Contract also included a provision requiring that Gory submit certain Contract disputes to a "Contracting Officer" for a written decision prior to filing suit in court ("Arbitration Provision"). Plaintiff's Ex. 2 at ¶ 31.

11. In preparing its bid for the Project, Gory relied on the terms of the Contract, especially the 500-day deadline for Project completion in the Preliminary Project Milestones. N.T. I:15. Specifically, this completion date impacted calculations as to overhead costs and bonding capacity. *Id.* at I:16-I:17.

12. PHA issued a "Notice to Proceed" in the Project on May 15, 1996. Plaintiff's Ex. 5. The Notice to Proceed directed Gory to begin work on the Project on May 20, 1996 and set October 1, 1997 as the Project completion date. *Id.*

13. The Notice to Proceed stated that Clarence Mosely ("Mr.Mosely") was the Contract representative and that he had "the responsibility of coordinating this work on a daily basis and, as such, will be [PHA's] principal contact person" with Gory. Plaintiff's Ex. 5.

14. When the Project began, Mr. Gory attended biweekly Project meetings and additionally was on the Project site approximately three times a week from May 1996 to April 1998 and once a week from May to July 1998. N.T. I:34, I:87-I:88.

Project Problems

15. On December 5, 1996, Gory advised Barclay by letter that Gory was being delayed in completing the Plumbing Work in 12 specific units on upper floors of Emlen Arms due to a lack of metal studs. N.T. I:19-I:22; Plaintiff's Ex. 6. The responsibility for installing these studs fell on Keating, the general contractor for the Project. N.T. I:19-I:20. Gory received no response to this letter. *Id.* 21.

16. On December 19, 1996, Gory sent Barclay a second letter regarding the delay. N.T. I:22; Plaintiff's Ex. 7. Gory received no response to this letter. N.T. I:23.

*3 17. On January 3, 1997, Gory sent Barclay a letter via certified mail advising Barclay that the studs still had not been installed and complaining that Gory was being "piecemealed" and "financially burdened" as a result. N.T. I:23-I:24; Plaintiff's Ex. 8. [3] Gory informed Barclay that the continuing delay was interfering with Gory's completion date and that Gory would withdraw its employees from the Project if the Project was not completed on time. *Id.* Although Barclay received this letter on January 10, 1997, Gory received no response. N.T. I:24; Plaintiff's Ex. 8.

3 "Piecemealing" refers to completing small portions of work in different areas and parts of a project and is contrary to typical construction procedures. N.T. I:24;

Plaintiff's Ex. 19. In this case, it led to Gory "jumping around the building trying to find work to do...." N.T. I:24.

18. On May 13, 1997, Gory sent Barclay a fourth letter, which requested $565 per month for each month after May 1, 1997 for storing plumbing fixtures. N.T. I:25; Plaintiff's Ex. 9. The need for storage arose because construction that had to be completed before Gory could install the fixtures was not completed.*Id.* Gory received no response to this letter. N.T. I:26.

19. On September 24, 1997, Gory advised Barclay that Gory was being delayed due to a lack of bathroom tile floors and kitchen cabinets and tops. N.T. I:26-I:27; Plaintiff's Ex. 11. The responsibility for installing the bathroom tile floors and kitchen cabinets and tops fell on Keating. N.T. I:26. Gory received no response to this letter.*Id.* at I:27.

20. Gory sent Barclay a fax memorandum on October 9 and again on October 10, 1997 notifying Barclay that Gory anticipated being "out of work" as of the week of October 17, 1997 due to lack of progress in specific areas and floors. N.T. I:27-I:28; Plaintiff's Ex. 12. Gory received no response to this fax memo. N.T. I:28.

21. On October 20, 1997, Gory notified Barclay via fax memorandum that, for the reasons stated in its fax memo of October 10, 1997, it had removed its work force from the Project as of October 16, 1997. N.T. I:28; Plaintiff's Ex. 13.

22. On December 3, 1997, Gory faxed Barclay a letter advising that "[t]he delay past the completion date of 10/1/97 is not the fault of JJGory [sic] Mechanical and we expect to be compensated for any and all cost beyond that date."N.T. I:35-I:36; Plaintiff's Ex. 15. Gory also informed Barclay that it had not been paid since May 1997 and requested an open change order for $500.00 per diem past the completion date. *Id.* Gory received no response to this letter. N.T. I:36.

23. By a contract modification dated January 19, 1998 ("Modification"), PHA extended the Project completion date 190 days from October 1, 1997 to April 10, 1998. N.T. I:36-I:37; Plaintiff's Ex. 17. This extension purported to be at no additional cost to PHA. N.T. I:37-I:38; Plaintiff's Ex. 17.

24. Gory refused to accept the Modification at no cost and advised Barclay as much in a letter dated January 28, 1998. N.T. I:41; Plaintiff's Ex. 18. In its letter, Gory indicated that it would accept a change order in the total amount of $95,000.00, based on a $500.00 charge per day for 190 days. N.T. I:43-I:44; Plaintiff's Ex. 18. Gory sent a copy of this letter to Mr. Mosely and attached copies of its previous letters informing Barclay of the delay. N.T. I:41-I:42; Plaintiff's Ex. 18. Mr. Mosely did not respond to this letter. N.T. I:43.

*4 25. On February 3, 1998, Gory returned the signed Modification to PHA with the following language inserted:

It should further be understood that the execution of this document neither prejudices, limits or adversely affects James J. Gory Mechanical Contracting, Inc.'s intended delay claim against the Philadelphia Housing Authority and/or others.

N.T. I:38; Plaintiff's Ex. 17. A representative of PHA signed the Modification on March 2, 1998. Plaintiff's Ex. 17. At no point thereafter did PHA make additional contract modifications extending the Project's completion date. N.T. I:50.

26. On January 28, 1998, Gory sent a letter to Barclay and Mr. Mosely stating that Gory was still being piecemealed and that the work necessary for Gory to install plumbing was "randomly missing throughout the 9th, 8th and 7th floors."N.T. I:45-I:47; Plaintiff's Ex. 19. In the letter, Gory advised Barclay and Mr. Mosely that Gory would "complete what is available" and would not return to "unfinished floors without additional compensation." Plaintiff's Ex. 19. Gory received no response to this letter. N.T. I:45.

27. In addition to sending letters and fax memoranda to Barclay and Mr. Mosely, Gory and others regularly raised the delay concerns at the biweekly Project meetings, at which Mr. Mosely and representatives of Barclay were present. N.T. I:29-I:30, I:89-I:90, I:114-I:115, I:157.

28. Between April 10, 1998, the Project completion date as modified, and July 11, 1998, PHA made at least four performance and installation

requests of Gory. N.T. I:54-I:55; Plaintiff's Ex. 29. Although the Contract modification authorizing this additional work was not approved by a Contracting Officer until January 5, 1999, Gory did the work in question earlier based on the belief that PHA was behind on its paperwork and would subsequently authorize and issue payment. N.T. I:49-I:50; Plaintiff's Ex. 29.

29. All work on the Project was substantially completed in July 1998, and the building was occupied around that time. N.T. I:56-I:57, I:87-I:88, I:102, I:176.

Outstanding Amounts for Contract Work

30. On December 18, 1998, Gory submitted Application for Payment Number 16, in which Gory sought payment for ten items of change order work it had performed. N.T. I:72-I:74. The total amount requested in Application for Payment Number 16 at that time was $60,948.11. *Id.* at I:72.

31. Between December 18, 1998 and October 5, 2000, Gory repeatedly telephoned, faxed and sent letters to Mr. Mosely and PHA employee Daniel McCusker ("Mr.McCusker") regarding Application for Payment Number 16. N.T. I:72-I:76; Plaintiff's Exs. 34-39. At no point did PHA respond or make payment on Application for Payment Number 16. N.T. I:72-I:76.

32. On October 5, 2000, Gory submitted a Revised Application for Payment Number 16 for $93,520.75. N.T. I:77; Plaintiff's Ex. 40. This amount represented payment for six items of change order work completed by Gory, totaling $56,864.92, and retainage withheld from payment on an earlier application, totaling $36,655.83. Plaintiff's Exs. 33A, 40. To date, Gory has not received payment on Revised Application for Payment Number 16. N.T. I:77.

*5 33. In addition to the amount outstanding on Revised Application for Payment Number 16, Change Order Number Eight reflects a charge of $4,964.00 for underground storm line testing done by Gory. N.T. I:78-I:79. Although PHA paid Gory for the amount due on this change order, it later retracted payment, and the $4,964.00 charge is not included in Revised Application for Payment Number 16. *Id.* I:79.

34. The total amount of the payment due and owing Gory by PHA for contract work performed and completed, inclusive of change order work, is $98,484.75.

Outstanding Amounts for Project Extension Costs

35. Gory's bid on the Project was based on a Project duration of 500 calendar days. N.T. I:16; Plaintiff's Ex. 4.

36. Gory was required to continue its presence at Emlen Arms for a period of 283 calendar days beyond the 500-calendar day period originally allotted for completion of the Project ("Extension"). N .T. II:18; Plaintiff's Ex. 18; Defendant's Ex. 2.[4] The reasons for the Extension are in no way attributable to Gory and arise from Keating's failure to complete its work in a timely fashion, PHA and Barclay's failure to coordinate and manage the Project efficiently and PHA and Sheward's design defects. N.T. I:29-I:35, I:174.

4 Gory originally asserted that the Extension Period was 190 days long but amended its calculations to 283 days based on evidence presented by PHA at the Trial. N.T. II:24-II:28.

37. For each calendar day beyond the original 500-calendar day period that Gory continued its presence at Emlen Arms, Gory incurred additional expenses of $500.00. N.T. I:43. This amount included additional expenses for a project manager, superintendent, payroll preparation, bookkeeping, bonding capacity and other extended general conditions and administrative costs. *Id.* I:16-I:17, I:44, I:121-I:124.

38. Although PHA has disputed this additional expense amount, they have provided no substantive basis for their proposed expense amount. N.T. II:16-II:17. In addition, Mr. McCusker, who testified as to the expense amount proposed by PHA, had no involvement in the Project and has never owned or managed a construction company.*Id.* II:17-II:18.

39. The total amount of costs incurred by Gory due to the delay of the Project's completion beyond the 500-calendar day period amount to $141,500.00.

Procedural Issues

40. Gory commenced this action by filing a complaint against PHA ("Complaint") on February 9, 2000. In the Complaint, Gory asserted that it had "fully performed and completed all of the work required for the Plumbing Construction of the Project, and all conditions precedent to Gory's right to claim and have judgment entered against PHA in this civil action have been satisfied and discharged, or have been waived by PHA."Complaint at ¶ 10.

41. In its Answer, filed April 19, 2000, PHA purported to deny the allegations in Paragraph 10 of the Complaint:

> It is specifically denied that the plaintiff performed and completed all of the work required for the Plumbing Construction of the Project and further specifically denied that all conditions precedent have been satisfied, discharged or waived by answering defendant Philadelphia Housing Authority. On the contrary defendant incorporates its answer to paragraph nine above as if the answer was herein set forth at length.

***6** PHA's answer to the Complaint and new matter ("Answer") at ¶ 10. [5]

5 Paragraph Nine of the Answer states as follows:

> It is specifically denied that plaintiff undertook the performance of the work for the Plumbing Construction of the Project and did at all times stand ready, willing and able to furnish, install and complete all of the required work in accordance with the requirements of the Contract Documents. On the contrary plaintiff failed to adhere to the required provisions of the contract in question and therefore breached same. The specifics of the contract breach are in dispute and are the subject matter of this lawsuit.

Answer at ¶ 9.

42. As part of the Answer, PHA asserted as a new matter that the Court did not have jurisdiction over this dispute because of Gory's alleged failure to adhere to the Arbitration Provision's requirements and to submit the dispute to a Contracting Officer. Answer at ¶¶ 29-33.

43. Discovery in this matter, in which both Parties actively participated, was closed on August 7, 2000, and the deadline for filing pre-trial motions was October 16, 2000.

44. On November 27, 2000, over seven months after it filed the Answer, PHA filed a praecipe to demand a jury trial. Because this demand was not filed within 20 days of the last pleading, as required by Pennsylvania Rule of Civil Procedure 1007.1(a), the Court granted Gory's Motion to Strike Demand for Jury Trial on March 13, 2001.

45. The Parties attended a court-sponsored settlement conference on February 9, 2001. At no point between filing the Answer and attending this conference did PHA make any attempt to invoke the Arbitration Provision or request the extension of any deadline.

46. On February 16, 2001, nearly one year after being served with the Complaint and a mere two months before the scheduled Trial date of April 17, PHA filed a motion for summary judgment requesting that the Court enter judgment in its favor based on Gory's alleged failure to abide by the Arbitration Provision's terms.

47. On February 27, 2001, PHA filed a motion requesting leave to amend its answer to the Complaint to include a counterclaim arising from Gory's alleged failure to complete its work on the Project. The Court denied this motion on April 5, 2001.

48. On April 10, 2001, the Court issued an order and an accompanying opinion denying PHA's motion for summary judgment. *James J. Gory Mech. Contr., Inc. v. Philadelphia Housing Auth.*, February Term, 2000, No. 453 (C.P.Phila.Apr. 5, 2001) (Herron, J.) . [6]

6 Available at http://courts.phila.gov/cptcvcomp.htm.

49. At the Trial, the Court ruled that PHA's denial in Paragraph 10 of the Answer was a general denial and constituted an admission that Gory had completed the Plumbing Work required of it in the Contract and had

satisfied all conditions precedent. N.T. I:108-I:109. PHA sought leave to amend the Answer to include a more specific denial, but the Court denied PHA's motion and prevented PHA from presenting testimony as to Gory's alleged failure to comply with the Contract. *Id.* at II:7-II:7, II:11-II:12.

DISCUSSION

PHA's proposed findings of fact and conclusions of law are peculiar in that they discuss only the alleged errors made by the Court during the Trial and effectively ignore the substantive matters in dispute in this case. Specifically, PHA focuses almost exclusively on the Court's refusal to enforce the Arbitration Provision and the Court's treatment of portions of the Answer as an admission that was unamendable at Trial.

PHA's assertions cannot mask the fact that the Court's conclusions are attributable not to "legal error" or to any fault of Gory. Rather, PHA's arguments are fatally undermined by its repeated failure to manage both the Project and this case in a responsible manner and by the prejudice that the course of action it urges would cause Gory. As a result, the Arbitration Provision does not preclude Gory from seeking redress in this forum, and Gory's substantive claims are meritorious.

I. PHA Has Waived its Right to Enforce the Arbitration Provision

*7 In its proposed findings of fact and conclusions of law, PHA reiterates the previously rejected argument that the Arbitration Provision requires Gory to submit this dispute to a Contracting Officer before the Court can hear the matter. Because PHA did not act on this claim until two months before the Trial, however, it waived the right to raise this argument. [7]

7 Although the Court believes it addressed this matter adequately in its April 10, 2001 opinion, it has incorporated its justifications into this opinion for the sake of completeness and comprehensiveness.

In general, Pennsylvania favors the dispute settlement through arbitration [8] as a way "to promote swift and orderly disposition of claims."*Midomo Co. v. Presbyterian Hous. Dev. Co.,* 739 A.2d 180, 190 (Pa.Super.Ct.1999) (quoting *Hazleton Area School Dist. v. Bosak,* 672 A.2d 277, 282 (Pa.Commw.Ct.1996)).*See also In re Fellman,* 412 Pa.Super. 577, 582, 604 A.2d 263, 265 (1992) ("[a]rbitration agreements are generally encouraged as a prompt, economical and adequate solution of controversies"). A line of Pennsylvania cases holds that a mandatory arbitration provision deprives a court of subject matter jurisdiction. *See, e.g., Shumake v. Philadelphia Bd. of Educ.,* 454 Pa.Super. 556, 561, 686 A.2d 22, 25 (1996). Because "lack of subject matter jurisdiction is a defense that cannot be waived,"*LaChappelle v. Interocean Mgmt. Corp.,* 731 A.2d 163, 167 (Pa.Super.Ct.1999), it could be inferred from this line of cases that an objection based on an agreement to arbitrate may be raised at any time and cannot be waived.

8 While PHA bases its argument on Gory's failure to exhaust administrative remedies, it has been noted that Pennsylvania's policy of favoring arbitration is comparable to the "long-standing public policy of hesitancy to interfere with administrative proceedings before all administrative remedies have been exhausted."*Mid-Atlantic Toyota Distribs., Inc. v. Charles A. Bott, Inc.,* 101 Pa. Commw. 46, 52-53, 515 A.2d 633, 636 (1986) (citation omitted).*Cf. Lancaster Cty. v. Pennsylvania Labor Relations Bd.,* 761 A.2d 1250, 1257 (Pa.Commw.Ct.2000) (applying law on failure to exhaust administrative remedies to a request for arbitration).

Recently, however, Pennsylvania courts have reached the opposite conclusion, and a pattern of cases holding that the defense of arbitration is waivable has emerged. *See, e.g., Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. Partnership,* 416 Pa.Super. 45, 49, 610 A.2d 499, 501 (1992) (concluding that the defendant "waived its right to enforce the arbitration clause"). Courts have looked at the following to evaluate a claim of waiver:

> The key to determining whether arbitration has been waived is whether the party, by virtue of its conduct, has accepted the judicial process. Acceptance of the judicial process is demonstrated when the party (1) fails to raise the issue of arbitration promptly, (2) engages in discovery, (3) files pretrial motions which do not raise the issue of arbitration, (4) waits for adverse rulings on pretrial motions before asserting arbitration, or (5) waits until the case is ready for trial before asserting arbitration.

St. Clair Area Sch. Dist. Bd. of Ed. v. E.I. Assocs., 733 A.2d 677, 682 n. 6 (Pa.Commw.Ct.1999) (citations omitted).

While a defense of arbitration clearly is waived if not raised as a new matter, the Superior Court made it clear in *Goral v. Fox Ridge, Inc.*, 453 Pa.Super. 316, 683 A.2d 931 (1996), that merely raising an agreement to arbitrate in this manner is not sufficient to preserve the defense. In *Goral,* the defendants pleaded as a new matter that, "alternatively, any of [the plaintiffs'] claims that are not barred by the applicable statute of limitations are required by ... agreement of sale to be submitted to common law arbitration." 453 Pa.Super. at 319, 683 A.2d at 932. Ten months later, the defendants objected to a request for discovery, arguing that the plaintiffs' claims had to be submitted to arbitration. Nearly six months after the discovery dispute, the defendants filed a motion to compel arbitration, which the trial court denied.

***8** On appeal, the Superior Court affirmed the lower court's decision, concluding that the defendants' "repeated references to the arbitration [were] not sufficient to avoid a finding of waiver."453 Pa.Super. at 321, 683 A.2d at 933. The fact that the defendants raised the question of arbitration in their new matter specifically was unpersuasive because "[t]hey did so ... only as an alternative to their preferred option of winning a favorable ruling from the court."453 Pa.Super. at 322, 683 A.2d at 933. The court also noted that, prior to filing their motion to compel, the defendants "did nothing to move the matter to arbitration" and instead "allowed the case to linger on the trial court's docket and awaited discovery."453 Pa.Super. at 323, 683 A.2d at 934. Had the defendants truly wanted the matter resolved by arbitration, the court counseled, they could have, and, impliedly, should have, taken steps toward that end in their preliminary objections. 453 Pa.Super. at 322, 683 A.2d at 934.

The facts of this matter are similar to those of *Goral.*Here, before filing the Motion on February 16, 2001, PHA made no attempt to invoke the defense of administrative remedies after raising it in its answer almost a year before.[9] Indeed, the court's reasoning in *Goral* is even more convincing here, as this case had progressed far beyond discovery and was scheduled for trial less than a month after the relevant motion was assigned.[10] By engaging in discovery, waiting until the eve of the Trial to submit its motion, participating in a court-sponsored settlement conference, demanding a jury trial and attempting to assert a counterclaim, PHA demonstrated a clear acceptance of the judicial process. In addition, referring this matter to arbitration after such extensive court involvement would fail to advance, and would even subvert, arbitration's purpose of increased efficiency and judicial economy. *Cf. School Dist. of Phila. v. Livingston-Rosenwinkel, P.C.*, 690 A.2d 1321, 1322 (Pa.Commw.Ct.1997) (refusing to enforce arbitration provision "because enforcement of the arbitration provision would frustrate the public policy interest in efficient dispute resolution"). Thus, PHA waived any right it may have had to enforce the Arbitration Provision, and PHA's argument that this matter must be submitted to a Contracting Officer must be rejected once again.

9 PHA's failure to raise the defense of administrative remedies is even more inadequate than the *Goral* defendants' "repeated references" to the arbitration provision in that case. In addition, the *Goral* defendants cited the relevant arbitration provision in their new matter, while PHA did not specifically invoke the Arbitration Provision or Gory's obligation to submit this matter to a Contracting Officer at any point before filing the Motion.

10 According to the docket in this matter, PHA's motion for summary judgment was assigned on March 23, 2001, and its motion to amend was assigned on April 3, 2001.

II. Gory Has Sustained its Breach of Contract Claim

To establish a claim for breach of contract, a claimant must show "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages."*CoreStates Bank, N.A. v. Cutillo,* 723 A.2d 1053, 1058 (Pa.Super.Ct.1999) (citation omitted). While a breaching party may pursue a breach of contract claim against another breaching party, the pursuing party's recovery is limited to those benefits "in excess of the loss that he has caused by his own breach."*Lancelotti v. Thomas,* 341 Pa.Super. 1, 10, 491 A.2d 117, 122 (1985) (quoting Restatement (Second) of Contracts § 374(1) (1979)).

***9** Gory has established, and PHA appears to acknowledge, that the Contract satisfies the first requirement of this cause of action, namely, the existence of a contract. The remaining questions are whether PHA breached the Contract and, if so, the amount of damages Gory suffered as a result.

A. By Failing to Pay Gory for its Work and by Failing to Ensure the Project's Timely Completion, PHA Breached the Contract

In the course of the Trial, Gory showed that PHA breached the Contract by failing to pay Gory for its work. Even a cursory examination of the record reveals a recurring pattern: Gory requested payment, and PHA invariably ignored to Gory's requests. Because of PHA's continuing delinquency, there remain outstanding amounts that PHA has never paid Gory, a clear breach of the Contract.

PHA also breached the Contract through the delay of the Project and its failure to ensure that the Preliminary Project Milestones were met. The Contract specifies that the Project is to extend 500 days and assigns responsibility for ensuring completion within that time frame to PHA and its representatives. Plaintiff's Ex. 4 at 5B, D-37. While Plaintiff's Exhibit 17 establishes that Gory agreed to the 190-day Extension proposed by PHA,[11] this was done with the express condition that Gory's consent "neither prejudices, limits or adversely affects" Gory's delay claim against PHA. Plaintiff's Ex. 17. In addition, the reasons for the delay are clearly attributable to PHA: in spite of the many specific notices Gory sent to PHA and its representatives informing them of the ongoing Project delays, PHA ignored these notices and took no action to remedy the situation.[12] *Cf. Coatesville Contractors & Eng'rs. Inc. v. Borough of Ridley Park,* 509 Pa. 553, 560, 506 A.2d 862, 865 (1986) ("exculpatory provisions in a contract cannot be raised as a defense where ... there is a failure on the part of the owner to act in some essential matter necessary to the prosecution of the work"). Thus, PHA breached the Contract by failing to ensure that the Project was completed within the 500-day period set forth in the Contract and by failing to pay Gory amounts required by the Contract.

11 As an aside, there is no evidence that Gory consented to extending the completion date for the Project beyond the Extension Period.

12 PHA also appears to take issue with the fact that Gory first communicated its concerns about the Project to Barclay and not to Mr. Mosely, the Contracting Officer or PHA directly. The Contract, however, indicates that Barclay is PHA's authorized representative on the Project, and the concerns that Gory was seeking to have addressed fall within the scope of Barclay's responsibilities. Plaintiff's Ex. 4 at ¶ 5A. In addition, Gory raised its concerns about the delay at meetings at which Mr. Mosely was present. As a result, even if Gory did not communicate with the official Contracting Officer or anyone else at PHA directly, its actions are understandable and excusable.

B. Gory Is Entitled to Damages for the Full Amounts Due for Work Completed and for the Project Delays

Gory contends that it is owed compensation for unpaid Plumbing Work it did on the Project and for the delays in completing the Project. The Court agrees and further concludes that PHA's allegations that Gory also breached the Contract do not entitle it to limit the amounts it owes Gory.

1. PHA's Breach of the Contract Has Damaged Gory in the Amount of 239,984.75, Exclusive of Interest

Gory's claim for damages can be broken down into two parts: damages for Plumbing Work for which it was never paid and damages for the delay in the Project's completion.

Plaintiff's Exhibit 40 shows that the total adjusted Contract amount payable to Gory was $1,523,097.77. This is within the payment modification amounts authorized by PHA. Plaintiff's Ex. 29.[13] To date, Gory has been paid only $1,429,577.02, leaving a balance of $93,520.75. Plaintiff's Ex. 40; N.T. I:77. In addition, PHA had paid Gory $4,964.00 for work done in accordance with Change Order Number Eight but subsequently withdrew its payment. N.T.I:77-I:79. Thus, the total amount outstanding for Gory's work on the Project is $98,484.75.

13 Although Plaintiff's Exhibit 29 indicates an adjusted authorized Contract amount of $1,537,174.66, it appears from Plaintiff's Exhibit 40 that subsequent modifications lowered this to $1,523,097.77.

***10** Gory contends that it is entitled to interest on the amount outstanding, and the Court must concur. Under 73 Pa.C.S. § 1628 (repealed as of Nov. 11, 1998), which was in effect at the time the Contract was executed, a contractor working under a public contract[14] is entitled to interest on a final payment:

14 A "public contract" is defined as follows:

> A contract exceeding $50,000 for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including heating or plumbing contracts, under the terms of which the contractor is required to give a performance bond and labor and material payment bond as provided by the act of December 20, 1967 (P.L. 869, No. 385) known as the "Public Works Contractors' Bond Law of 1967," but excepting work performed for the State Highway and Bridge Authority.

73 Pa.C.S. § 1621 (repealed as of Nov. 11, 1998). The Contract appears to satisfy these requirements.

The final payment due the contractor from the contracting body after substantial completion of the contract shall bear interest at a rate of 6% per annum for all contracts without provisions for retainage and at a rate of 10% per annum for all contracts with provisions for retainage, such interest to begin after the date that such payment shall become due and payable to the contractor: Provided, however, That where the contracting body has issued bonds to finance the project, interest shall be payable to the contractor at the rate of interest of the bond issue or at the rate of 10% per annum, whichever is less.

73 Pa.C.S. § 1628.[15] Here, the Contract includes a retainage clause, and there is no indication that PHA issued bonds to finance the Project. Plaintiff's Ex. 2 at ¶ 27(f). Moreover, it is apparent that the Project, including Gory's work under the Contract, was substantially completed[16] and that the outstanding amounts were payable and due by February 1, 1999, the date from which Gory has requested that the Court compute interest. Thus, Gory is entitled to interest on the outstanding amount of $98,484.75 at a rate of 10 percent per annum beginning February 1, 1999.

15 This statute may be treated as part of the Contract because "substantive laws in effect when the parties enter into a contract are implicitly incorporated into it."*Parsonese v. Midland Nat'l Ins. Co.*, 550 Pa. 423, 428-29, 706 A.2d 814, 816 (1998) (citing *DePaul v. Kauffman*, 441 Pa. 386, 398, 272 A.2d 500, 506 (1971)).

16 "Substantial completion" is defined as follows:

> Construction that is sufficiently completed in accordance with contract documents and certified by the architect or engineer of the contracting body, as modified by change orders agreed to by the parties, so that the project can be used, occupied or operated for its intended use. In no event shall a project be certified as substantially complete until at least 90% of the work on the project is completed.

73 Pa.C.S. § 1621 (repealed Nov. 11, 1998). Because Emlen Arms has been occupied, the Court has inferred that PHA has certified it as completed.

Gory is also entitled to damages caused by the PHA's failure to prevent the 283-calendar day delay of the Project. Pennsylvania law allows a plaintiff to establish damages by "expert witnesses, or by persons with knowledge and experience qualifying them to form a reasonably intelligent judgment as to value."*Walnut Street Fed. Sav. & Loan Ass'n v. Bernstein*, 394 Pa. 353, 356, 147 A.2d 359, 361 (1959) (quoting *Westinghouse Air Brake Co. v. City of Pittsburgh*, 316 Pa. 372, 376, 176 A. 13, 15 (1934)). Mr. Gory's credentials and extensive experience qualify him to estimate the delay-related damages, and the evidence supporting his conclusion that he suffered losses amounting to $500.00 per calendar day of delay is compelling. *Cf. Pennsylvania Dept. of Transp. v. James D. Morrissey, Inc.*, 682 A.2d 9, 16 (Pa.Commw.Ct.1996) (a contractor "is not required to prove its actual costs with mathematical certainty; rather, it need only introduce evidence which affords a sufficient basis for estimating the damages with reasonable certainty," and "estimates which have a basis in reason are legally sufficient to support an award"); *Barrack v. Kolea*, 438 Pa.Super. 11, 22, 651 A.2d 149, 155 (1994) (evidence is sufficiently substantial to support an award of damages if it is "relevant and adequate to support a reasonable person's conclusion"). Mr. McCusker, in contrast, does not have Mr. Gory's expertise or experience, was not involved in the Project and gave no substantive basis for his estimate of $75.00 per week in damages. *Cf. Sprang & Co. v. USX Corp.*, 410 Pa.Super. 254, 264, 599 A.2d 978, 983 (1991) (discounting testimony of appellant's witnesses where they did no more than "attack the conclusions drawn by appellee's experts"). As a result, the Court must agree with Gory that it suffered damages attributable to PHA as a result of the 283-calendar day delay in the amount of $500.00 per calendar day, for a total of $141,500.00 in damages. When the amount owed for Gory's work on the Project is included, PHA owes Gory a total sum of $239,984.75 in damages, exclusive of interest.

2. Gory Fulfilled its Obligations under the Contract, Precluding Any Limitation on Damages

***11** PHA has attempted to argue that Gory breached its obligations under the Contract, precluding it from recovering the full amount it claims is due.[17] In answering the Complaint, however, PHA admitted that Gory completed all the work required of it under the Contract. In addition, allowing PHA to amend the Answer at Trial and to withdraw its admission would have caused Gory substantial prejudice and would have been improper. Accordingly, the Court cannot find that Gory breached the Contract or that its damages should be limited.[18]

17 PHA sought to amend the Answer to assert a counterclaim on this basis. Due to the lateness of its motion to amend and the prejudice it would have caused Gory, however, the Court denied PHA's motion.

18 As noted *supra,* the fact that a claimant has also breached a contract does not foreclose the possibility of recovery completely but merely limits the claimant to damages in excess of the harm he or she has caused. *Lancelotti v. Thomas,* 341 Pa.Super. 1, 10, 491 A.2d 117, 122 (1985) (quoting Restatement (Second) of Contracts § 374(1))

a. PHA's General Denial in its Answer Constitutes an Admission That Could Not Be Amended at Trial

Under Pennsylvania Rule of Civil Procedure 1019(c) ("Rule 1019(c)"), a pleading party may aver the satisfaction of conditions precedent generally. In contrast, Rule 1019(c) requires that a denial of the performance, occurrence or satisfaction of conditions precedent be made "specifically and with particularity." Rule 1019(c). When a denial of this kind is made without specificity, such a general denial "shall have the effect of an admission."Pa. R. Civ. P. 1029(b).*See also First Wis. Trust Co. v. Strausser,* 439 Pa.Super. 192, 199, 653 A.2d 688, 692 (1995) (mortgagor's general denial of mortgagee's allegation regarding total amount due on mortgage constituted admission, allowing summary judgment); *Swift v. Milner,* 371 Pa.Super. 302, 309, 538 A.2d 28, 30 (1988) (by failing to deny specifically, the defendant admitted all allegations as to liability, allowing summary judgment on that issue); *City of Phila. v. Kenny,* 28 Pa. Commw. 531, 543-45, 369 A.2d 1343, 1250-51 (1977) (because general denial of liability did not imply denial of alleged failure to file return or to pay tax, such allegations were deemed admitted).[19] To determine whether a denial has been made with the requisite degree of specificity, a court must look at the pleading as a whole.*Commonwealth by Preate v. Rainbow Associates, Inc.,* 138 Pa. Commw. 56, 61, 587 A.2d 357, 360 (1991) (citation omitted); *Cercone v. Cercone,* 254 Pa.Super. 381, 391, 386 A.2d 1, 6 (1978).

19 In this sense, a general denial is unlike a general allegation in a complaint, which violates Pennsylvania's pleading rules and is subject to preliminary objections. *See Connor v. Allegheny Gen. Hosp.,* 501 Pa. 306, 311 n. 3, 461 A.2d 600, 602 n. 3 (1983) (if the defendant believed that allegations in the complaint were insufficiently specific, it "could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of [the] complaint").

PHA has asserted that Paragraphs Nine and Ten of the Answer constitute a specific denial of Gory's assertions of complete performance and satisfaction of conditions precedent:[20]

20 PHA relies on *Roban Construction. Inc. v. Housing Authority of City of Hazleton,* 67 Pa. D. & C.2d 130 (C.P. Luzerne 1974), to assert that Gory's Complaint does not include the allegation that it completed the work required of it under the Contract. In *Roban Construction, Inc.,* the court held that an averment of completed work does not constitute an allegation that conditions precedent have been satisfied if the contract in question imposed additional obligations on the plaintiff. In the instant case, however, Gory has specifically alleged that it satisfied all conditions precedent, rendering *Roban Construction, Inc.* irrelevant.

> 9. Denied. It is specifically denied that plaintiff undertook the performance of the work for the Plumbing Construction of the Project and did at all times stand ready, willing and able to furnish, install and complete all of the required work in accordance with the requirements of the Contract Documents. On the contrary plaintiff failed to adhere to the required provisions of the contract in question and therefore breached same. The specifics of the contract breach are in dispute and are the subject matter of this lawsuit.
>
> 10. Denied. It is specifically denied that the plaintiff performed and completed all of the work required for the Plumbing Construction of the Project and further specifically denied that all conditions precedent have been satisfied, discharged or waived by answering defendant Philadelphia Housing Authority. On the contrary defendant incorporates its answer to paragraph nine above as if the answer was herein set forth at length.

***12** Answer at ¶¶ 9-10.

In no way do these paragraphs constitute a specific denial. The second sentence of each paragraph does nothing more than preface Gory's allegations with the phrase "it is specifically denied that...." The remaining sentences of Paragraph Nine essentially state that Gory breached the Contract by failing to comply with it and that the instant dispute relates to the Contract. Notwithstanding PHA's repeated use of "specific" and related words, there is nothing specific about PHA's denial whatsoever. As a result, PHA's failure to set forth a specific denial constitutes an admission that Gory fully performed and completed the work required of it and that all conditions precedent to its claim have been satisfied.

The Court's refusal to allow PHA to amend the Answer to provide greater specificity and thus to revoke its admission was also proper. While Pennsylvania trial courts are granted

broad discretion to allow the amendment of a pleading, "Pennsylvania appellate courts have repeatedly ruled that an amendment will not be permitted ... where the amendment will surprise or prejudice the opposing party."*Capobianchi v. BIC Corp.*, 446 Pa.Super. 130, 134, 666 A.2d 344, 346 (1995) (quoting *Horowitz v. Universal Underwriters Ins. Co.*, 397 Pa.Super. 473, 479, 580 A.2d 395, 398 (1990).*See also Burger v. Borough of Ingram*, 697 A.2d 1037, 1041 (Pa.Commw.Ct.1997) (a pleading may not be amended "where surprise or prejudice to the other party will result"). A court may consider the question of timeliness "insofar as it presents a question of prejudice to the opposing party, as by loss of witnesses or eleventh hour surprise."*Pilotti v. Mobil Oil Corp.*, 388 Pa.Super. 514, 518-19, 565 A.2d 1227, 1229 (1989).

Here, there can be no question that Gory would be prejudiced by allowing PHA to withdraw its admission of Gory's complete performance. It goes without saying that a plaintiff's course of action, from discovery to trial, is framed by the matters in dispute. In the instant case, PHA's admission justified Gory's inference that PHA had acknowledged the satisfaction of its obligations under the Contract and that the Parties' dispute centered solely on the terms of the Contract, PHA's breach and damages. Thus, Gory, in preparing for Trial, reasonably omitted those facts and items that would have supported its allegation of full performance. To allow PHA now to withdraw its admission would effectively render Gory's work on this matter for the past year worthless and would amount to substantial prejudice, while rewarding PHA for its defective pleading and its ongoing failure to file motions in a timely manner. [21]

21 This prejudice is succinctly summarized by Gory's statement that it made "strategy decisions which were made relative to discovery which was undertaken and not undertaken" based on the Answer and "[t]he issues in the claims are framed by the pleadings."N.T. II:8.

PHA contends that "the plaintiff was prepared for defendant's claim of lack of performance of the contract and in fact presented evidence that the final payment was made on the contract and therefore performance was not an issue."PHA's Proposed Findings of Fact and Conclusions of Law at ¶ 18. These allegations of preparedness, however, are unsubstantiated, and PHA's assertions that Gory presented extensive evidence of its performance are not supported by the record.

***13** PHA's reliance on the recent Superior Court decision in *Ghaner v. Bindi*, No. 30 MDA 2000, 2001 WL 729191 (Pa.Super.Ct. Jun. 29, 2001) is also misplaced. In *Ghaner*, the plaintiff failed to file a pre-trial statement, and the trial court granted the defendant's request for an order precluding the plaintiff from presenting any testimony or exhibits at trial on this basis. On appeal, the court reversed, finding that the trial court had abused its discretion by imposing such a severe sanction.

While there are some similarities, the differences between *Ghaner* and the instant case are numerous:

The deficiency in *Ghaner* was a failure to file a pre-trial statement, which was due sixty days before trial. Pa. R. Civ. P. 212 .1(b)(1). The Superior Court thus concluded that the prejudice to the defendant was "in his immediate trial preparation" and was "curable on remand." 779 A.2d 585, 2001 WL 729191, at *5. In the instant matter, PHA's admission dates back to the Answer and has had an impact on every aspect and stage of this case for the past year.

In *Ghaner*, the plaintiff attributed her failure to file a pre-trial statement to withdrawal of her counsel, changes in court procedure and difficulties in communicating due to severe hearing loss. Here, PHA has presented no justification for its general denial and its delay in seeking to amend the Answer.

Under Pennsylvania Rule of Civil Procedure 212.2, a trial court has discretion as to what sanctions to impose for a failure to file a pre-trial statement and "may" include in the relief ordered a preclusion on testimony or exhibits. Pa. R. Civ. P. 212.2(c). In contrast, the Pennsylvania Rules of Civil Procedure implicated here are mandatory and direct that a denial of conditions precedent "*shall* be made specifically and with particularity" and that a general denial "*shall* have the effect of an admission." Pa. Rs. Civ. P. 1019(c), 1029(b) (emphasis added).

The *Ghaner* record revealed "only a single failure to comply with the Rules of Civil Procedure" and "no evidence of repeated failure to comply with the Rules of Civil Procedure or other orders of the trial court."779 A.2d 585, 2001 WL 729191, at *4-*5. In this case, PHA has repeatedly filed documents with the Court in an untimely manner.

In *Ghaner*, the trial court's order prohibited the plaintiff from presenting any testimony or exhibits at trial whatsoever and "was tantamount to a dismissal" of

the action. 779 A.2d 585, 2001 WL 729191, at *3. Here, the Court refused to allow evidence as to Gory's supposed failure to satisfy conditions precedent but granted PHA wide latitude in exploring Gory's other actions, the Contract's terms, PHA's own conduct and the amount and extent of damages.

Because *Ghaner* is easily distinguishable from the instant case, it does not support PHA's claims of error.[22] Thus, for the foregoing reasons, granting PHA leave to amend the Answer would have prejudiced Gory, and PHA is bound by its admission in the Answer.[23]

22 PHA also complains that, until Trial, Gory did not highlight PHA's admission by filing preliminary objections, a motion for judgment on the pleadings or any other manner. This argument verges on the absurd. In the first place, it would be laughable for a party to file preliminary objections on the grounds that an opposing party's failure to deny an allegation specifically and with particularity has resulted in an admission. Additionally, PHA has not supplied the Court with a single case that would require a party to file a motion for judgment on the pleadings, a request for admissions or any other document to confirm admissions made in the answer to a complaint. PHA's argument must therefore be rejected.

23 In spite of PHA's protestations to the contrary, the Court's decision at Trial to allow Gory to amend the length of the Extension Period does not conflict with this conclusion. Gory's motion was based on PHA's own exhibits and evidence, as presented to the Court, and thus could not have prejudiced PHA.

b. PHA's Admission Establishes That Gory Fully Performed Under the Contract, Precluding Any Limitation on Damages

***14** An admission in a pleading, such as PHA's admission in the Answer, constitutes a judicial admission and has "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact."*Durkin v. Equine Clinics, Inc.*, 376 Pa.Super. 557, 567, 546 A.2d 665, 670 (1988) (stating further that such admissions are "conclusive in the case").*See also Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, 1054 (Pa.Commw.Ct.1997) (judicial admissions, which include "statements made by a party in the pleadings," are "conclusive" and "have the effect of withdrawing a fact from issue and dispensing it without the need for proof of the fact"). As a result, PHA's admission was dispositive, and the Court must conclude that Gory performed fully and completed all work required of it under the Contract.

Because Gory satisfied its responsibilities under the Contract, no limitation on damages applies. Thus, PHA is responsible to Gory for $141,500.00 in damages stemming from the delay in completing the Contract and $98,484.75, plus interest on that amount computed at a rate of 10 percent per annum from February 1, 1999, owed for Gory's work on the Project.

CONCLUSIONS OF LAW

1. Because PHA waived its right to invoke the Arbitration Provision, Gory need not present its claim to Contracting Officer, and the Court has subject matter jurisdiction in the instant matter.

2. There was a contract, in the form of the Contract, between Gory and PHA.

3. PHA breached the Contract by failing to pay Gory the full amounts required under the Contract and by failing to ensure that the Project was completed within the 500-calendar day period set forth in the Contract.

4. Gory fully performed and completed all of the work required of it under the Contract.

5. As a result of PHA's breach of the Contract, Gory has suffered the following damages: $98,484.75 for Contract work performed and completed, inclusive of change orders; and $141,500.00 for the 283-day delay in completing the Project.

6. Gory is entitled to prejudgment interest on the amount owed for its work under the Contract. Such interest is to be computed at a rate of 10 percent per annum beginning February 1, 1999.

7. The Court awards Gory $98,484.75, plus interest on this amount to be computed at the rate of 10 percent per annum from February 1, 1999 until the date on which PHA makes payment, and an additional $141,500.00.

ORDER

AND NOW, this 11th day of July, 2001, upon consideration of the pleadings, trial, and the briefs of counsel, and for the

reasons set forth in the contemporaneously filed Findings of Fact and Conclusions of Law, this court finds in favor of Plaintiff James J. Gory Mechanical Contracting, Inc. and against Defendant Philadelphia Housing Authority. It is hereby ORDERED and DECREED that the Defendant shall pay the Plaintiff $98,484.75, plus interest on this amount to be computed at the rate of 10 percent per annum from February 1, 1999 until the date on which PHA makes payment, and $141,500.00.

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EXHIBIT E

1996 WL 943774 (Pa.Com.Pl.)
Court of Common Pleas of
Pennsylvania, Fayette County.

Safeguard

v.

Standard Machine and Equipment Co. Inc.

No. 853 of 1996, G.D. | October 29, 1996.

Opinion

SOLOMON, J.

Attorneys and Law Firms

*2 *Vincent J. Roskovensky Jr., James R. Apple* and *James S. Alter*, for plaintiff.

Nancy Duffield Vernon, for defendant.

STATEMENT OF THE CASE

The plaintiff's complaint contained 14 paragraphs. The first two identified the parties and were admitted in the defendant's answer. In short, the remaining paragraphs averred that: the defendant requested the goods and services which are the subject of the complaint; *3 the defendant agreed to pay the prices charged; there is a balance due the plaintiff in the amount of $5,163.43; and that the plaintiff has made repeated demands for payment which the defendant refuses.

The defendant's answer admitted the identity of the parties, but purported to deny the remaining averments by using the identical language in paragraphs three through 14, inclusive, as follows: "The averment contained in paragraph ... is specifically denied. After reasonable investigation, the defendant is without sufficient knowledge or information to form a belief as to the truth of the averment. Proof is demanded."

DISCUSSION

Pa.R.C.P. 1029(b) provides that "[A] general denial or a demand for proof, except as provided by subdivision (c) of this rule, shall have the effect of an admission." The pertinent exception in paragraph (c) of Rule 1029 sets forth that "[A]n averment shall be deemed to be denied if proof thereof is demanded and the pleader states ... (2) that he is without such knowledge or information because the means of proof are within the exclusive control of an adverse party or hostile person."

This exception affords relief to a pleader who is unable to obtain the information needed in order to plead because such information is in the control of the adverse party. However, "where it is obvious that the means of information are not within the exclusive control of the adverse party the court ought to ignore such an averment": *Elia v. Olszewski*, 368 Pa. 578, 580 n.1, 84 A.2d 188, 190 n.1 (1951); *Delaware Valley Carpeting v. Leicht*, 73 Pa. D. & C.2d 51 (1975).

In the instant case, the defendant certainly must know whether it requested the plaintiff's goods and services, whether it agreed to a price, and whether it received the goods. Since this knowledge or information is not within the exclusive control of the plaintiff, the defendant *4 may not rely upon Rule 1029(c)(1) to excuse a failure to make a specific denial of the factual allegations contained in the complaint of the plaintiff. *Cercone v. Cercone*, 254 Pa. Super. 381, 386 A.2d 1 (1978). If the defendant could not properly rely upon the exception provided by Rule 1029(c)(1), Rule 1029(b) imposed upon it an obligation to deny specifically the factual allegations of the complaint. *Id.* Having failed to deny specifically the factual allegations of the complaint, with the exception of admitting the identity of the parties, the answer of the defendant effectively manifests the defendant's admission to the facts averred in the complaint. *Swift v. Milner*, 371 Pa. Super. 302, 538 A.2d 28 (1988). Hence, judgment on the pleadings must be entered in favor of the plaintiff.

Wherefore, we will enter the following order.

ORDER

And now, October 29, 1996, it is hereby ordered and directed that the motion of the plaintiff for judgment on the pleadings is granted.

Parallel Citations

34 Pa. D. & C.4th 1

End of Document

EXHIBIT F

2001 WL 1855055
Pennsylvania Court of Common Pleas.

HYDRAIR, INC. et al
v.
NATIONAL ENVIRONMENTAL BALANCING BUREAU et al

No. 2846 FEB.TERM.2000. | April 23, 2001.

OPINION

HERRON, J.

*1 Defendants National Environmental Balancing Bureau (NEBB), Pennsylvania Environmental Balancing Association (PEBA), Eastern Air Balance, Inc. (EAB), Bobby Roaten, Ted Salkin, Patricia Casey, Michael Dolim, Carlin Management and William Reardon filed six sets of preliminary objections to the second amended complaint of plaintiffs Hydrair, Inc. and Albert Hawkins. The court sustains the objections in part.

BACKGROUND

NEBB is a trade association that certifies environmental balancing firms. NEBB's offices are in Gaithersburg, Maryland. Dolim is a former vice-president of NEBB. He has not worked for NEBB since November 30, 1999.

PEBA is the Pennsylvania chapter of NEBB. Carlin Management is the company that PEBA hired to manage its office. Reardon is an owner of Carlin Management and secretary or treasurer of PEBA. Casey is a Carlin Management employee who serves as PEBA's office manager. Salkin is chairman of the PEBA technical committee. Roaten is the former president of PEBA.

Environmental balancing firms test and balance heating and air conditioning systems. EAB and Hydrair are Pennsylvania environmental balancing firms and are competitors. Roaten is the president and owner of EAB, and Hawkins is an employee of Hydrair.

Until this year, plaintiffs held a NEBB certification to perform balancing work. The plaintiffs allege that the defendants conspired to revoke the plaintiffs' certification by misrepresenting the quality of the plaintiffs' balancing work to each other and to plaintiffs' customers. Plaintiffs allege that, without the certification, they cannot perform balancing work.

On February 25, 2000, plaintiffs Hydrair and Hawkins filed the original complaint against defendants NEBB, PEBA, EAB and Roaten. On July 27, 2000, the court sustained in part these defendants' preliminary objections to the complaint and granted the plaintiffs leave to file an amended complaint within 20 days. The plaintiffs filed an amended complaint on August 21, 2000—5 days late. Defendants filed preliminary objections, including an objection to strike the amended complaint as untimely. Instead of answering the preliminary objections, the plaintiffs filed a second amended complaint. The second amended complaint added Salkin, Casey, Dolim, Carlin Management and Reardon as defendants. The defendants again filed preliminary objections, including a motion to strike the second amended complaint based on the untimeliness of the first amended complaint. The court sustained the objection to untimeliness and struck the second amended complaint. On motion for reconsideration the court vacated that order.

At issue now are the preliminary objections to the second amended complaint. The second amended complaint—which is not a model of clarity—has five counts. Count I asks for an injunction against only NEBB to that orders NEBB to restore the certification. Count II claims tortious interference with contractual relations against all defendants. The plaintiffs base this claim on two sets of actions: Roaten and EAB's interference with Hydrair's existing balancing contracts with two school districts and all defendants' participation in decertifying the plaintiffs such that plaintiffs could not get future balancing contracts. Count III claims fraud against all defendants. Count IV claims defamation against all defendants except NEBB based on derogatory statements about the quality of the plaintiffs' work. Count V claims conspiracy to defame against all defendants except NEBB.

DISCUSSION

I. THE COURT OVERRULES THE OBJECTIONS TO PLAINTIFFS' UNTIMELY AMENDMENT OF THE COMPLAINT.

*2 NEBB objects to the second amended complaint as untimely. The court overrules the objection. In their motion

for reconsideration, the plaintiffs set forth just cause for the five-day delay, and the court sees no prejudice accruing to the defendants from the delay. *Peters Creek Sanitary Auth. v. Welch,* 545 Pa. 309, 681 A.2d 167, 170 (1996).

II. THE COURT SUSTAINS DOLIM'S OBJECTION TO IMPROPER FORM OF SERVICE.

Dolim objects on the ground of improper service of the second amended complaint and lack of personal jurisdiction. The court sustains the objections and quashes service on Dolim.

Under Pennsylvania's Long–Arm Statute, a plaintiff may serve a defendant outside of Pennsylvania by any form of mail addressed to the defendant and requiring a signed receipt. 42 Pa.C.S.A. § 5323(a)(3).[1] The defendant or his authorized agent must sign the return receipt. Pa.R.C.P. 403*and* 404(2). The certificate of service that the plaintiffs filed with the Prothonotary shows that the plaintiffs sent a copy of the second amended complaint to NEBB in Gaithersburg, Maryland. Attached to the certificate of service are the transmittal letter addressed to Dolim at NEBB and the return receipt addressed only to NEBB, received on October 16, 2000 and bearing the signature of what appears to be "Toni Day." Dolim did not sign the receipt. Without Dolim's signature, service was not proper. Pa.R.C.P. 403.

1 Plaintiffs do not argue that service was proper under Maryland law. 42 Pa.C.S.A. § 5323(a) ("When the law of this Commonwealth authorizes service of process outside this Commonwealth, the service, when reasonably calculated to give actual notice, may be made ... (2) In the manner provided or prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction.")

In their brief, plaintiffs argue that service was proper because they served NEBB and NEBB is Dolim's agent. The court disagrees for two reasons. First, the certificate of service that plaintiffs filed is not sufficient for this court to find that NEBB or Day was Dolim's authorized agent to accept service of process. Pa.R.C.P. 405(b)("A return of service shall set forth ... the identity of the person served and any other facts necessary for the court to determine whether proper service has been made."); *Neff v. Tribune Printing Co.,* 421 Pa. 122, 218 A.2d 756, 757 (1966)(stating that there is no presumption of validity of service of process, and holding service was invalid where, among other things, the return of service did not set forth the agency of the person served). Second, the plaintiffs have admitted that Dolim has not appointed an agent for service of process. In paragraph 26 of his preliminary objections, Dolim alleges that he "has not authorized any person at NEBB's offices or anyone else to accept, receive or sign for service of process on his personal behalf."In violation of Pa.R.C.P. 1029(a) and Phila.Civ.R. *1028(C)(1), plaintiffs did not specifically admit or deny this factual averment or assert lack of knowledge under Pa.R.C.P. 1029(c). Instead, plaintiffs answered paragraph 26 as follows: "Denied. This allegation avers matters outside the four corners of the complaint and is thus not cognizable by way of preliminary objection."Answer to Dolim's Preliminary Objections ¶ 26. The plaintiffs are incorrect in arguing that they need not specifically answer this objection raising outside evidence. The rules specifically provide for the admission of outside evidence to resolve an objection raising issues of fact about improper service. Pa.R.C.P. 1028(c)(2)*and* Note. Had plaintiffs specifically denied paragraphs 26 or alleged lack of knowledge, the court might have ordered discovery to resolve the objection. But because plaintiffs did not specifically admit or deny paragraph 26 or assert a lack of knowledge, the court must deem plaintiffs to have admitted that Dolim has not authorized anyone at NEBB to accept service for him. Pa.R.C.P. 1029(b); *Cercone v. Cercone,* 254 Pa.Super. 381, 386 A.2d 1, 4 (1978). Therefore, Day was not Dolim's agent to accept service.

*3 Plaintiffs also argue that service was proper because they served Dolim at his usual place of business. The court disagrees. A plaintiff may serve process by *handing* the complaint at the "office or usual place of business of the defendant to his agent or the person for the time being in time of the office."*See*Pa.R.C.P. 402(a)(2)(iii)*and* 404(1). Because plaintiffs *mailed* a copy of the complaint, the service-by-hand rules do not apply. Pa.R.C.P. 403 governs service by mail. *Seealso*Pa.R.C.P. 404(2). Since that rule contains no provision allowing a person in charge of a defendant's office to sign for the defendant, such service is ineffective. *Weaver v. Martin,* 440 Pa.Super. 185, 655 A.2d 180, 193 (1995)(stating that service of process by mail is allowed only pursuant to the limited procedures under Pa.R.C .P. 403, and holding that service was improper where plaintiff's attempted service by mail did not follow any of those limited procedures).

Plaintiffs did not properly serve Dolim and the court cannot exercise personal jurisdiction over Dolim. *Sharp v. Valley Forge Med. Ctr. and Heart Hosp.,* 422 Pa. 124, 221 A.2d 185, 187 (1966) ("The rules relating to service of process must be strictly followed, and jurisdiction of the court over

the person of the defendant is dependent upon proper service having been made...."). The court sustains the preliminary objection to improper service and personal jurisdiction. The court will order service of the complaint on Dolim stricken. Should the plaintiffs have the complaint reinstated, they shall serve Dolim in Pennsylvania within 30 days after that reinstatement or outside of Pennsylvania within 90 days after that reinstatement. *See*Pa.R.C.P. 401*and* 404; *Collins v. Park,* 423 Pa.Super. 601, 621 A.2d 996, 999 (1993) (holding that, "[w]here service of process is defective, the proper remedy is to set aside the service[,]" and that plaintiff cannot proceed against defendant until plaintiff effects proper service on the defendant).

Because the lack of effective service deprives the court of personal jurisdiction over Dolim, the court need not now consider Dolim's other arguments regarding lack of personal jurisdiction. Dolim may raise these arguments again should plaintiffs serve Dolim properly.

Dolim also alleges that plaintiffs did not attach copies of all prior pleadings to the process that they attempted to serve on Dolim. Pa.R.C.P. 425(a). The court deems plaintiffs' failure to specifically deny this factual allegation as an admission that they did not attach the pleadings. Pa.R.C.P. 1029(b); *Cercone,* 386 A.2d at 4. Though a violation of Pa.R.C.P. 425(a) would not ordinarily warrant striking service, it would warrant an order that plaintiffs serve Dolim with the omitted pleadings. *Almart Stores v.. Liberty Shop Ctr.,* 54 Pa.D. & C.2d 415, 418 (C.P. Lehigh 1972); *Jacobs v. Brooks,* 69 Pa.D. & C.2d 112, 114 (C.P. Somerset 1972); 2 Goodrich Amram 2d § 425(a)(2). Should plaintiffs attempt to serve Dolim again, that service shall include all prior pleadings.

III. THE COURT OVERRULES NEBB'S PRELIMINARY OBJECTION TO COUNT I (INJUNCTION).

*4 Count I seeks to enjoin NEBB from decertifying plaintiffs. NEBB argues that Count I is insufficiently specific and legally insufficient because Count I does not identify any bylaw, statute or common law that NEBB violated. The court disagrees and overrules the objection.

Count I alleges that defendants' actions in decertifying the plaintiffs were "omissions to do acts which are specifically required to be done under the NEBB by-laws and under the statutory and common law, the requirements of which are incorporated under the NEBB charter and by-laws."Second Amended Complaint ¶ 48. The court interprets the "acts which are specifically required ... under common law" as referring to the tort claims against NEBB in Counts II and III. The claim for tortious interference in Count II, if proven, would support a claim for an injunction. *SeeAdler, Barish, Daniels, Levin and Creskoff v. Epstein,* 482 Pa. 416, 393 A .2d 1175, 1181–1186 (1978) (affirming trial court's order enjoining tortious interference with contractual relations). Therefore, the court must overrule NEBB's objection to Count I.

The court notes, however, that the plaintiffs' claim for an injunction must depend entirely upon their right to relief for tortious interference, for the plaintiffs' claim under the bylaws is not legally sufficient and is insufficiently specific. Count I alleges that the NEBB bylaws give plaintiffs the right to notice of allegations and the right to a full and fair evidentiary hearing, and that NEBB violated these rights.[2] Second Amended Complaint ¶¶ 49, 50. In considering this preliminary objection, the court accepts as true the factual allegation that the bylaws state that plaintiffs shall receive notice of allegations and a full and fair evidentiary hearing.[3] *Borden v. Baldwin,* 444 Pa. 577, 281 A.2d 892 (1971). But the court need not accept as true plaintiffs' legal conclusion that these provisions confer legally enforceable rights on the plaintiffs. *Detweiler v. School Dist. of Borough of Hatfield,* 376 Pa. 555, 104 A.2d 110, 113 (1954) (though court must accept as true the plaintiff's factual averments as to the contents of a writing, the court is not bound by plaintiff's legal interpretation of these provisions). In their complaint, plaintiffs cite no law giving plaintiffs the right to enforce the bylaws against NEBB. In their brief, plaintiffs do not even discuss Count I. Do plaintiffs base their right to enforce the bylaws on contract law? Do plaintiffs base their claim on tort law? Do they base it on the Maryland General Corporation Law? Md.Code.Ann., Corps. & Ass'ns § 1–101 *etseq.* After three rounds of pleading, the court still can only speculate as to plaintiffs' legal theory; and the plaintiffs' failure to attach a copies of the bylaws —which defendants produced to plaintiffs during discovery —compounds the court's confusion. Therefore, if plaintiff's tortious interference claim eventually fails, so must its claim for an injunction.

2 Though plaintiffs did not attach a copy of the bylaws to its complaint, defendants did not object to this defect.

3 NEBB attached a copy of the bylaws to their March 7, 2000 response to plaintiffs' petition for a preliminary injunction. It is not clear whether the court may consider

these bylaws in determining the preliminary objections. *CompareEberhart v. Nationwide Mut. Ins. Co.*, 238 Pa.Super. 558, 362 A.2d 1094, 1097 (1976) (holding that court cannot consider writing introduced into record by defendant making preliminary objection unless plaintiff admits the authenticity of the writing) *withDetweiler v. School Dist. of Borough of Hatfield*, 376 Pa. 555, 104 A.2d 110, 113 (1954) (holding that, under an exception to the speaking demurrer rule, court may consider writing introduced into record by defendant making preliminary objection if plaintiff bases his claims on the writing) *andSatchell v. Insurance Placement Facility of Pennsylvania*, 241 Pa.Super. 287, 361 A.2d 375, 377 (1976)(same). Even were the court to consider the copy of the bylaws, however, the result would not change, for the bylaws do not expressly set forth the rights to which plaintiffs claim they are entitled. *SeeFramlau Corp. v. Delaware County*, 223 Pa.Super. 272, 299 A.2d 335, 338 (1972) (holding that, to the extent that a plaintiff's allegations are inconsistent with the writing upon which the plaintiff bases a claim, the writing governs).

IV. THE COURT SUSTAINS IN PART THE PRELIMINARY OBJECTIONS TO COUNT II (TORTIOUS INTERFERENCE).

***5** Count II alleges that the defendants tortiously interfered with Hydrair's existing and prospective contractual relations. The defendants object on the grounds of legal insufficiency and insufficient specificity. The court sustains these objections in part.

The elements of a claim for tortious interference with existing or prospective contractual relations are

(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;

(2) purposeful action on the part of defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;

(3) the absence of privilege or justification on the part of the defendant; and

(4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa.Super.Ct.1997) (citations omitted), *quotedinFlynn Corp. v. Cytometrics*, June 2000, No. 2102, op. at 11 (C.P.Phila.Nov. 17, 2000) (Sheppard, J.). "Absence of privilege or justification" means that the defendant's conduct was "improper." *Cloverleaf Dev., Inc. v. Horizon Fin., F.A.*, 347 Pa.Super. 75, 500 A.2d 163, 167 (1985) (citing Restatement (Second) of Torts § 767 for six factors to consider when determining whether defendant's conduct was improper). The plaintiffs must show actual pecuniary loss. *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa.Super.Ct.1998). They cannot recover solely for emotional distress or injury to reputation. *Id.*

A. Hawkin's Tortious Interference Claims.

As did the original complaint, the second amended complaint fails to allege the existence of a contract to which Hawkins was a party or a prospective contract to which he would be a party. Therefore, the court sustains the demurrers of all defendants to Hawkins' tortious interference claim in Count II. *Rutherfoord v. Presbyterian–University Hospital*, 417 Pa.Super. 316, 612 A.2d 500, 507 (1992) (stating that the existence of a contractual relationship between the plaintiff and a third person is an essential element of tortious interference).

B. Hydrair's Tortious Interference Claims.

Hydrair's tortious interference claim is legally sufficient against all defendants except Reardon.

1. *Hydrair's claims for tortious interference with existing contractual relations.*

Hydrair states a legally sufficient claim against Roaten and EAB for tortious interference with existing contractual relations based on the Hamburg and Kunkle contracts. The complaint identifies contractual relations with third parties: Hamburg and Kunkle school districts. The complaint alleges that Roaten and EAB acted purposefully to harm those relations: they made false statements to the Hamburg and Kunkle school districts in an effort to take over those jobs. Second Amended Complaint ¶¶ 20, 34–36. The complaint alleges that the actions of Roaten and EAB were unprivileged, Second Amended Complaint ¶ 48, and sufficiently alleges that Roaten and EAB acted improperly: they made false statements to Hamburg and Kunkle. *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472, 474–75 (1960) (allegation that defendant made false statements to plaintiff's employer with purpose and result of inducing employer to terminate plaintiff employee stated legally sufficient claim of intentional interference with contract); *Evans v. Philadelphia Newspapers, Inc.*, 411 Pa.Super. 244, 601 A.2d 330, 333 (1991) (stating that plaintiff may base claim of intentional

interference on a variety of torts, including defamation); *seealso*Restatement (Second) of Torts, § 768, cmt. h (stating that competition is not a defense to intentional interference with an *existing* contract). The complaint alleges actual damage: Roaten and EAB caused Hydrair to be delayed in finishing the Hamburg job and caused Hydrair to lose the Kunkle job. *SeeKelly–Springfield Tire Co. v. D'Ambro,* 408 Pa.Super. 301, 596 A.2d 867, 871 (1991) (holding that allegation that defendant's interference caused unnecessary delay in the sale of plaintiff's property to a third party was a sufficient allegation of actual damage). [4]

4 The court does not read the second amended complaint as alleging that any defendants except Roaten and EAB induced Kunkle or Hamburg school districts to breach their contracts. *SeeHydrair, Inc v. National Envtl. Balancing Bureau,* February 2000, No. 2846, op. at 4 (C.P.Phila. July 27, 2000) (Herron, J.) (sustaining preliminary objections to tortious interference claim of original complaint). Like the original complaint, the second amended complaint does not allege that the decertification proceedings interfered with the Hamburg and Kunkle jobs or that Hamburg and Kunkle even knew about the decertification proceedings. If Hydrair does claim tortious interference with existing contractual relations against NEBB, PEBA, Carlin Management, Casey, Dolim, Reardon or Salkin, that claim is legally insufficient and insufficiently specific.

***6** 2. *Hydrair's claim for tortious interference with prospective contractual relations.*

Hydrair states a legally sufficient claim against all defendants except Reardon for tortious interference with prospective contractual relations. Hydrair does not identify any specific prospective contracts with third parties, but instead alleges that defendants' conduct completely barred Hydrair from doing business in its territory. Second Amended Complaint ¶ 46. This is a sufficient allegation that prospective contractual relations existed. Hydrair need not identify specific prospective contracts. *SeeKelly–Springfield Tire Co.,* 596 A.2d at 871 (holding that plaintiff's was not deficient for failing to identify a specific prospective contractual relation, because "prospective contractual relations are, by definition, not as susceptible of definite, exacting identification as is the case with an existing contract with a specific person.").

The complaint alleges specific purposeful actions by NEBB, PEBA, Roaten, EAB, Salkin, Casey, Carlin Management and Dolim to decertify Hydrair. Second Amended Complaint ¶¶ 22, 24, 29, 33, 34, 37, 38, 39. The court can reasonably deduce from the complaint that NEBB certification is a requirement for obtaining a balancing contract, *see* Second Amended Complaint ¶¶ 46 *and* 51, and that these defendants would have known that the substantially certain result of decertification would be Hydrair's inability to get balancing contracts.*Field v. Philadelphia Elec. Co.,* 388 Pa.Super. 400, 565 A.2d 1170, 1178 (1989) (stating that "intent extends both to the desired consequences and to the consequences substantially certain to follow from the act."); Restatement (Second) of Torts § 8A (stating that "intent" means "that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it.").*SeealsoB.T.Z., Inc. v. Grove,* 803 F.Supp. 1019, 1023 (M.D.Pa.1992) (stating that the intent required for a tortious interference claim can be inferred where the result is substantially certain to occur.). Therefore, the complaint sufficiently alleges that these defendants "took purposeful action ... specifically intended ... to prevent" Hydrair from getting balancing contracts. *Strickland,* 700 A.2d at 985.But the second amended complaint does not allege any specific actions by Reardon. It only alleges that Reardon was the "owner/member" of Carlin Management, that he was "Secretary and/or Treasurer of PEBA," that he ran "the daily workings of PEBA," that he hired Casey, that he was a co-conspirator and that he caused PEBA's members to vote for Hydrair's decertification. Second Amended Complaint ¶¶ 27, 33, 37. Since there are no allegations of specific conduct by Reardon causing plaintiffs' decertification, the tortious interference claim against Reardon is legally insufficient and insufficiently specific.

***7** The complaint specifically alleges that the defendants' actions were not privileged, Second Amended Complaint ¶ 48, and it alleges sufficient facts such that the court cannot now conclude that the defendants did not act improperly. Second Amended Complaint ¶¶ 22, 33, 37, 38, 40. *SeeCreeger Brick & Bldg. Supply, Inc. v. Mid–State Bank & Trust Co.,* 385 Pa.Super. 30, 560 A.2d 151, 152 (1989) ("If there is any doubt as to whether a claim for relief has been stated, the trial court should resolve it in favor of overruling the demurrer.").

The complaint alleges actual damage: the decertification made Hydrair unable to get balancing contracts.

C. The Demand for Punitive Damages

Roaten, EAB, Carlin Management, Dolim and Casey [5] object to the demand for punitive damages in Count II. A plaintiff

may recover punitive damages for tortious interference when the defendant's "actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct...."*SHV Coal, Inc. v. Continental Grain Co.,* 526 Pa. 489, 587 A.2d 702, 704 (1991). The complaint alleges intentional acts by Roaten, EAB, Dolim, Casey and Carlin, and the court overrules their objections to the punitive damages demand in Count II.

5 Reardon objects to the demands for punitive damages in all counts. Since there is no legally sufficient claim against Reardon, the court does not address these objections.

In summary the court (1) sustains Reardon's objections to Count II; (2) sustains the objections of the NEBB, PEBA, Roaten, EAB, Salkin, Casey, Dolim and Carlin Management to Hawkin's claims in count II; (3) overrules the objections of NEBB, PEBA, Roaten, EAB, Salkin, Casey, Dolim and Carlin Management to Hydrair's claims in Count II; and (4) overrules the objections of Roaten, EAB, Carlin Management, Dolim and Casey to the demand for punitive damages in Count II.

V. THE COURT SUSTAINS THE DEFENDANTS' PRELIMINARY OBJECTIONS TO COUNT III (FRAUD).

Count III alleges that the defendants fraudulently crafted complaints about plaintiffs work on the Kunkle and Hamburg jobs and other jobs. The defendants argues that Count III is legally insufficient and insufficiently specific. The court agrees. Two of the elements of fraud are a misrepresentation by the defendant and the plaintiff's justifiable reliance on the misrepresentation.*Bortz v. Noon,* 566 Pa. 489, 729 A.2d 555, 560 (1999). As in the original complaint, there is no allegation in the second amended complaint that the defendants made a statement to the plaintiffs on which the plaintiffs relied. Instead, the second amended complaint alleges that the defendants made false statements to others —to Hydrair's customers and to each other—which caused plaintiffs harm. The court sustains the preliminary objections of the defendants to Count III.

VI. THE COURT SUSTAINS IN PART THE PRELIMINARY OBJECTIONS TO COUNT IV (DEFAMATION).

Count IV of the complaint alleges that PEBA, EAB, Roaten, Casey, Dolim, Carlin, Reardon and Salkin defamed the plaintiffs. In the July 27, 2000 opinion addressing the preliminary objections to the original complaint, the court held that plaintiffs had stated a legally sufficient claim for defamation against PEBA, EAB and Roaten . [6] Casey, Dolim, Reardon, Carlin Management and Salkin argue that Count III is legally insufficient and insufficiently specific. The court sustains the objections in part.

6 Roaten and EAB again object to the defamation claim and the court again overrules their objection.

***8** A claim for defamation must generally allege: " '1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third party's understanding of the communication's defamatory character; and 5) injury." ' *Walder v. Lobel,* 339 Pa.Super. 203, 448 A.2d 622, 627 (1985), quoting *Raneri v. DePolo,* 65 Pa.Commw. 183, 441 A.2d 1373, 1375 (1982); 42 Pa.C.S.A. 8343(a). The complaint must allege with particularity, among other things, the content of the defamatory oral or written statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made. *Itri v. Lewis,* 281 Pa.Super. 521, 422 A.2d 591, 592 (1980). "A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession." *Agriss v. Roadway Express, Inc.,* 334 Pa.Super. 295, 483 A.2d 456, 461 (1984).

The second amended complaint states a legally sufficient claim for defamation against Casey and Carlin Management. The complaint alleges that Casey wrote NEBB that she had been receiving numerous complaints about plaintiffs for years. This alleged statement supports an action for defamation per se because it could impute that plaintiffs lacked competence in the balancing trade.*Holland v. Flick,* 212 Pa. 201, 61 A. 828 (1905); *Price v. Conway,* 134 Pa. 340, 19 A. 687 (1890); *Zerpol Corp. v. DMP Corp.,* 561 F.Supp. 404, 409–10 (E.D.Pa.1983). The circumstances in which Casey made these statements—in a letter recommending decertification of plaintiffs based on poor performance—increases their defamatory nature. The defamation claim against Carlin Management is legally sufficient because the complaint sufficiently alleges that Casey acted within the scope of her authority when writing the letters.Restatement (Second) of Agency § 247. Therefore, the court overrules the demurrer and specificity objections of Casey Carlin Management to Count IV.

Casey and Carlin Management also object to the demand for punitive damages in Count IV. A plaintiff may recover punitive damages for defamation when the defendant acted with actual malice. *Bargerstock v. Washington Greene Community Action Corp.,* 397 Pa.Super. 403, 580 A.2d 361, 366 (1990). Actual malice means that the defendants published the defamatory statement with knowledge that it was false or with reckless disregard of whether it was false. *Id.* The complaint does not allege that Casey wrote the letter with knowledge that her statements in the letter were false or with reckless disregard of whether they were false. Therefore, the court sustains the objection of Casey and Carlin Management to the demand in Count IV for punitive damages.

The second amended complaint does not specifically identify any statements by Dolim or Reardon. It does not identify any statements by Salkin except statements by him to the plaintiffs. Therefore, the court sustains the objections of Dolim, Reardon and Salkin to Count IV. *Itri,* 422 A.2d at 592.

VII. THE COURT SUSTAINS THE DEFENDANTS' PRELIMINARY OBJECTIONSTO COUNT V (CONSPIRACY TO DEFAME).

***9** Count V alleges that PEBA, EAB, Roaten, Salkin, Casey, Carlin Management, Reardon and Dolim conspired to defame the plaintiffs. To state a cause of action for conspiracy, plaintiffs must allege a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an unlawful purpose. *Baker v. Rangos,* 229 Pa.Super. 333, 324 A.2d 498, 506 (1974). The Second Amended Complaint alleges that

> At all times material hereto, Roaten, Reardon, Casey, [Salkin], Dolim, Carlin Management, Eastern Air Balance and PEBA acted as the agents, servants, workmen and/or employees of defendant[s] PEBA & NEBB and were then and there acting within the scope of their agency, servitude, work and/or employment, as well as in their capacity as agents, servants and employees for each other.

Second Amended Complaint ¶ 13. Accepting this allegation as true, EAB, Roaten, Salkin, Dolim, Casey, Carlin Management and Reardon were agents of PEBA and were, for the purposes of the plaintiffs' conspiracy claim, a single entity. *Perrige v. Horning,* 440 Pa.Super. 31, 654 A.2d 1183, 1189 (1995) (stating that "averments of agency generally are considered as admitted facts for the purposes of demurrer, rather than as conclusions of law."). A single entity cannot conspire with itself. *Rutherfoord v. Presbyterian–University Hosp.,* 417 Pa.Super. 316, 612 A.2d 500, 508 (1992). Because the plaintiffs do not allege that this single entity conspired with a second person, plaintiffs conspiracy claim is legally insufficient. *Id.; Baker,* 324 A.2d at 506.The court sustains the objections of PEBA, Roaten, EAB, Salkin, Casey, Carlin Management and Reardon to Count V.

VIII. THE COURT SUSTAINS CASEY AND CARLIN'S OBJECTION FOR FAILURE TO ATTACH A WRITING.

All claims against Casey and Carlin Management are based on the letter that Casey sent to NEBB. Casey and Carlin Management object because the plaintiffs did not attach a copy of the letter to the second amended complaint.Pa.R.C.P. 1019 and 1028(a)(2). When a claim is based on a writing,

> the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.C.P. 1019(i).[7] Plaintiffs did not attach a copy of the letter, and they did not state that they do not have access to the writing. Therefore, the court sustains the objection for failure to conform with Pa.R.C.P. 1019(i).[8]

7 When plaintiffs filed the Second Amended Complaint, former Pa.R .C.P. 1019(h) governed the attachment of writings. That rule, amended effective January 1, 2001, is now located at Pa.R.C.P. 1019(i). Since the language quoted is identical in the new and the old versions of the rule, the court cites to the amended version.

8 Reardon also objects on the ground of failure to attach the letter. Because there is no legally sufficient claim against Reardon, the court does not address that objection.

CONCLUSION

The court will enter a contemporaneous order sustaining in part the defendants' preliminary objections in accordance with

this opinion. As there were dozens of objections by nine defendants to one confusing complaint, the order is lengthy.

ORDER

AND NOW, this 23rd day of April 2001, upon consideration of the preliminary objections of all defendants to the complaint and plaintiffs' response, and in accordance with the court's contemporaneously-filed memorandum opinion, the court HEREBY ORDERS the following:

DEFENDANT DOLIM

***10** (1) Dolim's preliminary objections based on improper service and lack of personal jurisdiction are SUSTAINED.

(2) Service of the complaint on Dolim is STRICKEN.

(3) Should the plaintiffs have the Second Amended Complaint reinstated against Dolim, plaintiffs shall serve Dolim in Pennsylvania within 30 days after reinstatement of the Second Amended Complaint or outside Pennsylvania within 90 days after reinstatement.

(4) Dolim's objections to Hawkin's claim in Count II are SUSTAINED.

(5) Dolim's objections to Hawkin's claim in Count II, including the objection to the demand for punitive damages, are OVERRULED.

(6) Dolim's objections to Counts III, IV and V are SUSTAINED.

DEFENDANT NEBB

(7) NEBB's objection to the second amended complaint based on untimeliness is OVERRULED.

(8) NEBB's objections to Hawkin's claims in Count I and II are SUSTAINED.

(9) NEBB's objections to Hydrair's claim in Count I and II are OVERRULED.

(10) NEBB's objections to Count III are SUSTAINED.

DEFENDANT PEBA

(11) PEBA's objections to Hawkins' claims in Count II are SUSTAINED.

(12) PEBA's objections to Hydrair's claims in Count II are OVERRULED.

(13) PEBA's objections to Counts III and V are SUSTAINED.

DEFENDANT SALKIN

(14) Salkin's objections to Hawkins' claims in Count II are SUSTAINED.

(15) Salkin's objections to Hydrair's claims in Count II are OVERRULED.

(16) Salkin's objections to Counts III, IV and V are SUSTAINED.

DEFENDANTS ROATEN AND EAB

(17) Roaten and EAB's objections to Hawkins' claims in Count II are SUSTAINED.

(18) Roaten and EAB's objections to Hydrair's claims in Count II, including the objection to the demand for punitive damages, are OVERRULED.

(19) Roaten and EAB's objections to Counts III and V are SUSTAINED.

(20) Roaten and EAB's objections to Count IV, including the objection to the demand for punitive damages, are OVERRULED.

(21) Roaten and EAB's objection to the plaintiffs' verification is OVERRULED.

DEFENDANTS CASEY, CARLIN MANAGEMENT AND REARDON

(22) Reardon's preliminary objections to Counts II through V are SUSTAINED.

(23) Casey and Carlin Management's objections to Hawkins' claims in Count II are SUSTAINED.

(24) Casey and Carlin Management's objections to Hydrair's claims in Count II, including the objection to the demand for punitive damages, are OVERRULED.

(25) Casey and Carlin Management's objections to Counts III and V are SUSTAINED.

(26) Casey and Carlin Management's demurrers and specificity objections to Counts IV are OVERRULED.

(27) Casey and Carlin Management's objections to the punitive damages claim in Count IV are SUSTAINED.

(28) Casey and Carlin Management's objections for failure to attach a writing are SUSTAINED.

(29) The plaintiffs shall file a third amended complaint within twenty (20) days of the entry of this order.

Parallel Citations

52 Pa. D. & C.4th 57

End of Document

EXHIBIT G

From: Maher, Trish
To: Kowalski, Brian (DC); Johnson, Everett (DC); Wisniewski, Drew (DC); Gragert, Sarah (DC)
Cc: Doran, Samuel
Subject: RE: Paterno v. NCAA
Date: Wednesday, June 10, 2015 1:46:16 PM

Brian,

I am following up on our call on Monday and your email message below. In light of Donald Remy's public statement made at essentially the same time we were talking, we think it is best to let the Court rule on our pending motion and your request for leave to amend, if you decide to seek leave. Of course, if the NCAA does believe that its Answer complies with Pennsylvania law, as Mr. Remy stated, then no amendment will be necessary.

Trish

From: Brian.Kowalski@lw.com [mailto:Brian.Kowalski@lw.com]
Sent: Monday, June 08, 2015 4:45 PM
To: Maher, Trish; Doran, Samuel
Cc: EVERETT.JOHNSON@LW.com; Sarah.Gragert@lw.com
Subject: Paterno v. NCAA

Trish –

I wanted to confirm our discussion today. As discussed, the NCAA disagrees strongly with Plaintiffs' position in their motion for judgment on the pleadings that the NCAA's Answer does not comply with Pennsylvania Rule of Civil Procedure 1029, or that any "denials" therein should be deemed "admissions." In any event, even if Plaintiffs were correct on that issue, Pennsylvania law does not permit entry of judgment on the pleadings in these circumstances; if there were any technical faults in the NCAA's Answer (which there are not), the NCAA would have the ability to amend to cure them.

As such, while we maintain our position, we have offered to amend our Answer now, and ask for consent under Rule 1033. Based on your motion, it appears that Plaintiffs believe the NCAA's Answer should provide additional detail concerning its denials, as well as include additional affirmative averments concerning the actual facts in this case. Without agreeing that any amendment to our existing answer is required here, we are more than happy to do so, and welcome the opportunity to once again set forth our positions in this case, as we have been doing for over two years now. We'd propose that Plaintiffs withdraw their motion if the NCAA amends its Answer, as the motion is premised entirely on the existing Answer and would therefore be moot.

We believe this approach is preferable to the alternative: engaging in extensive briefing and argument and placing significant, unnecessary burden on the court, where even if you prevailed on the technical issue, the NCAA would be given the opportunity to amend.

The NCAA believes it is time to move forward and resolve the merits of this case, rather than engage in further, unnecessary briefing and argument. Please let us know if you consent under Rule 1033 to the NCAA amending its Answer. If not, we are prepared to file an opposition to your motion.

Regards,

Brian

Brian E. Kowalski

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http://www.lw.com

EXHIBIT H

2002 WL 31012320
Only the Westlaw citation is currently available.
Pennsylvania Court of Common Pleas.

BEAL BANK, Assignee of First Union National Bank Plaintiff,
v.
PIDC FINANCING CORPORATION and SMF REALTY ASSOCIATES, L.P. Defendants.

No. 02522 AUG. TERM 2001, 040915. | Sept. 9, 2002.

Bank moved for summary judgment in action for mortgage foreclosure against limited partnership. The Court of Common Pleas, Philadelphia County, No. 02522, Albert W. Sheppard, Jr., J., held that: (1) partnership admitted that mortgage was in a specified amount, that it was in default, and that it failed to pay interest on the mortgage; (2) bank's summary judgment affidavit did not present a discrepancy among the material facts; (3) discrepancy regarding per diem interest rate precluded summary judgment on amount of interest owed on the indebtedness; and (4) fact that partnership contested reasonableness of attorney fees demanded by bank did not preclude summary judgment.

Motion granted in part.

West Headnotes (7)

[1] **Mortgages**
Construction and Effect of Answer

Limited partnership admitted in its answer to bank's complaint in mortgage foreclosure action that mortgage attached as an exhibit to complaint was the mortgage that partnership executed, and thus, partnership admitted to the specified amount of the attached mortgage, where partnership never specifically denied the validity of the attached exhibit in its answer to the complaint. Rules Civ.Proc., Rule 1029(b), 42 Pa.C.S.A.

Cases that cite this headnote

[2] **Mortgages**
Denials

Mortgages
Construction and Effect of Answer

Limited partnership admitted to its default of mortgage in bank's mortgage foreclosure action, where partnership made a general denial of default and stated in its answer to complaint that the note was a writing which spoke for itself, but failed to specifically deny that it did not make the required payments pursuant to the mortgage. Rules Civ.Proc., Rule 1029(b), 42 Pa.C.S.A.

Cases that cite this headnote

[3] **Mortgages**
Denials

Mortgages
Construction and Effect of Answer

Limited partnership admitted to its failure to pay interest on mortgage in bank's mortgage foreclosure action, where partnership in its answer denied that the sums set forth in bank's complaint were due and owing, but failed to respond to whether it had paid any interest on the mortgage. Rules Civ.Proc., Rule 1029(b), 42 Pa.C.S.A.

Cases that cite this headnote

[4] **Judgment**
Liens and Mortgages

Bank was entitled to summary judgment in mortgage foreclosure action against limited partnership, where partnership admitted that mortgage was in a specified amount, that it was in default, and that it failed to pay interest on the mortgage.

Cases that cite this headnote

[5] **Judgment**
Evidence in General

Judgment
Liens and Mortgages

Affidavit used by bank to support its motion for summary judgment did not present a discrepancy among the material facts of the bank's mortgage

foreclosure action against limited partnership, and thus, the *Nanty-Glo* rule did not apply, which rule precluded summary judgment when the moving party relied exclusively upon oral testimony through affidavits to establish the absence of a genuine issue of material fact, where partnership had admitted to facts set forth in affidavit in its answer to complaint.

Cases that cite this headnote

[6] Judgment
Liens and Mortgages

Discrepancy in bank's summary judgment affidavit regarding the per diem interest rate on mortgage in bank's mortgage foreclosure action against limited partnership precluded summary judgment on that specific issue.

Cases that cite this headnote

[7] Judgment
Liens and Mortgages

Fact that limited partnership contested the reasonableness of attorney fees demanded by bank in mortgage foreclosure action against partnership was an issue of damages that did not preclude the granting of summary judgment to bank; issue of attorney fees was to be decided in separate hearing.

Cases that cite this headnote

OPINION

SHEPPARD, J.

***1** Plaintiff, Beal Bank, has filed a Motion for Summary Judgment ("Motion") against defendant, SMF Realty Associates, L.P. ("SMF"), on the sole cause of action for mortgage foreclosure. [1] For the reasons set forth, the court is issuing a contemporaneous Order granting the Motion.

1 Plaintiff did not bring this Motion against the other defendant, PIDC Financing Corporation.

BACKGROUND

Beal Bank is a savings bank chartered in Texas, and is the assignee of First Union National Bank ("Bank"), a national banking association, pursuant to an assignment dated December 18, 2001. [2] Motion, ¶ 1; Amended Compl., ¶ 1. SMF is a limited partnership. Motion, ¶ 2; Answer [3], ¶ 2.

2 By order entered April 11, 2002, this court granted First Union National Bank's petition to substitute Beal Bank SSB as plaintiff in this action.

3 References to "Answer" in this Opinion refer to SMF's Answer to this Motion whereas references to "Answer to Amended Compl." refer to SMF's Answer to plaintiff's Amended Complaint.

On or about November 15, 1999, the Bank made a construction loan to SMF of up to $4,500,000 ("Loan"), and SMF executed and delivered to the Bank a promissory note ("Note") for that amount. Motion, ¶¶ 3-4; Answer, ¶¶ 3-4; Answer to Amended Compl., ¶ 6.

SMF also executed and delivered to the Bank a mortgage dated November 15, 1999 ("Mortgage"). Motion, ¶ 5; Answer, ¶ 5; Answer to Amended Compl., ¶ 6. According to plaintiff, the Mortgage serves as security for the Note. Motion, ¶ 5. SMF denies this as a conclusion of law to which it need not respond. Answer, ¶ 5. The Mortgage covers the real property located at 2722 Commerce Way, Philadelphia, Pennsylvania ("Property"), and is recorded at Mortgage Book JTD 3369, page 593, Philadelphia County Records. Motion, ¶¶ 5-6; Answer, ¶¶ 5-6. SMF is the equitable owner of the Property, and defendant PIDC Financing Corporation ("PIDC") is the record owner of the Property. Amended Compl., ¶¶ 7-8; Answer, ¶ 6.

According to the affidavit of Donald Bordelon, Senior Commercial Loan Officer for Beal Bank, SMF "was to obtain a loan of $1,750,000 from the Pennsylvania Industrial Development Authority ("PIDA") to pay down the [ ] Loan."Bordelon Aff. [4], ¶ 6. SMF states that it "made every effort to obtain a loan to down the indebtedness, but that despite such efforts, SMF was unable to procure such a loan ."Answer, ¶ 7.

4 Donald Bordelon's affidavit is attached to the Motion and supporting memorandum of law.

According to plaintiff, the Note and Mortgage matured on October 31, 2000, and SMF is in default of its obligations under the Note and Mortgage, including the obligation to repay the full amount of the Loan on or before October 31, 2000. Amended Compl., ¶ 9. In response to the allegation that it has defaulted, SMF has stated that "the Note is a writing which speaks for itself, and any characterizations of the Note are specifically denied," and "the remaining averments in ¶ 9 [of the Amended Complaint] are denied as conclusions of law, to which no response is required."Answer to Amended Compl., ¶ 9.

Plaintiff asserts that SMF owes the entire principal balance of the Loan, as well as interest, late fees, attorneys' fees and costs. Motion, Ex. A (bills reflecting attorneys' fees and costs); Amended Compl., ¶¶ 10-11. SMF denies that it owes any of these amounts to plaintiff. Answer to Amended Compl., ¶¶ 10-11.

*2 On October 17, 2001, the Bank filed an Amended Complaint in mortgage foreclosure against SMF and PIDC.[5] Motion, ¶ 8; Answer, ¶ 8. On November 6, 2001, SMF filed an Answer to the Amended Complaint. Motion, ¶ 10; Answer, ¶ 10. SMF did not file a new matter, counterclaim or preliminary objections to the Amended Complaint. Discovery closed on February 4, 2002, and neither party filed a petition to extend discovery. Beal Bank now brings this Motion asserting that it is entitled to summary judgment because no genuine issue of material fact exists. Motion, ¶¶ 14-15.

5 The Bank filed the original complaint on August 23, 2001, and served it upon SMF on August 29, 2001.

DISCUSSION

I. Standard for Summary Judgment

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."*Horne v. Haladay,* 728 A.2d 954, 955 (Pa.Super.1999) (citing Pa. R. Civ. P. 1035.2). Further, "in determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party."*Id.* Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law."*Id.* (citations omitted).

Rule 1035.3 provides, however, that when confronted with a motion for summary judgment,

> [t]he adverse party may not rest upon the mere allegations or denials of his pleading, but must file a response ... identifying (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa. R.C.P. 1035.3. A non-moving party is required to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor."*Ertel v. Patriot News Co.,* 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996) (holding that the trial court's grant of summary judgment in favor of the defendants was proper pursuant to Pa. R.C.P. 1035, as amended effective July 1, 1996). Otherwise, summary judgment should be granted.

In a mortgage foreclosure action, summary judgment is properly granted where "the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount."*Cunningham v. McWilliams,* 714 A.2d 1054, 1057 (Pa.Super.1998), citing *Landau v. Western Pennsylvania National Bank,* 445 Pa. 217, 225-26, 282 A.2d 335, 340 (1971)."This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings."*Id.* Our Superior Court has further explained that "[i]n an action on a note or bond secured by a mortgage, a plaintiff presents a *prima facie* case by showing 'the execution and delivery of the [note] and its nonpayment ....' " *Corestates Bank, N.A. v. Cutillo,* 723 A.2d 1053, 1056 (Pa.Super.1999), citing *Philadelphia Workingmen's Sav. Loan & Bldg. Ass'n v. Wurzel,* 355 Pa. 86, 90, 49 A.2d 55, 57 (1946).

II. Legal Analysis

***3** Plaintiff argues that each of the elements enumerated in *Cunningham, infra.*, exist to warrant summary judgment. Plaintiff first contends that SMF has admitted its execution and delivery of the Mortgage, an executed copy of which plaintiff attached to its Amended Complaint as Exhibit C. Motion, ¶ 11; Pltf's Memo of Law, p. 3. The Amended Complaint avers:

> In consideration of and to secure the Loan, SMF as equitable owner executed and delivered to the Bank a certain Mortgage (the "Mortgage") dated November 15, 1999 which is recorded of record ... and which Mortgage created a lien in favor of the Bank on certain real property located at 2722 Commerce Way, Philadelphia, Pennsylvania which property is more fully described in the metes and bounds description attached hereto as Exhibit "B" (the "Mortgaged Property").... A true and correct copy of Mortgage is marked as Exhibit "C," attached hereto and incorporated by reference.

Amended Compl., ¶ 6 and Exs. B and C. In response, SMF stated:

> Admitted in part, denied in part. It is admitted that SMF executed and delivered to the Bank a certain mortgage dated November 15, 1999 ("Mortgage"). It is admitted that there is a document attached to the Amended Complaint as Exhibit "B," which includes a two-page meets [sic] and bounds description. The averments in ¶ 6 which pertain to the contents of the Mortgage are denied, as the Mortgage is a writing which speaks for itself, and any characterizations of the document are expressly denied. The remaining averments in ¶ 6 are denied as conclusions of law, to which no response is required.

Answer to the Amended Compl., ¶ 6. Although SMF does not specifically state that it admits that Exhibit C to the Amended Complaint is a true and correct copy of the Mortgage it executed, plaintiff argues that SMF has made such an admission.

Rule 1029 of the Pennsylvania Rules of Civil Procedure provides: "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisons (c) and (e) of this rule, shall have the effect of an admission."Pa.R.C.P. 1029(b); *See First Wis. Trust Co. v. Strausser,* 439 Pa.Super. 192, 199, 653 A.2d 688, 692 (1995) (mortgagor's general denial of allegation regarding total amount due on mortgage was deemed an admission); *Swift v. Milner,* 371 Pa.Super. 302, 309, 538 A.2d 28, 30 (1988) (general denials on an issue deemed admissions, allowing summary judgment on that issue). To determine whether a denial has been made with sufficient specificity, a court must review the responsive pleading as a whole. *Commonwealth by Preate v. Rainbow Associates, Inc.*, 138 Pa. Commw. 56, 61, 587 A.2d 357, 360 (1991) (citation omitted); *Cercone v. Cercone,* 254 Pa.Super. 381, 390, 386 A.2d 1, 5 (1978).

[1] Rule 1029 requires, therefore, that SMF specifically deny or admit whether Exhibit C to the Amended Complaint was the Mortgage it executed.[6] Although SMF's pleading should have been more precise, SMF has never specifically denied that Exhibit C is the Mortgage it executed. Therefore, this court deems SMF's response as an admission that Exhibit C to the Amended Complaint is a copy of the Mortgage it executed. Pa. R.C.P. 1029(b).

6 SMF does not argue that either of the two exceptions found in Pa. R.C.P. 1029(c) or (e) apply.

***4** Next, the Mortgage itself establishes the specified amount for which it serves as security. Amended Compl., Ex. C. The Mortgage provides:

WHEREAS, Mortgagor is indebted to Mortgagee in the principal sum of FOUR MILLION FIVE HUNDRED THOUSAND Dollars ($4,500,000.00) (the "Loan"), together with interest thereon, as evidenced by a certain Promissory Note of even date herewith (the "Note"); and

WHEREAS, Mortgagor is the equitable owner of fee simple title to those certain tracts of land located in the City of Philadelphia, County of Philadelphia, Commonwealth of Pennsylvania, as more particularly described in Schedule "A"

attached hereto and made a part hereof (the "Real Estate"); and

WHEREAS, to induce Mortgagee to make the Loan and to secure payment of the Note and the other obligations described below, Mortgagor has agreed to execute and deliver this Mortgage.

Amended Compl., Ex. C., p. 1.

Based on SMF's admission that Exhibit C to the Amended Complaint is a copy of the Mortgage it executed, this court relies on the Mortgage for evidence of its specified amount. Pa. R.C.P. 1029(b). Furthermore, SMF has never disputed plaintiff's allegation that the amount of the Mortgage is $4,500,000. SMF did not file a New Matter and did not raise defenses in its Answer to the Amended Complaint. In addition, SMF did not file a counterclaim to the Amended Complaint. In short, nothing in the record indicates SMF's specific denial of plaintiff's averment regarding the amount of the Mortgage.

[2] Plaintiff further contends that SMF also has admitted its default of the Mortgage. Pltf's Memo of Law, p. 4. With regard to what constitutes a default, the Mortgage states that "[n]on-payment when due of any sum required to be paid to Mortgagee under any of the Loan Documents, including without limitation, principal and interest" qualifies as an "event of default." Amended Compl., Ex. C, ¶¶ 7, 7.1. Plaintiff contends that SMF has defaulted on the Mortgage by virtue of nonpayment. Motion, ¶ 12. The Amended Complaint avers as follows:

> SMF's obligation under the Note and Mortgage matured on October 31, 2000 due to the failure of SMF to effect a conversion of the Loan from a construction loan to a permanent loan. SMF is in default of its obligations pursuant to the Note and Mortgage (collectively, the "Documents") for reasons including the failure to repay the full amount of the Loan on or before October 31, 2000 as set forth in paragraph 2.3 of the Note. PIDC is in default of its obligations as a result of, among other things, the failure of SMF to make payments when due pursuant to the terms of the Documents.

Amended Compl., ¶ 9. [7]

7 The Note, attached to the Amended Complaint as Exhibit A, explains the construction loan and permanent loan phases of the agreement between SMF and the Bank. During the initial construction loan phase, "[i]nterest only for the first twelve (12) months on the outstanding principal balance at the Interest Rate shall be due and payable monthly in arrears commencing on the first day of January, 2000 and continuing on the first day of each month thereafter until the Conversion Date (the "Construction Phase")." Amended Compl., Ex. A, ¶ 2.1. Then, SMF was to obtain a permanent loan from the Pennsylvania Industrial Development Authority in an amount up to $1,750,000 which would allow SMF to pay down its indebtedness on the Note. Amended Compl., Ex. C (Joinder of Mortgage and Agreement), p. 1. This would convert the construction phase to the permanent phase of the loan. The Note defines the Conversion Date as "the date on which the Construction Loan is converted to the Permanent Loan, pursuant to the terms and conditions of the Loan Agreement."Amended Compl., Ex. A, ¶ 1.3.
During the permanent loan phase, "[f]rom the Conversion Date until the full amount of prinicipal due hereunder has been paid (the "Permanent Phase"), prinicipal and interest shall be due and payable on the first day of each month ... commencing on the first calendar month following the Conversion Date and continuing on the first day of each month thereafter, in consecutive monthly installments in an amount equial to the sum of (i) all then accrued and unpaid interest at the Interest Rate, plus (ii) a principal payment based on a hypothetical fifteen (15) year amortization period at the Interest Rate. If the Conversion Date is other than the first day of the month, interest only, at the Interest Rate on the unpaid principal balance of the Loan from the Conversion Date to the first Payment Date shall be due and payable on the first Payment Date and the first payment of principal and interest shall be due and payable on the second Payment Date."Amended Compl., Ex. A, ¶ 2.2.
The Note further states that "[t]he entire unpaid principal amount hereof, together with accrued and unpaid interest thereon and all other amounts payable hereunder shall be due and payable on October 1, 2014 (the "Maturity Date"). Notwithstanding the foregoing, if the conditions to conversion set forth in the Loan Agreement are not satisfied on or before October 31, 2000 (the "Scheduled Conversion Date"), the Construction Loan shall not convert to the Permanent Loan and the outstanding

> principal balance of the Construction Loan, together with all accrued and unpaid interest thereon and all other amounts payable under the Loan Documents, shall immediately be due and payable on the Scheduled Conversion Date."Amended Compl., Ex. A, ¶ 2.3. Plaintiff contends that by October 31, 2000, the construction loan never converted to the permanent loan, and that therefore, the principal, interest and all other amounts became immediately due and payable in full. Amended Compl., ¶ 9.

SMF responded to these allegations by stating:

> Denied. The averments in ¶ 9 which pertain to the contents of the Note are denied, since the Note is a writing which speaks for itself, and any characterization of the Note are specifically denied. The remaining averments in ¶ 9 are denied as conclusions of law, to which no response is required.

*5 Answer to Amended Compl., ¶ 9.

Plaintiff contends that SMF's response regarding the issue of default is another general denial which should be deemed an admission pursuant to Pa. R.C.P. 1029(b). Pltf's Memo of Law, pp. 3-4. SMF's position is that it has not admitted the plaintiff's averments in paragraph 9 of the Amended Complaint because "[t]he Note is a written document ... and therefore the Defendant need not provide its interpretation of the Document in its Answer."Def's Memo of Law, p. 5. This argument fails because whether or not SMF defaulted on the Mortgage is a factual allegation which SMF had to specifically deny or admit pursuant to Pa. R.C.P. 1029. *First Wis. Trust Co.,* 439 Pa.Super. at 199, 653 A.2d at 692. SMF's mere statement that "the Note is a writing which speaks for itself" is unresponsive to whether SMF defaulted on the Mortgage. In fact, SMF's blanket denial is particularly elusive considering that SMF should have specific knowledge of its obligations and whether or not it satisfied those obligations.

Although SMF generally denies that any amounts are due and owing, SMF nowhere disputes that it failed to make required payments pursuant to the Mortgage. Answer to Amended Compl., ¶¶ 9, 11. Instead, SMF's response to the Motion impliedly admits that the Note never converted from the construction loan phase to the permanent loan phase where it stated that "SMF made every effort to obtain a loan to pay down the indebtedness, but that despite such efforts, SMF was unable to procure such a loan."Answer, ¶ 7. Therefore, based on the terms of the Mortgage, Note, Pa. R.C.P. 1029(b) and plaintiff's pleading, SMF's general denial of whether it defaulted on the Mortgage is deemed an admission.

[3] Similarly, SMF's general denial of its failure to pay interest on the Mortgage is deemed an admission. In the Amended Complaint, plaintiff averred that:
SMF and PIDC are indebted to the Bank as follows:

Principal	$4,231,685.06
Interest as of August 16, 2001	$26,498.06
Late Fees	$7,748.72
Legal Fees & Costs to 7/31/01	$30,606.29
TOTAL	$4,296,538.13

Interest continues to accrue from and after August 16, 2001 at the per diem rate of $849.86.

Amended Compl., ¶ 11. [8]

8 The Bordelon affidavit states that "[a]s of March 25, 2002, Defendant owes $4,120,510.38 to Beal Bank, broken down as follows:

Principal	$4,035,462.34
Interest	$ 15,236.70
Attorneys' fees	$ 69,811.34
Total	$4,120,510.38
Per Diem after March 25, 2002	$ 602.29

In its Answer, SMF's responded as follows:

> Denied. It is specifically denied that the sums set forth in ¶ 11 are due and owing. It is specifically denied that the dollar amounts for late fees and legal fees and costs are due and owing, and strict proof thereof is demanded. By way of further answer, the applicable

> loan documents provide for payment, in limited circumstances, of reasonable legal fees. SMF specifically denies that the legal fees and costs set forth in ¶ 11 are reasonable. To the contrary, said fees and costs are completely unreasonable and not owing by SMF.

Answer to Amended Compl., ¶ 11. Despite SMF's use of the words "specifically denied," its response to whether or not it is indebted to the Bank for failure to pay interest constitutes a general denial. SMF's denial "that the sums set forth in ¶ 11 are due and owing," fails to respond to whether it has paid any interest on the Mortgage. Therefore, SMF's general denial is deemed an admission that it has failed to pay interest on the Mortgage. Pa. R.C.P. 1029(b).

*6 **[4]** In sum, SMF has admitted that the Mortgage is in a specified amount, it is in default of the Mortgage and that it has failed to pay interest on the Mortgage. Absent a disputed issue of material fact, these admissions justify the grant of summary judgment in a mortgage foreclosure action.*Cunningham,* 714 A.2d at 1057, citing *Landau,* 445 Pa. at 225-26, 282 A.2d at 340. SMF argues, however, that genuine issues of material fact exist with regard to "the maturity date of the Note and the conditions upon which a default would result."Def's Memo of Law, p. 5. SMF's rationale is that although plaintiff generally refers in its Amended Complaint to paragraph 2.3 of the Note as being the basis for the default[9], paragraph 2.3 of the Note refers to conditions set forth in a Loan Agreement which plaintiff failed to include in its pleadings. Def's Memo of Law, pp. 5-6. Paragraph 2.3 of the Note states:

9 Plaintiff avers: "SMF is in default of its obligations pursuant to the Note and Mortgage (collectively, the "Documents") for reasons including the failure to repay the full amount of the Loan on or before October 31, 2000 as set forth in paragraph 2.3 of the Note."Amended Compl., ¶ 9.

> *Maturity Date:* The entire unpaid principal amount hereof, together with accrued and unpaid interest thereon and all other amounts payable hereunder shall be due and payable on October 1, 2014 (the "Maturity Date"). Notwithstanding the foregoing, if the conditions to conversion set forth in the Loan Agreement are not satisfied on or before October 31, 2000 (the "Scheduled Conversion Date"), the Construction Loan shall not convert to the permanent loan and the outstanding principal balance of the Construction Loan, together with all accrued and unpaid interest thereon, and all other amounts payable under the Loan Documents, shall immediately be due and payable on the Scheduled Conversion Date.

Amended Compl., Ex. A, ¶ 2.3 (emphasis added). SMF argues that the absence of the Loan Agreement gives rise to material issues of fact regarding the Note's maturity date and the conditions upon which a default would result. Def's Memo of Law, p. 5.

Initially, although it is true that the record does not contain the Loan Agreement, the Note, attached as an exhibit to the Amended Complaint, incorporates the Loan Agreement by reference. Amended Compl., Ex. A, first paragraph on p. 1. More significantly, the record does not contain any evidence whatever that a genuine issue of fact exists regarding the Note's maturity date and the conditions upon which a default would result. SMF makes these allegations in its memorandum of law in opposition to the Motion, without any reference to the record, such as deposition testimony, answers to interrogatories, admissions or affidavits, to establish SMF's position regarding the Note's maturity date (and how it differs from plaintiff's position) and the conditions of default (and how it differs from plaintiff's position).[10] The record itself simply does not indicate an issue of fact to be determined at trial.

10 SMF's argument that plaintiff failed to include the Loan Agreement in its pleadings could have served as the basis for a preliminary objection for failure to attach a writing. SMF, however, did not file preliminary objections to the Amended Complaint. In addition, SMF did not plead a new matter or a counterclaim arguing that a necessary writing was missing, or that no default existed because of a contingency found in the Loan Agreement.

Moreover, the absence of the Loan Agreement does not preclude summary judgment because plaintiff has established the existence and terms of the Note and Mortgage by including with the Amended Complaint, a copy of the Note, a copy of the Mortgage, and a copy of the metes and bounds description of the mortgaged property which is the subject of the Mortgage. Amended Compl., Exs. A, B, C. Plaintiff has established SMF's default on the Mortgage through its averments in the Amended Complaint, which have been admitted by SMF pursuant to Pa. R.C.P. 1029, and by David Bordelon's verified statements in his affidavit. Amended Compl., ¶¶ 9-11; Bordelon Affidavit, ¶¶ 8-9, 11-12.

***7** SMF also argues that the *Nanty-Glo* rule prohibits this court's consideration of the affidavit by Donald Bordelon offered by plaintiff for its motion. Def's Memo of Law, p. 2; *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932). Our Commonwealth Court has summarized the *Nanty-Glo* rule by stating:

> The general substance of the Nanty-Glo rule is that summary judgment may not be had where the moving party relies exclusively upon oral testimony, through affidavits or depositions, to establish the absence of a genuine issue of material fact; no matter how clear and indisputable such proof may appear, it is the province of the jury to decide the credibility of the witnesses.

Kee v. Pennsylvania Turnpike Commission, 743 A.2d 546, 550 (Pa.Commw.1999), citing *O'Rourke v. Dep't of Corrections,* 730 A.2d 1039 (Pa.Commw.1999). The Superior Court has employed a three-step analysis to determine whether the *Nanty-Glo* rule should apply:

> Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. If so, the second step is to determine whether there is any discrepancy as to any facts material to the case. Finally, it must be determined whether, in granting summary judgment, the trial court has usurped improperly the role of the jury by resolving any material issues of fact.

Kirby v. Kirby, 455 Pa.Super. 96, 103, 687 A.2d 385, 388 (1997), citing *Dudley v. USX Corp.*, 414 Pa.Super. 160, 169-70, 606 A.2d 916, 920 (1992). [11]

11 Two trial courts have opined that the *Nanty-Glo* rule has been limited as it applies to motions for summary judgment by our Supreme Court's opinion in *Ertel v. Patriot-News, Co.*, 544 Pa. 93, 674 A.2d 1038 (1996), which held that a non-moving party defending against a summary judgment motion must establish evidence on issues for which it bears the burden of proof as would permit the jury to find in its favor. *Renk v. HealthAmerica Corp.*, 50 Pa. D. & C.4th 103, 108 n. 3 (C.C.P. Allegheny County, December 19, 2000)aff'd, 792 A.2d 626 (Pa.Super.2001) app. denied, 2002 WL 1827618 (Pa. Aug.9, 2002); *Butterfield v. Meadville Medical Center,* 32 Pa. D. & C.4th 289, 296 n. 7 (C.C.P. Crawford County, September 23, 1996).

[5] Applying the three-step analysis to this case, the plaintiff has presented a *prima facie* case in that plaintiff has shown through the pleadings and Pa. R.C.P. 1029, that SMF is in default of the Mortgage, that SMF has failed to pay interest on the obligation, and that the Mortgage is in the specified amount of $4,500,000. *See Cunningham,* 714 A.2d at 1057, citing *Landau,* 445 Pa. at 225-26, 282 A.2d at 340.

Next, the affidavit at issue does not present a discrepancy among the material facts of the case. Bordelon's affidavit states, in relevant part, that the Note became due and payable in full on October 31, 2000 (¶ 8), that the Note was not paid off (¶ 9), that the Note is secured by the Mortgage on property at 2722 Commerce Way, Philadelphia, Pennsylvania, which is owned by the defendant (¶ 12), and that the plaintiff paid attorneys' fees in this matter, and the copies of the bills are attached to the Motion as Ex. A (¶ 14). In addition, SMF's Answer and memorandum of law fail to point to any discrepancies between the statements made in the Bordelon affidavit and the material facts. The affidavit itself does not reveal any material discrepancies with either plaintiff's or defendant's pleadings, and since SMF has failed to present any affidavits, deposition testimony, or discovery, the affidavit does not reveal discrepancies with other evidence. [12]

12 Bordelon's affidavit also authenticates Exhibit A attached to the Motion. Bordelon Aff., ¶ 14.

[6] However, the affidavit does suggest a different *per diem* interest rate from that rate set forth in the Amended Complaint. [13] Accordingly, the court concludes that a hearing is necessary to determine the amount of interest due on the indebtedness, as of the date of this Order.

13 See page 9, and footnote 8, *supra.*

***8** As to the third element of the analysis, this court does not believe it would be usurping the role of the jury as fact finder because, as discussed above in this Opinion, no disputed issues of material fact have been established. Therefore, the *Nanty-Glo* rule does not apply to preclude consideration of the Bordelon affidavit. [14]

14 SMF argues that this court should treat the Motion like a motion for judgment on the pleadings. Def's Memo of Law, p. 4. Because the *Nanty-Glo* rule does not preclude consideration of the Bordelon affidavit, however, this court has considered all of the evidence presented and has analyzed the Motion as it has been filed, i.e., as a motion for summary judgment.

[7] Finally, SMF argues that material issues of fact exist regarding the reasonableness of attorneys' fees claimed by plaintiff. Def's Memo of Law, pp. 6-7. Generally, "[t]he parties to litigation are responsible for their own fees unless otherwise provided by statutory authority, agreement of the parties or some other recognized exception."*Equibank v. Miller,* 422 Pa.Super. 240, 619 A.2d 336, 338 (1993), app. denied, 535 Pa. 647, 633 A.2d 151 (1993). Significantly, SMF does not argue in its memorandum of law that plaintiff is not entitled to attorneys' fees [15]; rather, SMF argues that the reasonableness of the fees demanded is an issue of material fact which precludes the grant of summary judgment. Def's Memo of Law, pp. 6-7.

15 Regarding attorneys' fees, the Note provides: "If Bank retains the services of counsel by reason of a claim of default or an Event of Default hereunder or under any of the other Loan Documents, or on account of any matter involving this Note, or for examination of matters subject to Bank's approval under the Loan Documents, all costs of suit and all reasonable attorneys' fees and such other reasonable expenses so incurred by Bank shall be paid by Borrower, on demand, and shall be deemed part of the obligations evidenced hereby."Amended Compl., Ex. A, ¶ 13.5.

The reasonableness of the requested attorneys' fees is an issue of damages which does not affect whether plaintiff has satisfied the standard for summary judgment. In this mortgage foreclosure action, summary judgment is properly granted where "the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount."*Cunningham,* 714 A.2d at 1057, citing *Landau,* 445 Pa. at 225-26, 282 A.2d at 340. "This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings."*Id.* This court agrees with SMF that a hearing would be appropriate to hear testimony regarding the reasonableness of attorneys' fees. However, such a hearing does not preclude summary judgment.

It is significant to recall the standard for summary judgment in this case. On a motion for summary judgment, a non-moving party may not rest on denials of the pleading, but rather, must present evidence regarding existing issues of fact. Pa. R.C.P. 1035.3; *Ertel,* 544 Pa. at 101-02, 674 A.2d at 1042. Here, SMF has failed to present any theory to defend against plaintiff's allegations and any evidence to support a defense to plaintiff's *prima facie* case. In fact, SMF failed to cite any depositions, responses to discovery or affidavits in its Answer or supporting memorandum of law to defend against this Motion. Indeed, SMF has failed to present any evidence whatsoever. "Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."*Ertel,* 544 Pa. at 102, 674 A.2d at 1042. Therefore, in reviewing the record in a light most favorable to SMF, summary judgment is appropriate because the record does not demonstrate any genuine issue of material fact.

CONCLUSION

***9** For the reasons discussed, summary judgment in favor of the plaintiff and against SMF is granted, except as to (a) plaintiff's request for attorneys' fees which is held under advisement pending a hearing regarding the reasonableness of those fees, and (b) the amount of interest due on the indebtedness, also held under advisement pending a hearing.

The court will enter a contemporaneous Order consistent with this Opinion.

ORDER

AND NOW, this 9th day of September 2002, upon consideration of plaintiff, Beal Bank's Motion for Summary Judgment against defendant SMF Realty Associates, L.P. ("SMF"), SMF's response in opposition, the respective memoranda, all matters of record, and in accord with the contemporaneous Opinion filed of record, it is hereby ORDERED that the Motion is Granted, in part, and judgment is entered in the amount of $4,035,462.34 for the principal balance.

It is further ORDERED that a hearing will be scheduled to determine (a) the interest due and (b) the reasonable attorney fees.

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EXHIBIT I

3 Goodrich Amram 2d § 1029(c):3

Goodrich Amram 2d
Database updated June 2015
Civil Action

Christine M. Gimeno, J.D., LL.M.

Rule 1029. Denials. Effect of Failure To Deny
Commentary

§ 1029(c):3 Nature of reasonable investigation to ascertain truth of averment

West's Key Number Digest

West's Key Number Digest, Pleadings ⚿377, 378

A statement of the nature of the "reasonable investigation" undertaken by a party to ascertain the truth of an averment is not required and need not be set forth in a responsive pleading.[76] Nevertheless, the rule contemplates that a reasonable investigation will be made in good faith. A court may examine the reasonableness of an investigation when considering the general circumstances surrounding a statement that a party is without knowledge or information to form a belief as to the truth of an averment.[77]

When the Rule[78] is abused in its application, judgment on the pleadings may be granted.[79]

76 Civil Procedural Rules Committee Explanatory Comment to 1983 Amendment to Pa.R.C.P. No. 1029.

77 Equibank v. Interstate Motels, Inc., 25 Pa. D. & C.3d 149, 1982 WL 377 (C.P. 1982).

78 Pa.R.C.P. No. 1029(c).

79 Equibank v. Interstate Motels, Inc., 25 Pa. D. & C.3d 149, 1982 WL 377 (C.P. 1982).

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EXHIBIT J

3 Goodrich Amram 2d § 1029(c):2

Goodrich Amram 2d
Database updated June 2015
Civil Action

Christine M. Gimeno, J.D., LL.M.

Rule 1029. Denials. Effect of Failure To Deny
Commentary

§ 1029(c):2 Proof of averment in exclusive control of hostile party

West's Key Number Digest

West's Key Number Digest, Pleadings ⇔377, 378

One reason why a party might be without knowledge or information sufficient to form a belief as to the truth of an averment is that the means of proof as to the truth of that averment are within the exclusive control of an adverse party or a hostile person. [71]

Comment:

A party need not state in a responsive pleading that the reason why he or she is without knowledge or information sufficient to form a belief as to the truth of an averment is that the means of proof as to the truth of that averment are within the exclusive control of an adverse party or a hostile person. [72]

Illustration:

Where a defendant pleads that he or she is entitled to credits resulting from a landlord's rerenting of a particular piece of property, the Rule [73] may be used because the proof of such credits, in mitigation of damage, is within the exclusive control of the landlord. [74] A party also may state that he or she is without knowledge or information sufficient to form a belief as to the truth of an averment where the only possible sources for the information, other than an opponent, are business competitors of a defendant. [75]

71 Civil Procedural Rules Committee Explanatory Comment to 1983 Amendment to Pa.R.C.P. No. 1029.

72 Civil Procedural Rules Committee Explanatory Comment to 1983 Amendment to Pa.R.C.P. No. 1029.

73 Pa.R.C.P. No. 1029(c).

74 Winoka Village, Inc. v. Tate, 7 Pa. D. & C.2d 537, 1957 WL 6232 (C.P. 1957).

75 Price v. Larson Laboratories, Inc., 85 Pa. D. & C. 485, 1953 WL 4662 (C.P. 1953).

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving *The National Collegiate Athletic Association's Appendix to Opposition to Plaintiffs' Motion for Judgment on the Pleadings* on the following by First Class Mail and email:

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