

ORIGINAL



0000QMS5 CCGPRO 201404

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:**
) The NCAA Defendants’
) Response to Plaintiffs’ Motion to
) Modify Protective Order
)
) **Filed on Behalf of:**
) National Collegiate Athletic
) Association, Mark Emmert,
) Edward Ray
)
) **Counsel of Record for this**
) **Party:**
) Thomas W. Scott, Esquire
) Killian & Gephart, LLP
) 218 Pine Street
) P.O. Box 886
) Harrisburg, PA 17108-0886
) TEL: (717) 232-1851
) FAX: (717) 238-0592
) tscott@killiangephart.com
) PA I.D. Number: 15681
)
)
)
)

FILED
CLERK OF COURT
CENTRE COUNTY, PA
RECORDED
INDEXED
2013 DEC 10 PM 2:58

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA**

GEORGE SCOTT PATERNO, et al.)
)
 Plaintiffs,)
)
 v.)
)
 NATIONAL COLLEGIATE ATHLETIC)
 ASSOCIATION ("NCAA"), et al.,)
)
 Defendants,)
)
 And)
)
 THE PENNSYLVANIA STATE UNIVERSITY,)
)
 Nominal Defendant.)
)

EBERHARDT
PROTHONOTARY
CENTRE COUNTY PA

2014 DEC 10 PM 2:58

Civil Division
Docket No. 2013-2082

**THE NCAA DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
TO MODIFY THE PROTECTIVE ORDER**

Plaintiffs' Motion to Modify the Protective Order by striking Paragraph 5(a) is a clear request to disclose select pre-trial materials to influence public opinion and have this case decided in the media before it ever reaches a finder of fact. Plaintiffs have proffered no good cause—and there certainly is none—for the

Court to deviate from its prior ruling and strike this provision. Plaintiffs simply contend that the media attention and disclosure of certain documents in *Corman v. NCAA*, No. 1 MD 2013 (Pa. Commw. Ct.) (“*Corman*”) entitles Plaintiffs to “ensure that the public has fair access to the *full range of information* concerning the NCAA Defendants’ [conduct].” Mem. in Supp. of Mot. to Modify the Protective Order 7 (“Pls.’ Mem.”) (emphasis added). But in endorsing Paragraph 5(a) of the Stipulated Confidentiality Agreement and Protective Order (“Protective Order”), this Court reached the exact opposite conclusion, finding that ***the public interest in this matter strengthens the justification and need for Paragraph 5(a)*** to prevent a tainted jury. Opinion & Order 32, 33 (Sept. 11, 2014) (“Order”). Indeed, the recent media attention in *Corman* (initiated exclusively by the Plaintiffs in that case) demonstrates precisely why Paragraph 5(a) is critical here. The NCAA stands by its actions in entering into the Consent Decree with Penn State, and a complete and impartial review of all the facts will overwhelmingly demonstrate the propriety of its actions. But Plaintiffs’ apparent desire to engage in pre-trial spin and mischaracterization will make such a review impossible. Therefore, the National Collegiate Athletic Association (“NCAA”), Dr. Mark Emmert, and Dr. Edward Ray (collectively, the “NCAA Defendants”) respectfully request that the Court deny Plaintiffs’ motion.

ARGUMENT

A party seeking to modify a protective or confidentiality order bears the burden of “demonstrat[ing] good cause.” *In re Estate of duPont*, 966 A.2d 636, 639 (Pa. Super. Ct. 2009) (“[A] party seeking to modify an order of confidentiality or sealed settlement agreement must come forward with a reason to modify the order, and once this is done, the court should balance the interests, including reliance by the original parties to the order, to determine whether good cause still exists for the order.” (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994))), *aff’d*, 2 A.3d 516 (Pa. 2010); *In re Estate of duPont*, 2 A.3d at 525 (holding that the moving party must “demonstrate good cause” to modify an existing order). Plaintiffs’ motion fails to meet this burden and should be denied.

This Court already agreed with the NCAA Defendants and Penn State that good cause exists for Paragraph 5(a), given that, in part, the “risk to contaminate the potential jury pool is high.” Order 33. In so doing, the Court rejected Plaintiffs’ argument (which they now recycle¹) that increased public interest in the case creates a need to disseminate pre-trial discovery. *Id.* at 31.² The Court found

¹ Plaintiffs’ Motion reflects its *second* effort to roll back portions of the Court’s September 11, 2014 Opinion and Order. As the Court knows, Plaintiffs have recently filed yet another amended complaint re-asserting the Paterno Estate’s contract claims, which this Court has already considered and dismissed. Order 33.

² See also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31, 34-35 (1984)

that the NCAA's argument that Plaintiffs would "release said documents" was convincing and said that "this purpose would be an abuse of the discovery process." *Id.* at 33. Specifically, the Court found that "[t]he fact there is a high public interest in this case ***more strongly justifies the inclusion of the provision.***" *Id.* at 32 (emphasis added). The Court reasoned that "the dissemination of pre-trial discovery ... is ***more likely to taint a potential jury pool in a situation where public interest is higher than average,*** such as the case at bar." *Id.* (emphasis added).

Plaintiffs' motion fails to offer even a hint of good cause for the Court to reverse this previous decision, enabling Plaintiffs to now disclose documents. Plaintiffs do not cite a single case to support their absurd arguments and they certainly do not provide any authority to support their claim that disclosure in one case makes disclosure necessary in another. Indeed, courts have held that documents which are public in one case may properly be subject to a protective order in another case. *See Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 534 (1st

(holding that litigants do *not* have an "unrestrained right to disseminate information that has been obtained through pretrial discovery"); *Stenger v. Lehigh Valley Hosp. Ctr.*, 554 A.2d 954, 961 (Pa. Super. Ct. 1989) ("[If] discovery information were to be readily available to the public, the detrimental consequences to the discovery process would be grievous," and, "[a]s a result, the entire litigation procedure would suffer.'[N]onparty access [to discovery materials] in controversial cases threatens the right of the litigants to a fair trial." (citation omitted)).

Cir. 1993) (holding that public civil complaints filed in one matter were properly subject to a protective order in another matter).

There is absolutely no reason—much less “good cause”—for Plaintiffs to disclose their version of the “full truth” and “ensure that the public has fair access to the full range of information” before this case even proceeds to trial. *See* Pls.’ Mem. 1, 2, 7. Plaintiffs’ motion itself makes clear that striking Paragraph 5(a) will almost certainly result in a significant release of select discovery materials, designed to paint an unbalanced, and inaccurate depiction of the so-called “full truth.” In addition to the NCAA and Penn State, these disclosures also may harm the interests of third-parties like Pepper Hamilton LLP, Mayer Brown LLP, and the Big Ten—whose discovery rights and obligations are obviously impacted by the Protective Order. Even more concerning, continuous disclosures will further taint a jury pool and make it impossible to hold a jury trial in Pennsylvania, which was precisely why this Court approved Paragraph 5(a) in the first place. *See* Order 32 (holding that high public interest in this case “more strongly justifies” Paragraph 5(a)).

The recent disclosures of materials by Plaintiffs in *Corman*, along with *Corman* Plaintiffs’ statements to the media and accompanying press ***strengthen the justification for Paragraph 5(a)*** to prevent additional tainting of a potential jury in this case. In *Corman*, the NCAA and Penn State proposed the same

Protective Order that was entered in this case to avoid the very problems that have recently come to fruition. In fact, the events in *Corman*—where there is no protective order—demonstrate exactly why this provision is necessary.

On November 2, 2014, *Corman* Plaintiffs attached three internal, confidential, NCAA emails to a filing. The emails were taken out of context, irrelevant to the filing, and then twisted in the media by the *Corman* Plaintiffs. The media seized on the emails, as described by Plaintiffs, setting off a flurry of public attention.³ Senator Jake Corman told the local news that “[a]ll we ever wanted; I think anybody ever wanted is a clearer picture how this consent decree came about.”⁴ Corman also told ESPN that “to think the NCAA would bluff [Penn State] into some part of penalty – it doesn’t paint a very pretty picture.”⁵

³ See, e.g., Lori Falce, *Redacted Emails Show NCAA Bluffed on Consent Decree*, Centre Daily Times, Nov. 5, 2014, available at <http://www.centredaily.com/2014/11/05/4443344/redacted-emails-show-ncaa-bluffed.html#>; Kevin Horne, *Internal Emails Show NCAA Questioned Authority to Sanction Penn State*, Onward State (Nov. 5, 2014, 11:01 AM), <http://onwardstate.com/2014/11/05/internal-emails-show-ncaa-questioned-jurisdiction-over-penn-state/>; *Just Released Emails Reveal NCAA Questioned Its Own Authority on Penn State Sanctions*, WGAL.com, <http://www.wgal.com/news/just-released-emails-reveal-ncaa-discussions-on-penn-state-decision/29562992> (last updated Nov. 5, 2014).

⁴ 6 News Staff, *Released Emails Show NCAA Internal Debate*, WJACTV.com, <http://www.wjactv.com/news/features/local-headlines/stories/released-emails-show-ncaa-internal-debate-over-psu-sanctions-3282.shtml> (last updated Nov. 5, 2014).

⁵ Josh Moyer, *NCAA Officials Debated PSU Penalty*, ESPN.com,

These actions were totally inappropriate and deeply mischaracterized the evidence revealed through discovery in the *Corman* case.

Again on November 7, 2014, *Corman* Plaintiffs disclosed roughly 323 pages of discovery materials in conjunction with a filing. On November 11, 2014, they disclosed 18 exhibits (about 86 pages of discovery materials) with their Response to the NCAA Cross Motion, and Reply in Further Support of Motion. These documents were mostly communications between the NCAA and the Freeh Group and had a dubious connection to the motion—much less the case. Plaintiffs again released the documents and grossly mischaracterized them in statements to the press. Senator Corman said the documents revealed that “[c]learly, there was coordination.”⁶ A Pennsylvania television station quoted Corman saying, “[i]t really appears that there was a predetermined outcome and they were just working to make that happen.”⁷ Both statements are plainly false.

http://espn.go.com/college-football/story/_/id/11826657/internal-ncaa-emails-offer-glimpse-penn-state-sanctions-jerry-sandusky-child-sex-abuse-scandal (last updated Nov. 5, 2014).

⁶ Jeremy Roebuck & Angela Coulombis, *E-mails Show NCAA, Freeh Contact During Penn State Probe*, Philly.com, Nov. 13, 2014, http://articles.philly.com/2014-11-13/news/56394781_1_nittany-lion-inn-donald-remy-ncaa-president-mark-emmert.

⁷ See, e.g., Erin Calandra, *Corman Reacts to New Documents in NCAA Lawsuit*, WJACTV.com, <http://www.wjactv.com/news/features/top-stories/stories/corman-reacts-new-documents-ncaa-lawsuit-4265.shtml> (last updated Nov. 12, 2014); see also Lori Falce, *Documents from Corman Suit Indicate NCAA*

In light of the *Corman* Plaintiffs' prejudicial press strategy, misstatements, and growing media pressure, the NCAA responded on November 14, 2014 by disclosing *eight of its own documents* (approximately 0.05% of the 15,997 NCAA documents produced in that case)—which it would have been able to do even if there was no litigation—and information to provide necessary context and correct the record. The NCAA did not disclose any other party's documents.

The NCAA Defendants firmly believe that the release of pre-trial materials in *Corman* must stop. *Corman* is scheduled for a bench hearing in just under a month, but the instant case will likely continue long past the resolution of *Corman*. Here, the NCAA Defendants, Penn State, and Plaintiffs⁸ have relied on and are committed to the protections of Paragraph 5(a). Abolishing the provision will lead this case down the same path as *Corman* and likely taint any potential jury pool. Plaintiffs' Motion is a clear request to pour gas on the fire that Senator Corman has lit by engaging in their own selective, mischaracterized, and prejudicial disclosure

Collaborated in Freeh Probe, Centre Daily Times, Nov. 12, 2014, available at <http://www.centredaily.com/2014/11/12/4453786/corman-documents-indicate-ncaa.html>; Max Mitchell, *State Officials Say NCAA Collaborated on Freeh Report*, Legal Intelligencer, Nov. 13, 2014, available at <http://www.conradobrien.com/news/state-officials-say-ncaa-collaborated-on-freeh-report-> (Plaintiffs' law firms' website linking to Legal Intelligencer article); CBS 21 Web Staff, *More Emails Revealed between NCAA and Freeh Group*, CBS 21, <http://www.local21news.com/news/features/top-stories/stories/more-emails-revealed-between-ncaa-freeh-group-13287.shtml> (last updated Nov. 12, 2014).

⁸ See Pls.' Mem. 4 n.1 (noting compliance with the Protective Order).

of documents to the public and media.⁹ To be very clear—the NCAA strongly believes (and the full record in *Corman* has fully demonstrated) that the NCAA Defendants acted legally and appropriately in entering into the Consent Decree with Penn State. But the selective public disclosure of sound bites—mischaracterized and taken out of context—has no appropriate place in civil litigation, much less a case potentially to be decided by a jury.

CONCLUSION

For the foregoing reasons, the NCAA Defendants respectfully request that the Court deny Plaintiffs' Motion to Modify the Protective Order.

Respectfully submitted,



Date: December 10, 2014

Thomas W. Scott (No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *PHV*, DC
No. 358446)
Brian E. Kowalski (admitted *PHV*, DC No.
500064)

⁹ *Corman* Plaintiffs' prejudicial and selective disclosure only represents a small fraction of the thousands of produced documents, which together with witness testimony provide full context and support for the NCAA Defendants' actions.

Sarah M Gragert (admitted *PHV*, DC No.
977097)

LATHAM & WATKINS LLP

555 Eleventh Street NW

Suite 1000

Washington, DC 20004-1304

Telephone: (202) 637-2200

Email: Everett.Johnson@lw.com

Brian.Kowalski@lw.com

Sarah.Gragert@lw.com

Counsel for NCAA Defendants

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing NCAA Defendants' Response to Plaintiffs' Motion to Modify the Protective Order by First Class Mail and email to:

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers
L. Joseph Loveland
Mark A. Jensen
Patricia L. Maher
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
mjensen@kslaw.com
pmaher@kslaw.com
aparrish@kslaw.com

Paul V. Kelly
John J. Commisso
JACKSON LEWIS P.C.
75 Park Plaza
Boston, MA 02116
Telephone: (617) 367-0025
Email: Paul.Kelly@jacksonlewis.com
John.Commisso@jacksonlewis.com

Counsel for Plaintiffs

Daniel I. Booker
Jack B. Cobetto
Donna M. Dobblick
William J. Sheridan
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: (412).288-3131
Email: dbooker@reedsmith.com
[jacobetto@reedsmith.com](mailto:jcobetto@reedsmith.com)
ddobblick@reedsmith.com
wsheridan@reedsmith.com

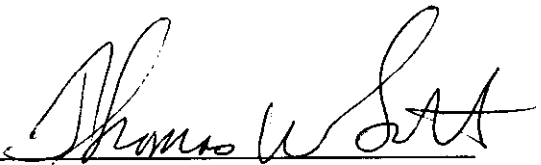
Michael T. Scott
REED SMITH LLP
Three Logan Square, Suite 3100
1717 Arch Street
Philadelphia, PA 19103
Telephone: (215) 851-8100
Email: msscott@reedsmith.com

Joseph P. Green
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellefonte, PA 16823-0179
Telephone: (814) 355-4769
Email: jgreen@lmgrlaw.com

*Counsel for The Pennsylvania State
University*

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
Potter County Courthouse, Room 30
One East Second Street
Coudersport, PA 16915

Dated: December 10, 2014


Thomas W. Scott
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Counsel for NCAA Defendants