

ORIGINAL



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

ESTATE of JOSEPH PATERNO;

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:**

) NCAA's Brief in Support of It's

) Motion to Compel the

) Production of Documents from

) Plaintiffs Jay Paterno and

) William Kenney

)

) **Filed on Behalf of:**

) National Collegiate Athletic

) Association, Mark Emmert,

) Edward Ray

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PENNSYLVANIA STATE UNIVERSITY,

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Civil Division

Docket No. 2013-
2082

**THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S BRIEF IN
SUPPORT OF ITS MOTION TO COMPEL THE PRODUCTION OF
DOCUMENTS FROM PLAINTIFFS
JAY PATERNO AND WILLIAM KENNEY**

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PRELIMINARY STATEMENT

Plaintiffs Jay Paterno (“Paterno”)¹ and William Kenney (“Kenney”) (collectively, “Plaintiffs”) repeatedly proclaim they are on a search for “truth,” but their actions say otherwise. From the beginning of this case Plaintiffs have taken the view that they can accuse but never have to explain, that they can play offense but never have to defend. But this is a neutral forum and a level playing field. It is time for Plaintiffs to try and prove what they allege: that statements in the Consent Decree (quoted from the Freeh Report) are demonstrably false, that the National Collegiate Athletic Association (“NCAA”) knew they were false in July 2012, and that Plaintiffs have somehow been injured by the NCAA. It is their charge, their burden, and their responsibility to come forward with evidence in their possession. Their paltry productions in response to the NCAA’s document requests fall far short of satisfying their discovery obligations, much less demonstrate an interest in truth-seeking.

Plaintiffs have had *over a year* to produce documents, yet to date, they have not produced documents responsive to over half of the NCAA’s Requests for the Production of Documents (“Requests”). Indeed, Kenney has produced only job application materials, a few tax returns, and six other documents. Plaintiffs’ intransigence has prejudiced the NCAA’s ability to move forward with depositions

¹ “Coach Paterno” or “Coach Joe Paterno” refers to Jay Paterno’s father.

of critical witnesses, identify and pursue other necessary discovery, and move the case forward to a determination on the merits. Plaintiffs' inaction—after multiple meet-and-confer conferences and pressure from the NCAA to produce documents—is a violation of their obligations under the Pennsylvania Rules of Civil Procedure.

For its part, the NCAA has produced 16,030 documents, comprising 50,327 pages, through twelve rolling productions. The NCAA's production of documents and materials was *substantially complete as of December 2014*—seven months ago—with a final very small production in May 2015.² Gragert Decl. ¶¶ 5-6. The NCAA also fully responded to 34 Interrogatories (served in three separate requests from the Estate of Joseph Paterno) and 48 Requests for Admission. In addition, the NCAA has produced a comprehensive privilege log and roster of individuals on that log. Simply put: there is no dispute that the NCAA has fully complied with its discovery obligations.

Plaintiffs have used the NCAA's comprehensive discovery responses to move forward with depositions. In addition to taking depositions of former members of the NCAA's governing body, they are now pushing the NCAA to depose its senior officers. Simultaneously, their refusal to produce documents

² After December 11, 2014, the NCAA produced only 29 more documents in May 2015. Gragert Decl. ¶ 6.

relevant to the claims they brought has prejudiced the NCAA's ability to prepare for trial. As explained below, Plaintiffs have failed to produce countless categories of critical documents. Without these documents, the NCAA cannot learn the basic facts surrounding Plaintiffs' claims and cannot effectively take depositions. The NCAA respectfully requests that the Court order Plaintiffs to promptly respond in full to the NCAA's discovery requests and, for those requests to which they have no materials, certify that they have engaged in a good faith, reasonable effort to search for them.

FACTUAL BACKGROUND AND HISTORY

On May 21, 2014, the NCAA served requests for the production of documents on Paterno and Kenney. *See generally* NCAA's 1st Requests to Paterno (May 21, 2014), attached as Ex. 1; NCAA's 1st Requests to Kenney (May 21, 2014), attached as Ex. 2. Over a month later, Plaintiffs agreed to produce non-privileged documents for most of the Requests, and lodged objections to others—but they produced no documents at that time. *See generally* Paterno's Objs. & Resps. to NCAA's Requests (July 11, 2014), attached as Ex. 3; Kenney's Objs. & Resps. to NCAA's Requests (July 11, 2014), attached as Ex. 4. Months passed and Plaintiffs continued to rebuff their discovery obligations, producing no documents. Jay Paterno finally produced documents on April 6, 2015, but by May 21, 2015—a full year after the NCAA had served its requests—he had produced only 42

documents. Gragert Decl. ¶ 7 (July 10, 2015). Only after the NCAA finally communicated its intent to file this motion did he make a meaningful production, in June of this year. He has now produced 525 documents.

As for Kenney, he has all but ignored the NCAA's discovery requests. He did not produce *any* documents until May 21, 2015. Gragert Decl. ¶ 10. That production contained only job application material and two other emails. His second production—which was produced this week—contained a mere fourteen documents, including tax returns and four other documents.³ Gragert Decl. ¶ 11. This is consistent with his general disinterest in providing discovery. For example, the NCAA served him with interrogatories on May 20, 2015, but on the day they were due (June 19, 2015), his counsel declared—without asking for consent or giving prior notice—that he would not respond for another 30 days. Gragert Decl. ¶ 9; Letter from S. Doran to B. Kowalski, et al. (June 3, 2015). And it was not until two weeks after the NCAA noticed his deposition did his counsel advise that he would not be available that day. Gragert Decl. ¶ 8. He has yet to provide another date. *Id.*

The NCAA has provided Plaintiffs ample opportunity to cure their production deficiencies. *See, e.g.*, Letter from B. Kowalski to P. Maher (Jan. 28,

³ Kenney's production is, at most, responsive to Request Nos. 11, 14, 19, 20, and 25 – and even then, only partially so.

2015) (“Eight months have passed, and these individuals have produced no documents in response to our requests ... please immediately produce documents for each or confirm they have nothing to produce.”), attached as Ex. 5; Letter from S. Gragert to P. Maher at 1 (Apr. 21, 2015) (“Apr. 21, 2015 Letter”) (“Nearly a year has passed since the NCAA served its discovery requests, but Plaintiffs have produced few materials in response.”), attached as Ex. 6; Letter from S. Gragert to P. Maher (May 13, 2015) (stating that “Plaintiffs have produced virtually nothing in response [to the NCAA’s Requests]” and warning that if “Plaintiffs are unable to complete their productions [by June 3, 2015], we have no choice left but to seek judicial assistance”), attached as Ex. 7. The NCAA also engaged in two meet-and-confer conferences with Plaintiffs to help facilitate prompt responses. Gragert Decl. ¶ 15.

Notwithstanding the extended period for response, Plaintiffs’ productions remain woefully incomplete. First, Plaintiffs are standing on objections and refuse to produce documents responsive to three categories of documents, including requests for documents concerning (i) Jay Paterno’s book, *Paterno Legacy*, (ii) Plaintiffs’ income from January 1, 2006 to December 31, 2010, and (iii) Plaintiffs’ attempts to secure employment as a football coach prior to 2011. *See* Ex. 6, Apr. 21, 2015 Letter at 4; Ex. 3, Paterno’s Objs. & Resps. to NCAA’s Requests Nos. 13, 25, 29; Ex. 4, Kenney’s Objs. & Resps. to NCAA’s Requests Nos. 13, 25.

The relevance of this information to Plaintiffs' claims that they have been defamed and their prospects for future employment tortuously impaired is so obvious it need not be explained.

Second, Plaintiffs have failed to produce documents responsive to over half the Requests for which they actually agreed to produce documents. The few documents Plaintiffs produced are questionably relevant or partially responsive to a limited number of Requests. For example, Paterno has produced emails forwarding publicly available press articles, emails from the public that mention the Freeh Report or The Pennsylvania State University ("Penn State"), and draft speeches pertaining to largely irrelevant subject matter. Kenney's few documents, although they do include employment applications and tax returns (documents Paterno has not produced), are—at best—partially responsive to only five of the NCAA's 30 Requests.

QUESTION PRESENTED

Should Plaintiffs William Kenney and Jay Paterno be compelled to produce non-privileged, relevant documents that the Pennsylvania Rules of Civil Procedure required them to produce over a year ago?

ARGUMENT

Pennsylvania law permits broad discovery. *See* Pa.R.C.P. No. 4003.1(a), (b). Parties "may obtain discovery regarding any matter, not privileged" that

“appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* This standard is “necessarily broader than the standard used at trial” because the purpose of discovery is to “ensure that a party has in its possession all relevant and admissible evidence before the start of trial.” *Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc.*, 904 A.2d 986, 994 (Pa. Commw. Ct. 2006) (citing *Am. Future Sys., Inc. v. BBB*, 2005 Pa. Super. 103, 872 A.2d 1202 (2005)).

Parties have thirty days to produce materials in response to document requests. Pa.R.C.P. No. 4009.12(a). If a party fails to comply with his or her discovery obligations, as has happened here, a court may order compliance and, if appropriate, impose sanctions. *See* Pa.R.C.P. No. 4019; *Rohm & Haas Co. v. Lin*, 2010 PA Super 26, ¶¶ 10-16, 992 A.2d 132, 143-44 (2010) (affirming default judgment as a sanction for willful discovery violations); *Roccograndi v. Temple Univ. Health Sys.*, 55 Pa. D. & C.4th 136, 145 (C.P. 2001). Courts limit discovery only where it has no bearing on the facts of a case. *See McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *2-3 (C.P. Sept. 9, 2010) (granting motion to compel and holding that “[u]nder Pennsylvania’s broad discovery rules, as long as it is relevant to the litigation, whether directly or peripherally, a party may obtain discovery regarding any unprivileged matter. As a practical matter, that means that nearly any relevant materials are discoverable”), attached as Ex. 22. In addition, any doubts

regarding relevancy are to be resolved in favor of discovery. *Ario v. Deloitte & Touche LLP*, 934 A.2d 1290, 1293 (Pa. Commw. Ct. 2007).

However, Kenney apparently believes he is above these basic principles and need not respond to discovery requests, and Paterno wants to believe that discovery is exceedingly narrow. Neither could be further from the truth.

I. PLAINTIFFS' OBJECTIONS ARE WITHOUT MERIT.

In response to certain document requests, Paterno and Kenney have refused to produce documents based on unfounded objections. Specifically, they refuse to provide documents concerning: (i) Paterno's book about his father and this litigation, (ii) Paterno's and Kenney's income from January 1, 2006 to December 31, 2010, and (iii) Paterno's and Kenney's attempts to secure employment as a football coach prior to 2011.⁴ These are valid requests and they should be compelled to provide responsive material.

A. The NCAA's Request for Documents Related to Paterno's Book is Relevant and Proper.

Request No. 25 to Paterno seeks documents concerning his book, *Paterno Legacy*, such as drafts, public statements, and communications.⁵ Paterno has

⁴ See Ex. 6, Apr. 21, 2015 Letter at 4; Ex. 3, Paterno's Objs. & Resps. to NCAA's Requests Nos. 13, 25, 29, 30; Ex. 4, Kenney's Objs. & Resps. to NCAA's Requests Nos. 13, 25, 26.

⁵ Request No. 25 to Paterno seeks "[a]ll Documents Concerning Your upcoming book, Paterno Legacy, including without limitation, all drafts, public

produced only the final, published book—which was already publicly available. But he refuses to provide any other materials on the grounds that the Request seeks material that is not relevant and/or is protected by confidentiality agreements or applicable privileges, and it is vague, overly broad, and unduly burdensome. Ex. 3, Paterno’s Objs. & Resps. to NCAA’s Requests No. 25. These objections are without merit.

First, Paterno’s objection that this Request seeks irrelevant material cannot be taken seriously. The book, every draft of it, and every communication about it is a party admission that would be admissible under the rules of evidence. Subject matter central to his book is likewise central to this litigation, including Coach Joe Paterno’s legacy and reputation,⁶ Jay Paterno’s acts and omissions in relation to the Sandusky scandal,⁷ the effect of the Sandusky scandal on Jay Paterno’s reputation,⁸ and the NCAA sanctions and this litigation.⁹ For example, the following are but a few relevant statements in the book:

statements, and Communications.” Ex. 1, NCAA’s 1st Requests to Paterno No. 25.

⁶ See, e.g., *Paterno Legacy* at xx, xxiii, 1-2, 55, 79, 94, 177-78, 280-81, 316-17, 319 (2014) (JAYP_0000160), excerpts attached as Ex. 8.

⁷ See, e.g., *id.* at 9, 173, 176, 178, 206, 324.

⁸ See, e.g., *id.* at xx, 2, 8, 55, 125, 169, 213, 222-23, 227, 242, 247, 313-14, 329-31.

⁹ See, e.g., *id.* at 9, 338, 346-47, 358.

- “Joe Paterno was disparaged by the baseless conclusions of the Freeh Report and resulting NCAA sanctions” *Paterno Legacy* at 52 (2014) (JAYP_0000160), excerpts attached as Ex. 8.
- “At that moment [of Joe’s firing] the trustees chose to condemn an innocent man. But in their actions, they also offered up the name of Penn State, an honorable name earned over decades. In a moment of fear and panic, they destroyed it. For the damage done to the Penn State name, all the money, all the investigations, and all the public relations firms they hire cannot repair what they’ve done.” *Id.* at 197.
- “The subsequent use of Anderson’s answer in the Freeh Report that ‘coaches often took showers with Jerry and young boys’ was used by the NCAA to help sanction Penn State and damage the reputations of a lot of good men. It fed the perception that we all knew or should have known.” *Id.* at 9.
- “Joe Paterno has been pronounced by the media as ‘the most powerful man in the state,’ the foundation of an argument alleging he could and should have done more. His own words: ‘In hindsight I wish I had done more’ have been used against him over and over again as a sign of guilt. It never was an admission of guilt. It was a painful statement that if he had only known more, then he could have done more. Clemente’s powerful report makes the point that Joe Paterno was but one of many, some infinitely more highly educated on this issue, who missed this.” *Id.* at 3.
- “I got down to the brunt of it. ‘Dad,’ I asked, ‘what happened?’ ‘Mike [McQueary] came to me, and it was the first I’d ever heard anything like this. I knew I wasn’t the one to handle this, so I did what I was supposed to do. I couldn’t go running with things I didn’t know were true. I went to Tim and Gary.... I didn’t see it. I knew Tim and Gary are capable people. Mike had to tell them what he saw. I don’t know what he told them, but there was nothing else I could do.” *Id.* at 206 (first alteration in original).

Indeed, the book contains many damning admissions in which Paterno blames the purported harm to Plaintiffs’ reputations on Louis Freeh, the grand jury proceedings, Penn State, and the media’s rush to judgment—but not the NCAA.

That is the exact opposite posture that Plaintiffs have assumed in this litigation, in which they have sought to blame the NCAA for all of their alleged harm.¹⁰ For example, Paterno writes:

- “[T]he [Freeh R]eport damaged the reputations of Penn State, Joe Paterno, and other accused men. What saddened me most was Penn State’s board of trustees willingly accepting the report’s false narratives about our university.... Despite all we’d done to defend Penn State, their narrative would stain the school for the foreseeable future.” *Id.* at 332-33.
- “Media stories circulated, insinuating we knew about Jerry and either looked the other way or covered for him. Media people ... went on national television with false narratives destroying our reputations.” *Id.* at 317.
- “The absence of ... secrecy in Pennsylvania’s investigative grand jury proceedings took [Coach] Paterno’s job, tarnished his legacy, and perhaps even shortened his life. The presentment, combined with the state police commissioner’s statement that [Coach] Paterno had failed his moral obligation, doomed [Coach] Paterno’s career.” *Id.* at 4-5.
- “Going on behind the scenes [during the eleven days after the Freeh Report] was a coordinated effort to tear down Joe Paterno once and for all. After the initial two-day surge of the Freeh Report, the university leaked details of Joe’s last contract to a reporter from *The*

¹⁰ Recent events further undermine Jay Paterno’s already dubious claims that he has suffered an injury from commercial disparagement. For example, according to multiple news sources, Paterno recently started a partnership with a brewery to start brewing “Paterno Legacy Series” beer this fall. *See, e.g.,* Debra Erdley, *Family taps JoePa’s legacy for line of beer to be brewed in Latrobe*, TribLIVE (June 20, 2015), <http://triblive.com/news/editorspicks/8592175-74/paterno-beer-dudash#axzz3dXrsp8gb>; Cindy Boren, *Joe Paterno beer is coming soon to a tailgating party near you*, Wash. Post (June 22, 2015), <http://www.washingtonpost.com/blogs/early-lead/wp/2015/06/22/joe-paterno-beer-is-coming-soon-to-a-tailgating-party-near-you/>.

New York Times. The attempt was to imply Joe added a retirement bonus to his contract because he knew this was coming.” *Id.* at 336.

Paterno refuses to produce *any* documents related to the book, such as, drafts, outlines, notes, communications about the book, interviews, media statements, or factual summaries. Given the obvious relevance of the statements in the book itself, documents used in the production or promotion of the book are reasonably calculated to lead to the discovery of admissible evidence.

Second, Paterno’s confidentiality objection is unfounded. He has not identified any confidentiality agreement that would somehow govern these documents. In any event, such an agreement does not immunize materials from discovery. *See, e.g., Zoom Imaging, L.P. v. St. Luke’s Hosp. & Health Network*, 513 F. Supp. 2d 411, 417 (E.D. Pa. 2007) (confidentiality agreements do not preclude the production of documents as part of civil discovery); *Hepps v. Phila. Newspapers, Inc.*, 3 Pa. D. & C.3d 693, 731 (C.P. 1977) (non-privileged confidential documents are subject to discovery). The Court entered a protective order in this case for this very purpose. Nor is it likely that the vast majority of responsive documents are shielded by the attorney-client privilege and/or the attorney work product doctrine given that the book was made public and highly

publicized.¹¹ Indeed, the NCAA requested, *inter alia*, all *public* statements Paterno made about the book.

Third, Paterno has not provided any explanation for his conclusory objections that the Request is vague, overly broad and unduly burdensome. He has never identified any term he does not understand, nor has he asked for clarification. Likewise, he has never provided any data to support an objection that the Request is overly broad and unduly burdensome. He carries the burden to support his objection. *See Griffiths v. Ulmer*, 55 Pa. D. & C.4th 370, 373-74 (C.P. 2002) (a party seeking to withhold discovery bears the burden of proving the objectionable nature of the discovery he is withholding).

Paterno's objections are a thinly-veiled attempt to shield himself from producing highly relevant documents reflecting his own views about the facts and allegations in this case. Paterno should be ordered to comply with Request No. 25 and produce all documents concerning *Paterno Legacy*, including drafts, public statements, and communications.

B. The NCAA's Request for Documents Concerning Paterno and Kenney's Financial Position Over Time Is Relevant.

Paterno and Kenney allege, as they must, that they suffered economic loss because the NCAA purportedly defamed them and intentionally interfered with

¹¹ If Plaintiffs are claiming privilege, they must produce a privilege log—which they have yet to do.

their employment prospects. *See, e.g.*, Second Am. Compl. ¶ 141 (“SAC”). They have the burden to prove harm. *See, e.g., Weaver v. Lancaster Newspapers, Inc.*, 592 Pa. 458, 465-66, 926 A.2d 899, 903 (2007) (harm is an element of defamation); *Glenn v. Point Park Coll.*, 441 Pa. 474, 479-80, 272 A.2d 895, 898 (1971) (actual harm or damage is an element of intentional interference). But Plaintiffs are resisting discovery into their alleged injury.

The NCAA requested documents pertaining to Plaintiffs’ revenue streams dating back to January 1, 2006.¹² Plaintiffs refuse to produce materials prior to January 1, 2011.¹³ This position is untenable. The NCAA cannot adequately evaluate the effect the events of 2011 and 2012 may have had on Plaintiffs’ revenue streams without comparing their revenue after those events to their revenue prior to the events. *See Valley Forge Plaza Assocs. v. Rosen Agency, Inc.*, 120 B.R. 789, 797 (Bankr. E.D. Pa. 1990) (affirming the accuracy of damages calculations in light of the court’s ability to observe “historical [financial] data”

¹² The NCAA requested “Your pay-stubs, federal and state income tax returns, and any statement or record of other income You received from January 1, 2006 to the present,” (Request No. 25 for Kenney and Request No. 29 for Paterno), and “Any other Documents Concerning Your claim of pecuniary or financial loss from January 1, 2006 to the present,” (Request No. 26 for Kenney and Request No. 30 for Paterno).

¹³ Earlier this week, Kenney produced nine tax returns, but has otherwise not produced responsive documents. And Paterno has not produced a single responsive document, even for the time period after 2011, which he agreed to produce.

compiled from prior periods). Hence, the NCAA requested materials dating back five years—hardly an excessive period of time given they each worked at Penn State for over fifteen years.

Although Plaintiffs are willing to provide revenue information for 2011 to May 2013, this is insufficient to assess Plaintiffs’ reasonably anticipated revenue. 2011 was a year marked with controversy, including the grand jury investigation into Gerald “Jerry” Sandusky (which was reported in the media in the spring of that year), the grand jury presentment, Coach Paterno’s firing, and Penn State’s engagement of Louis Freeh, among other events. And Penn State fired Paterno and Kenney just a few days into the start of 2012. This is insufficient information to reliably gauge the impact of these events—and any alleged actions of the NCAA—on their reasonably anticipated revenue. Plaintiffs should be compelled to produce all requested financial information.

C. Documents Concerning Past Efforts to Secure Employment Are Relevant.

Kenney and Paterno have refused to produce documents concerning any efforts to seek other employment from 2000 to 2010, claiming that only post-2011 documents are relevant.¹⁴ See Ex. 3, Paterno’s Objs. & Resps. to NCAA’s

¹⁴ Request No. 13 to Kenney (which is similar for Paterno) asked for: “All Documents from January 1, 2000 to the present Concerning Your past and present efforts to secure employment or income as a football coach (whether as a head coach or in a subordinate role) or any other position, including, without limitation,

Requests No. 13; Ex. 4, Kenney's Objs. & Resps. to NCAA's Requests No. 13. This argument is baseless. The evidence may well show that they are chronically unemployable, that they applied for and were refused jobs long before the Sandusky scandal, or that no other employer ever demonstrated any interest in hiring them. If they allege their employment prospects have been made worse, the finder of fact has a right to know what their prospects were before the events in question. Documents pertaining to Plaintiffs' potential employment prior to 2011 are highly relevant to understanding the likelihood they would have obtained other employment absent the Consent Decree—which Plaintiffs have made an issue through their tortious interference claims. For example, Paterno alleges in the Complaint that "he had been approached during his time [coaching at Penn State] by other universities and search firms exploring his potential interest in head coaching vacancies." SAC ¶ 147. Plaintiffs should not be allowed to run from their allegations now. If Plaintiffs had attempted, unsuccessfully, to obtain other coaching positions prior to their terminations at Penn State, that would be potentially relevant to causation. Likewise, interest by headhunters (or a lack

all draft and final job application materials such as cover letters and resumes, and any Communications with the University of Illinois, the University of Wisconsin, Purdue University, Virginia Polytechnic Institute and State University, Florida State University, the University of Massachusetts, North Carolina State University, Boston College, the University of Arizona, the University of Delaware, Syracuse University, or Western Michigan University, or any NFL franchise, including the New York Giants, Indianapolis Colts, Cleveland Browns, or any other prospective employer."

thereof) to recruit them for other open positions is also probative. Plaintiffs should be compelled to provide responsive materials.

II. WILLIAM KENNEY HAS SHIRKED HIS DISCOVERY OBLIGATIONS.

William Kenney's meager production of documents is inexcusable. Nearly a year ago, Kenney agreed to produce documents to almost all of the NCAA's Requests. *See generally* Ex. 4, Kenney's Objs. & Resps. to NCAA's Requests. Kenney then took *ten months* to produce documents—and then produced only some job application materials and two emails. *See* Gragert Decl. ¶ 10. Only earlier this week—faced with the NCAA's intent to file this motion—did Kenney produce fourteen additional documents.¹⁵ *See id.* ¶ 11. Even after this extensive delay, his production remains grossly incomplete. Indeed, there is little point in identifying and discussing specific discovery requests for which Kenney has failed to produce responsive documents. He has not produced documents to the vast majority of the NCAA's Requests, and even for those Requests for which he produced a few documents, his responses remain severely deficient.

Kenney's apparent disregard for the rules raises serious questions about whether Kenney's allegations in the Second Amended Complaint have any factual basis at all—otherwise, it would be reasonable to expect he could produce *some*

¹⁵ These fourteen documents were only *partially* responsive to approximately three of the NCAA's Requests (Nos. 14, 20, 25). Kenney should have additional documents responsive to these Requests, and the remaining NCAA Requests.

documents in support of them. Kenney should be compelled to produce immediately all responsive documents or certify that he has undertaken good faith, reasonable efforts to locate additional materials and that there are none.¹⁶

III. JAY PATERNO'S PRODUCTION IS WOEFULLY INADEQUATE.

Similar to Kenney, Jay Paterno did not produce a single document until *nine months* after his responses were due. *See* Gragert Decl. ¶ 7. Even then, as of May 21, 2015—a year after the NCAA served its requests—Paterno had produced only **42 documents**. *See id.* Only after faced with the possibility of this motion did he produce additional documents. He has now produced 525 documents (*see id.* ¶ 12), but most of these are fringe materials of limited relevance, such as emails sharing links to publicly available news articles. Even after his belated productions, his response remains woefully inadequate. He should be compelled to immediately produce all responsive documents or certify that he has undertaken good faith, reasonable efforts to locate additional materials and that there are none.

Below is a non-exhaustive set of examples that demonstrate the inadequacy of Paterno's production.¹⁷

¹⁶ *See, e.g., Mulartrick v. Heimbecker*, 34 Pa. D. & C.4th 432, 442 (C.P. 1996) (affirming entry of default judgment as a sanction for the failure to produce documents in response to discovery requests and a court order granting a motion to compel); *Pedrick v. Deerland Corp.*, 20 Pa. D. & C.4th 543, 550 (C.P. 1992) (affirming entry of judgment as a sanction after party “failed to comply” with discovery requests and a court order granting a motion to compel), *aff'd*, 431 Pa. Super. 652, 631 A.2d 1380 (1993).

The Consent Decree. Request No. 1 to Paterno seeks all documents concerning the Consent Decree—the gravamen of Plaintiffs’ Complaint. Nevertheless, Paterno’s production contains only *14 documents* that even reference the Consent Decree. These 14 documents include two duplicate copies of the Complaint, two copies of the Consent Decree, random public statements by third parties, and a few emails that mention the Consent Decree in passing. *See, e.g.*, JAYP_0000746, attached as Ex. 9; JAYP_0000761, attached as Ex. 10; JAYP_0000989, attached as Ex. 11.¹⁸ Indeed, Paterno’s Responses to the NCAA’s Interrogatories suggest that he has additional materials. His response to Interrogatory No. 7 references “hate mail and death threats” that he personally received “following the release of the Consent Decree.”¹⁹ Am. Resp. of Paterno to

¹⁷ These examples generally apply to Kenney as well, who has produced almost nothing.

¹⁸ Paterno’s production includes over six times as many documents referencing the Freeh Report than the Consent Decree. On their face, Paterno’s documents indicate that any purported harm he suffered was caused by the Freeh Firm or the media, not the NCAA.

¹⁹ This alleged “hate mail” would likely also be responsive to Request Nos. 2, 8, 23, and 26. Those Requests, respectively, call for “All Documents Concerning the Freeh Report”; “From January 1, 2000 to present, All Documents Concerning Sandusky or The Second Mile”; “All Documents discussing the reputation or popularity of, or public support for, You, the Paterno family, Coach Paterno, George Scott Paterno, or Plaintiffs Al Clemens or William Kenney”; and “All Communications, commentary, or other content from ... any ... social media source created, sent, received, forwarded, or otherwise transmitted by You Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Coach

NCAA's 1st Interrogs. No. 7, attached as Ex. 12. Paterno has not produced these documents.

Expert Reports Critiquing the Freeh Report. Request Nos. 4-7 to Paterno seek communications and other documents pertaining to the so-called expert reports critiquing the Freeh Report. Plaintiffs focus extensively on the findings of these reports in their Complaint as purported evidence that the Freeh Report statements are false. *See, e.g.*, SAC ¶¶ 72-79. Jay Paterno advised that he does not have responsive materials. Ex. 6, Apr. 21, 2015 Letter at 2. This heightens concerns regarding the sufficiency of his efforts to locate responsive materials. These "experts" were engaged by the Paterno family and, indeed, include Paterno's current counsel in this matter, King & Spalding. The Paterno family has relied heavily on the "experts" since their publication and have posted them on their website. *See* Paterno the Record, <http://www.paterno.com/Default.aspx> (last visited July 9, 2015).

Jerry Sandusky and the Second Mile. Request Nos. 8-9 seek documents concerning Jerry Sandusky and the Second Mile. Paterno has produced only a few third-party or public documents referencing Sandusky, notwithstanding that the two men coached together for approximately five years and Sandusky continued to

Paterno, Sandusky, the NCAA, Edward Ray, Mark Emmert, or Rodney Erickson." *See* Ex. 1, NCAA's 1st Requests to Paterno Nos. 2, 8, 23, 26.

visit the Penn State football facilities (and bring young children there) for another 12 years while Paterno was a coach.

Employment Applications. Request Nos. 13-14 to Paterno seek all documents and communications concerning his alleged efforts to secure employment.²⁰ These Requests are at the heart of Paterno's intentional interference claim. Paterno has largely produced a few unsigned (apparently draft) form letters to various schools or companies expressing a general interest in employment. He has not produced formal employment applications, emails transmitting the letters, or communications from the potential employers regarding interviews or advising him of their decision. For example, he produced a document titled "Intro E-Mail," which appears to include a *draft* email intended for an individual at Fox Sports, but he did not produce a transmittal email. See JAYP_0001335-36, attached as Ex. 13. Another document, titled "Maryland

²⁰ Request No. 13 calls for "All Documents from January 1, 2000 to the present Concerning Your past and present efforts to secure employment or income as a football coach (whether as a head coach or in a subordinate role), media commentator, sports columnist, or any other position, including, without limitation, all draft and final job application materials such as cover letters and resumes, and any Communications with ESPN, CBS Sports, Fox Sports, the University of Colorado, Boston College, the University of Connecticut, James Madison University, or any other prospective employer." Ex. 1, NCAA's 1st Requests to Paterno No. 13.

Request No. 14 calls for "All Communications Concerning open football coaching positions or Communications with other universities or schools Concerning football coaching employment." Ex. 1, NCAA's 1st Requests to Paterno No. 14.

Development Job,” lists the name of an athletic director, but again, Paterno did not produce any communications with this individual.²¹ See JAYP_0001358, attached as Ex. 14. Based on his allegations, he should have more. For example, Paterno alleges that “[h]e applied for the open head coaching positions at the University of Connecticut and James Madison University,” SAC ¶ 149, but he has produced *no* record of the applications. Nor has he produced documents in support of his allegation that he “had been approached during his time [at Penn State] by other universities and search firms exploring his potential interest in head coaching vacancies.” *Id.* ¶ 147.

Penn State Employment and Termination. Request Nos. 19-20 to Paterno seek documents concerning his Penn State contract, salary, benefits, termination, and departure. These Requests are relevant to assessing his alleged damages and causation for his intentional inference claim. In response, Paterno produced only a timeline regarding his termination from Penn State, two statements regarding health care benefits, and a single letter from 1997 regarding his salary increase. He worked at Penn State for *17 years*. SAC ¶ 147. He should have, at minimum,

²¹ Paterno produced one document containing three handwritten notes from December 2014, in which he expressed interest in what appear to be jobs at West Virginia University, the University of Georgia, and Ohio State University. See JAYP_0000027, attached as Ex. 15.

communications (with anyone) regarding his contract, employment, termination, and severance terms.

Decision to Run for Political Office. Request Nos. 21-22 to Paterno seek documents concerning his consideration of whether to run for public office (or to withdraw from a race) and polls or surveys conducted by or for him, or relating to him. Paterno's defamation claim put his reputation and popularity at issue, which was presumably a fundamental factor in his calculated decision to run for Pennsylvania Lieutenant Governor in February 2014 and then to subsequently withdraw from the race. But Paterno has essentially produced nothing in response.²² To gauge his reputation and popularity, Paterno may have conducted polling or had polling conducted on his behalf that related to him. He presumably emailed with political strategists, pollsters, public relations consultants, party leaders, or politicians and their staff. Yet Paterno has produced nothing of the kind.

Social Media. Request No. 26 to Paterno seeks his communications on social media concerning the subject matter of this litigation. Paterno has not

²² He produced only a public document listing election dates to remember, *see* JAYP_0000264, attached as Ex. 16 an email with Rachel Magnuson, Congresswoman Allyson Schwartz's Chief of Staff, regarding a polling memo and "possibilities" that include the "5th Congressional District or Lt. Governor," JAYP_0001104, attached as Ex. 17; and a document noting that he met with democratic party leaders in January 2012, JAYP_0000035-36, attached as Ex. 18.

produced any such materials, despite his active use of social media. For example, Paterno has a personal Facebook page with 2,548 friends to which he regularly posts, an active “public figure” Facebook page, a Twitter account with 57,200 followers and a blog.²³ The NCAA is aware of certain content on at least Paterno’s Twitter account related to this litigation, demonstrating that some or all of these websites should have responsive information.²⁴ He has not produced any of it.

Text Messages. Request No. 27 asks for Paterno’s text messages concerning the subject matter of this litigation.²⁵ He has produced nothing in response.

Communications with a Public Relations Specialist. Request No. 28 to Paterno seeks all communications with a public relations or media consultant or specialist. This Request is relevant to efforts to manage Paterno’s and his father’s reputations, especially in the wake of the Sandusky scandal and associated

²³ See, e.g., Jay Paterno, Facebook, <https://www.facebook.com/jay.paterno.5> (last visited July 9, 2015) (personal); Jay Paterno, Facebook, <https://www.facebook.com/jaypaternoforpa> (last visited July 9, 2015) (public figure); Jay Paterno (@JayPaterno), Twitter, <https://twitter.com/jaypaterno> (last visited July 9, 2015); Jay Paterno, *Official Website of Jay Paterno*, <http://www.votejaypaterno.com/#!/blog/cm6l> (last visited July 9, 2015).

²⁴ See, e.g., Jay Paterno (@JayPaterno), Twitter (June 10, 2015, 5:07 AM), <https://twitter.com/JayPaterno/status/608606468368162816>, attached as Ex. 19; Jay Paterno (@JayPaterno), Twitter (May 8, 2015, 12:51 PM), <https://twitter.com/JayPaterno/status/596764319074902017>, attached as Ex. 20; Jay Paterno (@JayPaterno), Twitter (Apr. 10, 2015, 6:59 AM), <https://twitter.com/JayPaterno/status/586528870846877696>, attached as Ex. 21.

²⁵ Rather than responding to the Request No. 27 for text messages, Paterno’s Responses and Objections incorrectly duplicated Request No. 19 and his responses thereto.

events.²⁶ Shortly after the Sandusky presentment was released, Coach Joe Paterno hired Dan McGinn, a communications expert based in Arlington, Virginia. McGinn was hired to help Coach Paterno navigate the reputational fallout after the news of Sandusky broke and Penn State fired him.²⁷ McGinn continued to work with the family as the Freeh Report was released. Acting as the family “spokesman,” he has issued countless statements on Coach Paterno, the Freeh Report, the Sandusky trial, and this litigation. For example, speaking on behalf of the family, McGinn has described the “damage” done by the Freeh Report to the “Paterno family” and the “Paterno name” as “like taking a blow torch to a dry set of woods.”²⁸ Therefore, communications with McGinn—or any other communications specialist—are relevant and responsive to whether Paterno’s or his father’s reputation was harmed and the cause of that harm. But Paterno produced only a few documents concerning an HBO documentary and four emails

²⁶ Rather than responding to the Request No. 28, seeking communications with a public relations specialist, Paterno’s Responses and Objections incorrectly duplicated Request No. 20 and his responses thereto.

²⁷ See Michael McCarthy, *Joe Paterno hires Crisis PR spin doctor*, USA Today (Nov. 9, 2011), <http://content.usatoday.com/communities/gameon/post/2011/11/joe-paterno-hires-his-own-crisis-pr-spin-doctor-penn-state-dan-mcginn-jerry-sandusky-/1#.VZ861U10xFo>.

²⁸ Press Release, NBC Sports Group, *Bob Costas Re-Examines the Freeh Report Tonight on “Costas Tonight,” 11 P.M. ET on NBC Sports Network* (May 29, 2013), <http://nbcsportsgrouppressbox.com/2013/05/29/bob-costas-re-examines-the-freeh-report-tonight-on-costas-tonight-11-p-m-et-on-nbc-sports-network/>.

with McGinn related to an award Coach Paterno received in 2012. This is hardly a complete production.

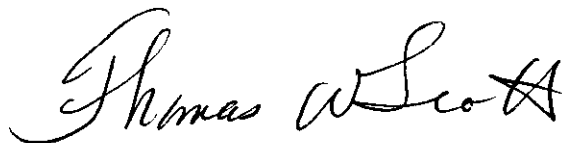
* * *

These are but a sampling of Requests for which Paterno's responses are facially incomplete. These are sufficient to raise concern about the adequacy of his responses to all Requests. He should be compelled to produce thorough responses or certify for each Request that he has undertaken a good faith, reasonable effort to locate responsive materials and that no additional materials exist.

CONCLUSION

The NCAA served its discovery Requests over a year ago. Enough is enough. It is time for Plaintiffs Paterno and Kenney to finally comply with their discovery obligations and complete their productions. For the foregoing reasons, the NCAA's Motion should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Thomas W. Scott", followed by a stylized star or flourish.

Date: July 10, 2015

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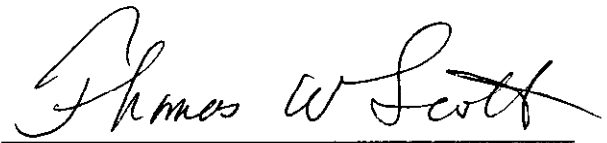
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